ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC003646
Case Name	BARBER, CHERILYN v. STATE OF ILLINOIS - DEPT OF HUMAN AND FAMILY SERVICES
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0157
Number of Pages of Decision	20
Decision Issued By	Thomas Tyrrell, Commissioner

Petitioner Attorney	Kevin Morrisson
Respondent Attorney	Kayla Koyne

DATE FILED: 5/2/2022

/s/Thomas Tyrrell, 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 SANGAMON	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cherilyn Barber,

Petitioner,

vs. NO: 18 WC 3646

State of Illinois–Healthcare and Family Services,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, and nature and extent, and being advised of the facts and law, modifies the Arbitrator Decision and corrects certain scrivener's errors. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission solely seeks to correct clerical errors in the Arbitrator Decision. On page six (6) of the Decision, the Arbitrator mistakenly wrote that the records Petitioner reviews and processes can be anywhere from 300 to 5,000 pages, with 500 pages being outside the norm. This is a clerical error. The Commission modifies the above-referenced sentence to read as follows:

> These records can be anywhere from 300 to 5,000 pages, with **5,000** being outside the norms.

Additionally, on page ten (10) of the Decision, the Arbitrator mistakenly wrote, "…prior to her injury date she was able to all the same activity on one day for a prolonger period of time." The Commission modifies the above-referenced sentence to read as follows:

> Petitioner testified that prior to her injury date she was able to **perform** all the same activity on one day for a **prolonged** period of time.

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 November 24, 2020, is modified as stated herein.

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

May 2, 2022

o: 3/8/22
TJT/jds
51

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

22IWCC0157

BARBER, CHERILYN Case# **18WC003646**
Employee/Petitioner

ST OF IL-HEALTHCARE AND FAMILY SERVICES
Employer/Respondent

On 11/24/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 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:

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

0499 CMS RISK MANAGEMENT
WORKERS' COMPENSATION MANGER
801 S 7TH ST 8M
SPRINGFIELD, IL 62794

6236 ASSISTANT ATTORNEY GENERAL
KAYLA KOYNE
500 S SECOND ST
SPRINGFIELD, IL 62706

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

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

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

NOV 24 2020

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

CHERILYN BARBER,
Employee/Petitioner

Case # **18** WC **3646**

v.

Consolidated cases: ______

STATE OF ILLINOIS-HEALTHCARE AND FAMILY SERVICES,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **10/30/20**. 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other ______

FINDINGS

On **1/22/18**, 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.

In the year preceding the injury, Petitioner earned $**44,085.37**; the average weekly wage was $**847.80**.

On the date of accident, Petitioner was **52** years of age, ***single*** with **no** dependent children.

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

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

Respondent shall be given a credit of $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

The petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury to her bilateral hands and arms due to her repetitive work activities, that arose out of and in the course of her employment by respondent, and manifested itself on 1/22/18. The remaining issues are moot.

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

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

Signature of Arbitrator

11/16/20
Date

NOV 24 2020

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 52 year old office coordinator, alleges that she sustained an accidental injury to her bilateral arms and hands due to repetitive work activities that arose out of and in the course of her employment by respondent on 1/22/18. Petitioner has worked for respondent for 6 years and in her current position for 3 years on the alleged date of accident.

Medical records prior to the alleged accident date of 1/22/18 reveal that when she was seen on 1/23/14 by Dr. Ellison, her primary care physician, she reported that "she gets numbness in her arms and hands". For her fatigue and numbness Dr. Ellison ordered some blood work. He was of the opinion that a lot of her symptoms may be due menopause, her medicine, or her mood. He also recommended that she quit smoking. He was of the opinion that if she did this she might be able to exercise more, which would help with her weight and subsequently her OSA, which might help with her energy and concentration.

Petitioner testified that her duties as an office coordinator involved use of a mouse, typing and reconciling. Petitioner testified that reconciling did not involve the computer. Petitioner testified that she experienced no symptoms when typing, but rather had pain in her forearm and numbness in her hands while using the mouse and doing reconciliation. Petitioner used her right hand to operate the mouse. Petitioner stated that she noticed the pain most when she was doing reconciliation. She testified that at times she had to stop her activity due to her pain, and do something else. Petitioner used a mouse a lot during the day to get into different programs and move around the screen to add different information and perform different functions such as downloading and printing. Petitioner testified that reconciliation required her to go through stacks of paper by flipping through the pages in the corner very fast. She testified that she primarily used her right hand to reconcile documents, and only used her left hand a little bit. She stated that the files she reconciled ranged from 100 to 2500 pages. She also testified that she experienced numbness in her hands when driving. Petitioner testified that her keyboard was on the desk and that it was useful for her to have her forearms on the desk when typing.

Petitioner testified that depending on her caseload, she probably spends about 50% of her day typing and using the mouse, and the other 50% of the day performing reconciliation. She stated that every case of reconciliation was different and it would take about 4 hours to reconcile each. She also stated that on average she would reconcile maybe 30 files a week, which according to her average of 4 hours each would constitute 120 hours of reconciling a week. Petitioner would also process mail depending on the cases. She testified that she would do 6 or 7 a day. This involved folding the paperwork and placing it into an envelope.

On 1/10/18 petitioner presented to the office of Dr. Ellison, her primary care physician, and was seen by the nurse practitioner, Mrs. Wangard. Petitioner complained of bilateral hand numbness which had been present for two months. She was found to have bilateral Tinel's at the wrist, but not the elbows.

She testified that around 1/22/18 she started noticing numbness in her hands and her arms. She was dropping things, and the numbness was waking her at night. She also reported pain in her hands and arms when working. She again testified that she noticed these symptoms most when she was using the mouse and reconciling a large stack of papers. She testified that she did not really notice these symptoms at any other times.

On 1/22/18 the Illinois Form 45, Employer's First Report of Injury was completed by Adilene Flores, First Notice Associate. Nothing was listed with respect to what the employee was doing when the accident occurred. How the accident occurred was listed as bilateral carpal and cubital tunnel on both arms; repetitive typing and case work.

On 1/22/18 petitioner underwent an EMG/NCV performed by Dr. Trudeau. Detailed nerve conduction studies of the upper extremities revealed bilateral median neuropathies at the wrists (bilateral carpal tunnel syndrome), moderately severe on either side, right essentially equal to the left; bilateral ulnar neuropathies at the elbows (bilateral cubital tunnel syndrome), mild and neurapraxic on either side, right essentially equal to left; and, no evidence of proximal median neuropathy, distal ulnar neuropathy, cervical radiculopathy, and brachial plexopathy.

On 2/7/18 petitioner presented to Dr. Neumeister at SIU School of Medicine. On her intake form she noted that she smokes a pack of cigarettes daily, and has or had has high blood pressure and diabetes. She complained of numbness and tingling of her bilateral hands that occasionally wakes her up from her sleep at night. Dr. Neumeister reviewed the EMG that showed bilateral cubital and carpal tunnel syndrome. She testified that she took NSAIDS with no relief. Following a physical examination Dr. Neumeister assessed bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. He recommended release of both the right and left cubital and carpal tunnels. He recommended that they start with the left.

On 2/13/18 petitioner completed the Employee's Notice of Injury. She noted that "ongoing pain/numbness from clerical work/case work" with respect to the duty she was performing at the time of injury. She identified the place where her injury occurred as her desk. She complained of ongoing numbness and pain.

On 2/27/18 the Supervisor's Report of Injury or Illness was completed by Kathy Butcher, PSA. She described the accident/incident as "About 6 weeks ago, Cherilyn came into my office with braces on her wrists. She said that both of her wrists/arms were bothering her and she needed to go to the Dr. to check it out."

On 2/27/18 petitioner underwent a left carpal tunnel release and cubital tunnel release performed by Dr. Neumeister. Petitioner followed-up post-operatively with Dr. Neumeister. On 3/12/18 petitioner reported that the sensation in her left hand was better. Dr. Neumeister removed her sutures.

On 4/3/18 petitioner underwent a right carpal tunnel release and cubital tunnel release performed by Dr. Neumeister. Petitioner followed-up post-operatively with Dr. Neumeister. On 4/16/18 petitioner reported that her numbness in her fingers had improved. She stated that she wanted to return to work where she would be typing. Dr. Neumeister removed her sutures. On 5/10/18 petitioner reported that she doing well with no residual numbness or tingling. She felt that she had normal sensation. She did report some tenderness around the carpal tunnel incision, and some swelling pain at the carpal tunnel site that worseneds when she types. Petitioner did not return to Dr. Neumeister until 9/16/19.

On 10/29/18 the evidence deposition of Dr. Neumeister was taken on behalf of petitioner. Dr. Neumeister is board certified in plastic surgery and hand and upper extremity surgery. He was of the opinion that typing could aggravate a person's carpal tunnel; that the positioning of a person while typing could lead to compression of the median nerve and that the ergonomics of a work station could bring about the symptoms of cubital tunnel. Dr. Neumeister testified that the more repetitive flexing and extension of the elbow that one does could cause the symptoms of numbness and tingling in the middle finger and the ring finger.

Dr. Neumeister testified that when he last saw petitioner on 5/10/18 following her right cubital and carpal tunnel release, she had diminished swelling around the scar, and swelling and some pain at the wrist that worsened with typing. He was of the opinion that this was not unusual, and that the swelling from the surgery could do that. He was further of the opinion that with time it would improve or go away entirely within a few weeks following that visit.

Dr. Neumeister was given a hypothetical that petitioner's job required her to enter basically all the basic information of a Medicaid applicant into the system; submit the application; and, enter all the information into the computer by typing. He was further told to assume that 75% of petitioner's job was typing, and the other 25% was going through the Medicare files and ordering them and processing them. He was also to assume that while petitioner was typing and doing these activities, her symptoms started and became worse to the point where she finally sought treatment in early 2018. Based on these hypotheticals, Dr. Neumeister was of the opinion that typing of a prolonged nature over the course of the years could aggravate or accelerate an underlying carpal tunnel condition if the symptoms came on while she was doing this activity and dissipated when she stopped. Dr. Neumeister was shown a picture of petitioner's keyboard and he was of the opinion that it was less ergonomic and if her symptoms come on while typing on that keyboard it could aggravate her cubital tunnel.

On cross examination, Dr. Neumeister was of the opinion that the more straight the elbow when typing the less likely the nerve in the elbow would be irritated. Dr. Neumeister testified that he had no documentation in his records of petitioner discussing her job duties or day to day activities with him. He testified that all he had in his records was that she mentioned typing in one visit. He further testified that petitioner did not describe at all how many minutes per day she spent typing or what it was that she typing; did not describe the layout of her work area; and, did not mention any activities outside of work that caused her pain, numbness, or tingling in her hands, other than sleeping. Dr. Neumeister noted that petitioner has risk factors that would make her more likely to have or develop cubital or carpal tunnel syndrome. He testified that these include obesity, being a smoker, and being a diabetic.

Dr. Neumeister was of the opinion that the causes of carpal tunnel are multifactorial, and clerical work like folding letters or answering phones might contribute to or aggravate this condition if the numbness and tingling came on while she was doing these activities. Dr. Neumeister testified that during petitioner's last visit she did not complain of having any issues with her grip, range of motion, pain, or numbness, other than some pain around the incision site, where she said she had some numbness when she was typing. Dr. Neumeister was of the opinion that frequent hobbies like painting or sculpting, or things that are very intensive with the hands, could possibly entrap that nerve and aggravate the symptoms that she was having if the symptoms came on while she was doing those activities.

Dr. Neumeister was of the opinion that cubital and carpal tunnel conditions are probably more likely to be more prone to be aggravated the longer you do a certain activity. However, he then stated that he was not sure a distinct number of activities or a distinct time is what is important because everybody is made up differently. He was of the opinion that minor loss of grip strength post-carpal tunnel release is pretty common immediately after surgery, but is extremely small in the long term. He was of the opinion that most everyone bounces back. He was further of the opinion that recurrent numbness would be uncommon. Dr. Neumeister was of the opinion that if someone has cubital or carpal tunnel syndrome, lifting a box of files or lifting an item that has 10 or 15 pounds of weight, could aggravate those symptoms.

On 9/10/19 the petitioner underwent Section 12 examination performed by Dr. Patrick Stewart, at the request of the respondent. Dr. Stewart reviewed petitioner's medical records from January 2018 through September of 2018, and notes from 2013 to 2017. Petitioner told Dr. Stewart that she works and processes Medicaid applications for nursing home placement. She reported that she then organizes these and sends them on for somebody else to assess the appropriateness of assistance. These records can be anywhere from 300 to 5,000 pages, with 500 being outside the norms. She stated that on average the record is about 750 pages. She reported that a single form has to be filled out for each of those cases, and the remainder of her time is spent

organizing those cases and going through the paperwork and organizing the paperwork so it can be assessed by the next level for the determination of assistance. Petitioner listed her hobbies only as reading and watching TV. She told him she was a one pack a day smoker.

Following a physical examination and record review, Dr. Stewart diagnosed petitioner with bilateral carpal tunnel and cubital tunnel syndrome with ulnar neuritis of the right elbow. With respect to casual connection, Dr. Stewart was of the opinion that petitioner had other medical conditions. He noted that her previous diagnosis of diabetes placed her at an increased risk for developing compression neuropathies, but more concomitant with her diagnosis and the exacerbation of her symptoms were the elevation of her BMI, being female, and being post menopausal. He was of the opinion that all these factors put her at an increased risk. Dr. Stewart noted that petitioner reported that when she does the organization of her paperwork she has symptoms when she is flipping through the papers with her right hand. He was of the opinion that this did not explain the reason for the development of the symptoms in her left upper extremity. He was further of the opinion that cubital tunnel is most commonly seen with forceful maintained grip and prolonged, maintained grip which does not occur in petitioner's described work activities.

Dr. Stewart was of the opinion that petitioner's medical treatment was appropriate and reasonable, and her prognosis was excellent. He was also of the opinion that because of the normal function he saw as far as her strength testing, Semmes-Weinstein's, and 2 point discrimination testing, he recommended, as far as her current aggravation was concerned, conservative treatment to try to resolve any irritation and symptoms within the ulnar nerve. He was of the opinion that this would include an elbow pad and protection, as well as anti-inflammatories and/or Prednisone. With respect to maximum medical improvement, Dr. Stewart was of the opinion that she had reached maximum medical improvement in deference to the left upper extremity because she was asymptomatic. With respect to the right side, he indicated that he would like to see the resolution of the ulnar neuritis. Dr. Stewart was of the opinion that this related back to the operative intervention on 4/3/18.

On 9/16/19 petitioner returned to Dr. Neumeister for the first time since her last visit on 5/10/18. She presented with ulnar nerve paresthesias and pain in the proximal forearm that started 3-4 weeks prior. She stated that it happened with overuse. Dr. Neumeister noted that when he last saw her in May of 2018 she had good results in resolution of her symptoms. Following an examination, Dr. Neumeister was of the opinion that petitioner had symptoms of cubital tunnel, despite being released, and now presented with symptoms consistent with radial tunnel. He recommended a nerve conduction study. His diagnosis was right cubital tunnel syndrome.

On 9/30/19 petitioner underwent a 2nd EMG/NCV performed by Dr. Trudeau. The results revealed moderately severe ulnar neuropathy at the right elbow (cubital tunnel syndrome). It was noted that it was likely

a recurrent lesion. Also noted was mild posterior interosseous neuropathy in the right dorsal proximal forearm. There was no evidence of distal ulnar neuropathy, medial neuropathy, other entrapment neuropathy, cervical radiculopathy, brachial plexopathy, or mononeuritis multiplex.

On 1/21/20 the evidence deposition of Dr. Stewart, a hand surgeon, was taken on behalf of the respondent. Dr. Stewart noted that the medical records showed that petitioner had been diagnosed with diabetes and treated for diabetes from 2014 to 2016, but then by her report, no longer had diabetes and was no longer requiring medication for diabetes. Dr. Stewart noted that this was relatively uncommon for somebody to just start to no longer require any treatment when nothing else has happened. Dr. Stewart opined that post her operative interventions for her carpal and cubital tunnel releases that petitioner had a little irritation of the ulnar nerve at the right elbow, but her strength and sensation was normal. Therefore, he was of the opinion that petitioner had a temporary aggravation and would likely resolve without any aggressive intervention. He then opined that her work activities did not contribute to, aggravate, or accelerate her carpal tunnel syndrome. He based this on the fact that petitioner described no forceful repetitive activity, no vibration exposure, and did not have her hands forced into an abnormal position of significant flexion or significant extension based on the workstation or her work activity that required the work to be done in an exaggerated wrist position. He further based it on the fact that when petitioner demonstrated her flipping through the pages she would flip through the pages with her right hand and then take time to glean whatever information was needed from that page in the creation of her report, and this meant that there would be a considerable period of time, depending on the amount of information on each page, even between these repetitive activities. Dr. Stewart opined, based on the way petitioner demonstrated the manner in which she did her job, noted that petitioner did not at any time flex her elbows beyond 90 degrees, and there was not really any indication that she was extending her arm fully, flexing her arm fully, or doing that repeatedly during the completion of her job activities. Dr. Stewart opined that it is the degree of flexion without a forceful maintained grip that would likely cause cubital tunnel syndrome, and what petitioner demonstrated to him did not meet that degree of flexion, and logically wouldn't, because if somebody is working at a work station, there would be no reason that they would need to flex their arms as far as they possibly can at the elbow, which for normal range of motion is between 130 and 145 degrees. He was of the opinion that one would have to reach onto the desk farther away and bring an item towards them. He testified that if petitioner claimed she typed 75% of the time and worked with paperwork the remaining 25% of the time that would not change his opinion about causation.

Lastly, on direct examination Dr. Stewart was of the opinion that if petitioner had a hobby for years that involved creating intricate artwork comparable to an origami that included grasping scissors to cut paper, fold paper, crease paper, and paint, that was time consuming and monotonous, that could potentially cause or

aggravate her carpal and cubital tunnel syndrome depending on the amount of time she does it, how much paper she cuts, how much force is used, and how long she is sitting, folding, and having to put pressure on her fingers in a forceful, repetitive manner to crease the paper.

On cross examination, Dr. Stewart testified that he did not have a chance to see how petitioner's work station was set up when he reviewed her work history. He described an at risk position at a workstation as prolonged flexion or extension beyond 40 degrees of the hands, wrists and arms, so that when you put your wrists on the keyboard the wrist is in a relatively neutral position, so that it is not significantly extended and flexed. Dr. Stewart was of the opinion that if someone rests her elbow on something that presses on that nerve over a prolonged period of time, that could make you have cubital tunnel symptoms.

On redirect examination Dr. Stewart noted that when petitioner was demonstrating her arm and hand placement she never held her hands in a position that was not ergonomic, or greater than 40 degrees.

Respondent offered into evidence the job description for Office Coordinator. The job duties were described as follows:

- 35% providing paraprofessional office support services to the Asset Discovery Initiative Section; assisting with special projects and studies; utilizing various computer software packages to access, gather, and analyze data for investigations; different types of a variety of correspondence; distributing directives to designated DHS offices to obtain information related to assigned projects; creating and updating cases and internal databases containing referrals, tasks, dispositions, appeals and production data for purposes of investigations received by OIG meeting referral criteria.
- 30% of this job involves screening and distributing confidential and sensitive mail containing financial information; coordinating, monitoring, and completing assigned projects; gathering, analyzing, and determining if verification is complete and initiating requests for missing verification information; conferring with other HFS office representatives and the general public; providing information concerning status, procedures, submission of documents, and gathering information for case preparation.
- 10% of this involves utilizing a PC to develop complex spreadsheets and report applications; reviewing data entry to design spreadsheets, charts and graphs; writing standard language commands for spreadsheets; testing applications for accuracy and reliability; performing back up procedures to provide a variety of documents and reports.
- 10% receiving and screening incoming telephone calls and visitors; responding to inquiries and informs callers of available services; interpreting and clarifying department and division processes and procedures, and referring inquiries of a highly complex nature to designated personnel.
- 10% establishing and maintaining a filing system containing various audit reports, general correspondence, and reports pertaining to unit activity.
- 5% performing other duties as required or assigned which are reasonably within the scope of the duties enumerated above.

Kathy Butcher has been a Manger-Public Service Administrator- for respondent for the past 5 years, and petitioner's supervisor during this same period. She testified that petitioner also has an immediate supervisor that she is over. Butcher stated that she has 25 employees and although she completed the supervisor's report on 2/27/18, she could not recall if petitioner reported it earlier. She testified that petitioner handles the applications for Medicaid that come in via the mail; looks in the IES system for case numbers; pulls out verifications (a few to thousands); prints that info out and sets it up in the case tracking system; sorts verifications by applications; sets up files; asks for missing documents on a boiler plate form with a freeform space at the bottom and gives it a due date; and sorts out all information they get, and reconciles it into the file. She testified that this job also includes reviewing and sorting documents.

Robert Kinsch was called as a witness on behalf of respondent. Kinsch works for Frasco Investigative Services in the surveillance department, and was asked by respondent to investigate petitioner on social media. Kinsch ran a report on petitioner's name, address, and date of birth, and created a comprehensive social media report on the her. Included as part of this investigation was petitioner's Facebook, Instagram, Twitter, Pinterest, LinkedIn, and Google+ accounts. Kinsch completed two reports on petitioner. One was dated 3/22/19 and the secondary one was dated 1/27/20. On the 3/22/19 report activity that was posted prior to the alleged date of injury was a four day move she doing on 6/23/17; a post indicating that it took her 7 hours to get all her art room belongings moved by herself on 6/9/17; photographs of book art posted 1/27/15, 5/18/16, and 5/28/17; and her attendance at a January Book Sale on 1/13/18. The report dated 1/27/20 only included social media posts in 2019, which were after her alleged injury date of 1/22/18. There was some reference to some jewelry sale in the posts which petitioner testified was the sale of jewelry that was premade. She testified that she did not make any jewelry. Petitioner testified that she regularly posts her book art on Facebook, but the date it is posted could be of book art she previously did that was posted just as an example of what she could do, and not indicative of work she was doing at that time. Petitioner did not charge more than $50 for book art.

Petitioner testified that currently she feels like her hands and arms are perfect. She testified that she has no pain, but did have decreased strength in her hands when trying to grip a case file and get it out of the filing cabinet drawer. She testified that her forearm is better, and that it is best to work with her forearm on the tables and alternate activities.

Petitioner testified that prior to her injury date she was able to all the same activity on one day for a prolonger period of time. Petitioner reviewed the job description respondent offered into evidence and testified that it looked like her job description and that it was accurate, and looks like what she does. Petitioner testified that if she does too much typing it can aggravate her hands.

On cross examination petitioner testified that she is currently working full duty without restrictions. She testified that she was not treating anymore and does not take any medications for her hands and arms. Petitioner testified that some days she smokes a whole pack of cigarettes, and other days she smokes none. Petitioner testified that before her EMG on 1/22/18 she had been noticing symptoms for about a couple of weeks that she attributed to stress. She also noticed symptoms when sleeping and driving. She stated that she initially went in because of her sleeping problems.

Petitioner testified that she would usually reconcile papers using her right hand, and would use the left hand to pull aside the papers. She stated that some files were 100 pages and others were up to 2500 pages. She testified that she would go through all the papers and typed up what was missing. She noted that if a file was 750 pages, it would take her about 4 hours to reconcile, type, and send out papers. She reported that on average she would have at least 30 files in a given week. She stated that when she did these files she had no other job duties at that time.

Petitioner testified that she has a computer at home that she only uses for internet activities. She also testified that she makes book art seasonally around Christmas time. She also testified that she does some for birthdays, but her busiest time is around Christmas, when she would do a couple of them per weekend, over just one weekend. She described this book art as making art out of the pages of a 500-600 pages book. In making her book art petitioner makes measurement on a page, and cuts and folds the edges down. She has been doing this for about 7 years, and uses her hands to do this. She denied any problems with her hands/arms when doing her book art. She testified that last year she made 15 books. She testified that for simple patterns she would just fold the pages, and for more intricate patterns she would cut the pages. When looking at her Facebook entries these statements may not be totally accurate, given that on 6/11/19 petitioner noted that she had 10 book art projects on the list at that time. If this is the case, and the holidays are her busiest times, that would make her estimate of doing 15 books a year low.

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

Petitioner is alleging an accidental injury to her bilateral hands and elbows (arms) due to her repetitive work activities that arose out of and in the course of her employment by respondent and manifested itself on 1/22/18.

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission (1987) 115 111.2d 524, 106 Ill.Dec 235, 505 N.E.2d 1026, the Supreme Court held that "the purpose behind the Workers' Compensation Act is best serviced by allowing compensation in a case … where an injury has been shown to be

caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction.." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

Since petitioner is claiming injuries to her bilateral hands and elbows (arms), in Illinois, recovery under the Workers' Compensation Act is allowed, even though the injury is not traceable to a specific traumatic event, where the performance of the employee's work involves constant or repetitive activity that *gradually* causes deterioration of or injury to a body part, assuming it can be medically established that the origin of the injury was the repetitive stressful activity. In any particular case, there could be more than one date on which the injury "manifested itself". Prior to petitioner's alleged accident on 1/22/18, petitioner had reported to Dr. Ellison on 1/23/14 that she gets numbness in her hands and arms, and was fatigued. Dr. Ellison was of the opinion that a lot of her symptoms were due to menopause, medication or her mood. There were no further records related to petitioner's hands or arms complaints until 2018.

On 1/10/18 petitioner complained of bilateral hand numbness for 2 months. The arbitrator notes that the onset of these symptoms could coincide with the time petitioner testified that her book art business was the busiest, since she had testified that she was busiest with her book art around Christmas time.

On 1/22/18 she underwent an EMG that revealed bilateral cubital and carpal tunnel syndrome. On 1/22/18 the Employer's First Report of Injury was completed and listed "repetitive typing and case work" under how the accident occurred.

Petitioner testified at trial that on 1/22/18 she reported pain in her hands and arms when working, mostly with using the mouse and reconciling a large stack of papers, and did not really notice these symptoms at any other times. She testified that she did not have symptoms when typing.

On 2/7/18 when petitioner saw Dr. Neumeister she indicated that she smoked a pack of cigarettes a day, and has or had high blood pressure and diabetes. Her only complaint at that time was numbness and tingling that occasionally wakes her from her sleep. She made no mention of any work activities. On her Employee's Notice of Injury completed 2/13/18 she reported "ongoing pain/numbness from clerical work/case work".

At trial she testified that her duties involved using a mouse, typing and reconciling, and reconciling did not involve any use of the computer. She specifically testified that she did not experience any symptoms when typing. She testified that her pain and numbness was related to her use of the mouse and doing reconciliation, with most of her pain and numbness associated with her doing reconciliation. She also reported numbness in

her hands when driving. She testified that she spent 50% or her day typing and using the mouse, and the other 50% doing reconciliation. She also processed 6-7 pieces of mail a day, for which she allocated no time.

Petitioner testified that she would usually reconcile papers using her right hand, and would use the left hand to pull aside the papers. She stated that some files were 100 pages and others were up to 2500 pages. She testified that she would go through all the papers and typed up what was missing. She noted that if a file was 750 pages, it would take her about 4 hours to reconcile, type, and send out the papers. She reported that on average she would have at least 30 files in a given week. She stated that when she did this she had no other job duties at that time.

Given that it is imperative that the petitioner place into evidence specific and detailed information concerning her work activities, including the frequency, duration, manner of performing, etc., the arbitrator finds, based on the petitioner's testimony at trial, and the varying work histories she provided to her medical experts, that she has failed to provide a consistent history as to the frequency, duration, and manner in which she performed her work duties. The arbitrator finds the petitioner provided a general description of what her duties are, and what the frequency and duration may be at a given time, but not overall. Additionally, although the petitioner provided the manner in which she used the keyboard on her desk, she specifically testified that she never had any symptoms while typing. Instead, she reported that the symptoms occurred with reconciling and using the mouse, the frequency of which was either missing or inconsistent in the records. Given this, the arbitrator finds the petitioner did not place into evidence specific and detailed information concerning her work activities. The arbitrator found the petitioner's description of her duties to be more general in nature.

In addition to the petitioner placing into evidence specific and detailed information concerning her work activities, it is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities. There is nothing in Dr. Ellison's records to support a finding that he had a detailed and accurate understanding of her work activities. Additionally, during his deposition on 10/29/18 Dr. Neumeister testified that he had no documentation in his records of petitioner discussing her job duties or day to day activities with him. He testified that all he had in his records was that she mentioned typing in one visit, which the arbitrator notes petitioner specifically testified did not cause her any problems. He further testified that petitioner did not describe at all how many minutes per day she spent typing or what it was that she was typing; did not describe the layout of her work area; and, did not mention any activities outside of work that caused her pain, numbness, or tingling in her hands, other than sleeping.

When Dr. Neumeister was given a hypothetical during his deposition that petitioner did 75% typing, and 25% going through Medicaid files, ordering them and processing them, and her symptoms were worse with these activities, Dr. Neumeister opined that typing of a prolonged nature over the course of years could

aggravate or accelerate underlying carpal tunnel condition if the symptoms came on while doing these activities and dissipated when the activities stopped. However, the arbitrator finds it significant that petitioner specifically testified that she had no symptoms when typing, and that this hypothetical was inconsistent with the petitioner's job description respondent offered into evidence, and the job description as testified to at trial by petitioner. Also, the arbitrator finds it significant that Dr. Neumeister did not have any understanding of how petitioner actually performed reconciliation.

Given the above, the arbitrator finds that Dr. Neumeister did not have a detailed and accurate understanding of petitioner's work activities and which activities actually caused her symptoms.

In addition to Dr. Neumeister, the other medical expert that examined petitioner and took a history of her job duties was Dr. Stewart, who examined petitioner on behalf of the respondent. Petitioner told Dr. Stewart that she works and processes Medicaid applications for nursing home placement. She reported that she then organizes these and sends them on for somebody else to assess the appropriateness of assistance. She stated that the records can be anywhere from 300-5,000 pages, with 5000 being outside the norms. She stated that on average the record is 750 pages. She reported that she completes a single form for each of these cases, and the remainder of her time is spent organizing the cases and going through the paperwork and organizing the paperwork so it can be assessed by the next level for the determination of assistance.

During his deposition Dr. Stewart was of the opinion that petitioner described no forceful repetitive activity, no vibration exposure, and did not have her hands forced into an abnormal position of significant flexion or significant extension based on the workstation or her work activity that required the work to be done in an exaggerated wrist position. He was further of the opinion that when petitioner demonstrated her flipping through the pages for reconciliation she would flip through the pages with her right hand and then take time to glean whatever information was needed from that page in the creation of her report, and this meant that there would be a considerable period of time, depending on the amount of information on each page, even between these repetitive activities.

Based on Dr. Stewart's examination and record review, as well as the history petitioner provided, the arbitrator finds that Dr. Stewart also did not have a detailed and accurate understanding of petitioner's work activities. Although petitioner did provide a history of the activities she performed for respondent, she did not provide Dr. Stewart with a detailed and accurate description of each these activities.

Based on the evidence petitioner provided regarding the specific and detailed information of her work activities, as well as the information Dr. Ellison, Dr. Neumeister, and Dr. Stewart had of petitioner's work activities, the arbitrator finds the petitioner did not include specific and detailed information concerning her

work activities, including the frequency, duration, manner of performing, etc., but rather provided a general overview of her work activities, that was not always consistent, especially given the fact that petitioner testified that she spent 50% of her day typing and using the mouse, and 50% doing reconciliation, but also testified that she processed mail, but allotted no time to that. Also, when her attorney gave a hypothetical to Dr. Neumeister, he asked the doctor to assume petitioner typed 75% of the time, and spent the remaining 25% going through Medicare files, ordering them, and processing them. The arbitrator finds it significant that this hypothetical is different from what the petitioner described as her job duties, as well as the breakdown of her job duties as identified in respondent's job description for petitioner. Additionally, the arbitrator finds it significant that when petitioner gave Dr. Stewart a history of her job duties she only mentioned that she processed Medicaid applications for nursing home placement and then organized and sent them to others to assess. She reported that this task could involve anywhere from 300 to 5000 pages, with the average being 750 pages. However, petitioner failed to provide Dr. Stewart with any specific or detailed information regarding her typing or mouse use. The arbitrator also finds Dr. Stewart's opinion that if petitioner's symptoms in her hands were worse when reconciling and flipping through the pages, which she did with her right hand, that would not explain the reason for the development in her left upper extremity, persuasive.

In addition to what petitioner reported to the medical experts, the arbitrator finds it additionally significant that petitioner failed to mention to any of her medical experts that she did book art, which could be heavily labor intensive since each book art involved using her hands to fold and/or cut up a 500-600 pages book. Petitioner testified that she has done this for 7 years, and did about 15 book art projects last year. She did not indicate how many she did in other years, and her Facebook pages may indicate that this number could be higher.

Lastly, the arbitrator notes the discrepancy between the job duties petitioner testified to at trial; the job duties Dr. Stewart and Dr. Neumeister believed petitioner performed; and, the job duties on petitioner's job description that respondent offered into evidence, which petitioner testified was accurate. The arbitrator finds all of these job descriptions differ. The arbitrator finds this is additional evidence that supports a finding that petitioner failed to place into evidence specific and detailed information concerning her work activities, and that the medical experts had a detailed and accurate understanding of her work activities, which are both required for a petitioner to prove her injury was caused by the performance of the her job and had developed gradually over a period of time, without requiring complete dysfunction.

The arbitrator also notes that when petitioner first sought treatment on 1/10/18, she indicated that she had bilateral numbness for about the last two months, with no reference to her work activities. Given that petitioner testified that her book art orders were very busy before Christmas, the arbitrator finds it significant that the

onset of petitioner's symptoms may have coincided with the time when she was busy working on her book art orders for Christmas.

Therefore, based on the above, as well as the credible evidence, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury her to bilateral hands and arms due to her repetitive work activities, that arose out of and in the course of her employment by respondent, and manifested itself on 1/22/18.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?
J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?
K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?
L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury to her bilateral hands and arms due to her repetitive work activities, that arose out of and in the course of her employment by respondent, and manifested itself on 1/22/18, the arbitrator finds theses remaining issues moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	11WC019452
Case Name	KEY, JOSEPH v. BEST TRANSPORTATION & IWBF
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0158
Number of Pages of Decision	13
Decision Issued By	Deborah Baker, Commissioner

Pro Se Petitioner	Joseph Key
Respondent Attorney	Will Dimas, Miles Cahill

DATE FILED: 5/4/2022

/s/Deborah Baker, 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

JOSEPH KEY,

Petitioner,

vs. NO: 11 WC 19452

BEST TRANSPORTATION SERVICES, INC.,
ILLINOIS INSURANCE GUARANTY FUND, and
ILLINOIS STATE TREASURER as *ex-officio* custodian 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 whether an employee-employer relationship existed between Petitioner and Respondent Best Transportation Services, whether Petitioner sustained an accidental injury arising out of and occurring in the course of his employment, and whether Petitioner's condition of ill-being is causally related to the work injury, 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 11, 2019 is hereby affirmed and adopted.

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

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

May 4, 2022

/s/ *Deborah J. Baker*

DJB/lyc

O: 4/27/22

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KEY, JOSEPH Case# **11WC019452**
Employee/Petitioner

BEST TRANSPORTATION SERVICES INC
ILLINOIS INSURANCE GUARANTY FUND AND THE ILLINIOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

On 9/11/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.82% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

0000 JOSEPH KEY
PO BOX 23
THORTON, IL 60476

1872 SPIEGEL & CAHILL PC
MILES P CAHILL
15 SPINNING WHEEL RD SUITE 107
HINSDALE, IL 60521

6202 ASSISTANT ATTORNEY GENERAL
PATRICIA JJEMBA
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [x] 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

Joseph Key
Employee/Petitioner

Case # **11** WC **19452**

v.

Best Transportation Services, Inc., Illinois Insurance Guaranty Fund and the Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **08/14/19** . 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. [x] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [x] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [x] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [x] What were Petitioner's earnings?
H. [x] What was Petitioner's age at the time of the accident?
I. [x] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **Did Petitioner provide adequate notice of the hearing?**

FINDINGS

On **04/21/2011**, Respondent Best Transportation *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 Best Transportation.

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner sustained accidental injuries on April 21, 2011 but failed to prove that said injuries arose out of and in the course of his claimed employment relationship with Best Transportation.

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner provided Best Transportation with timely notice of his claimed accident. Arb Exh 2.

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner failed to establish causal connection.

The Arbitrator views the remaining disputed issues as moot and makes no findings as to those issues.

The Illinois Insurance Guaranty Fund and the Injured Workers' Benefit Fund are not implicated as the Arbitrator makes no award.

ORDER

See the above and the attached decision. 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.

Signature of Arbitrator

9/10/19
Date

SEP 11 2019

Joseph Key v. Best Transportation, Illinois Insurance Guaranty Fund
and Injured Workers' Benefit Fund
11 WC 19452

Procedural History

On May 20, 2011, Petitioner's former counsel filed an Application for Adjustment of Claim naming Best Transportation Service, Inc. as the sole respondent. In the Application, Petitioner alleged injuring his neck, back, shoulders, arms and left wrist on April 21, 2011, while carrying a sofa through a doorway. Arb Exh 2. Years later, Petitioner's former counsel amended the Application by naming the Illinois Insurance Guaranty Fund and the Injured Workers' Benefit Fund as additional respondents.

For 3 ½ years following the accident, Petitioner received temporary total disability checks (in the amount of $500/week) and medical benefits via an occupational accident insurance policy issued by Dallas National Insurance Company. PX 3, 4.

On June 27, 2011, an attorney filed an appearance on behalf of Dallas National Insurance Company. In January of 2015, this attorney withdrew, noting that Freestone Insurance Company, formerly known as Dallas National Insurance Company, entered receivership in April 2014 and that the claim was transferred to the Illinois Guaranty Fund for processing. Petitioner offered into evidence a Firestone proof of claim form he signed before a notary on December 29, 2015. PX 5.

Prior to the hearing of August 14, 2019, the Arbitrator met with the parties on numerous occasions to sort out coverage- and liability-related issues. Daniel Meehan, a representative of Best Transportation, attended at least one of these meetings, in October 2016, accompanied by his attorney, Victor Shane. Petitioner and his attorney parted ways in June 2018, at which point Petitioner's attorney withdrew. Petitioner was unsuccessful in obtaining new counsel thereafter. The Arbitrator continued the case multiple times, sometimes over objection, and set the matter for final disposition on August 14, 2019. Petitioner represented himself on that date. Victor Shane presented a motion to withdraw, which the Arbitrator granted. Arb Exh 3. After the Injured Workers' Benefit Fund objected to proceeding, alleging that Best Transportation had received inadequate notice of the hearing, the Arbitrator asked Mr. Shane to make a statement on the record. Mr. Shane made the following representations: 1) Best Transportation sold its assets in 2017; 2) a litigation fund was established around the time of the sale; 3) Best Transportation extended a settlement offer to Petitioner's former counsel in 2018 and 4) this offer was not accepted. Mr. Shane also stated that he continued to represent Daniel Meehan in other matters, that he had notified Meehan of the August 14, 2019 hearing and that Meehan had elected not to attend the hearing. Mr. Shane also informed the Arbitrator that Best Transportation was no longer paying him.

Summary of Disputed Issues

Petitioner, who was pro se as of the hearing, claimed he began working as a delivery driver for Best Transportation in July 2010. Petitioner acknowledged completing and signing various documents, including a multi-page questionnaire labeled "Independent Contractor Prospect Qualification," during the hiring process. IGF 8. Initially, he used a truck owned by a friend, Kewanee, to make deliveries for Best. Later, after business slowed down, he sometimes used his own Ford van to make deliveries. He claims he injured his left shoulder, neck and back on April 21, 2011, while delivering a sofa at an

apartment building. He acknowledged driving Kewanee's truck while making deliveries on April 21, 2011.

Petitioner testified he never returned to work after the accident. After a lengthy course of conservative care, he underwent cervical spine surgery by Dr. Singh.

All issues are in dispute. Arb Exh 1.

Arbitrator's Finding as to Adequacy of Notice of Hearing to Respondent Best Transportation

The Arbitrator relies on the statements of attorney Victor Shane, Best Transportation's former counsel, in finding that Petitioner provided Best Transportation with adequate notice of the August 14, 2019 hearing. Mr. Shane appeared at that hearing, to present a motion to withdraw (Arb Exh 3). The motion is accompanied by a certified mail receipt signed by Daniel Meehan on August 7, 2019. Mr. Shane represented to the Arbitrator that Mr. Meehan was aware that the case was proceeding to trial and had elected not to participate. As noted above, Mr. Meehan had appeared before the Arbitrator on at least one prior occasion and was aware of the nature of the claim.

Arbitrator's Findings of Fact

Petitioner testified that, before being hired by Best Transportation, he drove a truck for Key Express, a business owned by his son. He drove for this company from 2006 through 2009. His son paid him in cash and via check.

Petitioner testified he went to Best Transportation's office in Willowbrook on July 20, 2010. At that office, he met with Dan Meehan and another man. He completed an application. He did not undergo a driving test. He held a "D" license. He did not have a CDL. He testified both that he was to be paid per delivery and at the rate of $125 per day.

Petitioner did not offer into evidence any paychecks issued to him by Best Transportation. The two checks he offered are dated August 13, 2010 and April 22, 2011 [the day after the claimed accident]. The check dated August 13, 2010, issued by "Contractor Resources Solutions", is in the amount of $702.12. The check dated April 22, 2011, issued by "Trucking Support Services, LLC" is in the amount of $99.60. Both checks are payable to Petitioner but neither sets forth any information as to what the payments represent. PX 1.

Petitioner testified he started driving for Best Transportation the day after being hired. He reported to Best Transportation's office in the morning and picked up his schedule for that day. The schedule showed various delivery locations and "windows" during which deliveries were to be made. He did not decide the order in which deliveries were to be made.

Under cross-examination by the Illinois Guaranty Fund, Petitioner identified a five-page document (IGF 8) as an "Independent Contractor Prospect Qualification" he completed and signed on July 27, 2010, at the request of Best Transportation. The third paragraph on page 4 of this document reads as follows:

> "Prospect understands that nothing contained in this information sheet or in the granting of an interview is intended to create an

employment relationship between Company and Prospect."

Petitioner testified that no one explained this provision to him.

Petitioner testified he drove two different vehicles for Best Transportation between July 2010 and the accident of April 21, 2011. One of these vehicles was a large truck owned by Kewanee Glaze, a man he had worked with in the past. Petitioner testified he drove this truck at the direction of Best Transportation. Payment for use of the truck would be made to Kewanee. Kewanee would then pay Petitioner. Petitioner testified that Kewanee paid him in cash, once a week. Petitioner acknowledged he drove Kewanee's truck on the day of the accident. [Kewanee was never made a respondent.] Respondent Illinois Guaranty Fund offered into evidence the first page of an equipment lease running between Best Transportation and Kewanee Glaze. The lease identifies Best Transportation as the lessee and Kewanee Glaze as the lessor. It also identifies Kewanee Glaze as a driver. The term of the lease ran from August 27, 2010 through August 27, 2013. The lease covered a 2002 International, Model 4700. The signatures of Best's president and Kewanee Glaze appear at the bottom, next to the date August 27, 2010. IGF 7.

Petitioner testified that the second vehicle he drove for Best Transportation was a Ford van that he owned. When he drove this van for Best, he was paid via check. When he first began working for Best Transportation, he drove only Kewanee's truck, five days a week. It was later, after work slowed down, that he began driving his van. Respondent Illinois Guaranty Fund offered into evidence an equipment lease running between Best Transportation and Petitioner. The term of the lease ran from March 25, 2011 through March 25, 2014. It covered a 1998 Ford owned by Petitioner. IGF 6. The Illinois Guaranty Fund also offered into evidence a Certificate of Insurance from State Farm pertaining to a 1998 Ford van. Petitioner is identified as the owner of this van and the "named insured." Best Transportation is identified as the certificate holder. The effective dates of the policy are January 5, 2011 through July 5, 2011. IGF 9. Respondent Illinois Guaranty Fund also offered into evidence a three-page "Fleet Operator and Service Agreement" running between Petitioner, who is identified as an "owner operator" and "Trucking Support Services, LLC, d/b/a Contractor Resource Solutions and CRS." IGF 1. Under cross-examination, Petitioner initially did not recall this document but then acknowledged signing it after he started making deliveries using his own Ford van. [The date March 10, 2011 appears next to Petitioner's signature.] Petitioner also acknowledged he never filed a workers' compensation claim against Trucking Support Services. He further acknowledged signing related documents, labeled IGF 2 and IGF 3. IGF 3 defines an owner-operator as an independent contractor. Petitioner testified that, although he signed these documents, he was not an independent contractor.

Under cross-examination by the Injured Workers' Benefit Fund, Petitioner testified that Best Transportation provided him with a phone. A dispatcher would call or text him and tell him where to go. The dispatcher was named "John." If he encountered a problem while driving, he would contact "John." After completing his route, he drove the truck home or left it at Best Transportation's facility in Willowbrook. No one told him he could drive the truck home. He did not maintain the truck. No one told him the procedure to follow if he got a flat tire.

Petitioner denied injuring his left shoulder or neck before or after the accident of April 21, 2011. This accident occurred on a Thursday. In the morning, he picked up the truck and began making deliveries. A helper rode with him. It was this helper's first day on the job. In the past, a different helper, who Petitioner knew as "Buddy," drove with him. It was Kewanee who paid "Buddy."

Petitioner testified he made five or six deliveries on April 21, 2011, prior to the accident. Shortly before the accident, he drove the truck to Hobo Furniture Store, located at 87th and Cicero, and gave the Hobo employees a work order showing which items of furniture he was to pick up. The Hobo employees pulled the items on the order. Those items included a sofa and mattresses. After these items were loaded onto the truck, Petitioner drove the truck to an apartment building on Thatcher in Chicago. Petitioner and the helper then began carrying the sofa to an apartment that was on the second floor of the building. Petitioner testified that the door of the apartment was small. He and the helper had to tilt the sofa to get it through the door. As they were trying to get the sofa through the door, the helper twisted in such a way that Petitioner's left shoulder and left side "went down."

Petitioner testified that, after the accident, he and the helper might have made one more delivery before quitting for the day. Petitioner testified he might have worked the following day, a Friday. It was maybe on Friday when he called "John," Best Transportation's dispatcher, and reported the accident. He told "John" he twisted his side going through a door.

Petitioner testified he was not physically able to go to work on Saturday. He went to the Emergency Room at Ingalls Hospital that day due to neck and shoulder pain. At the Emergency Room, he underwent two injections and was given medication. At discharge, he was directed to seek follow-up care. [No Emergency Room records are in evidence.] On the Monday after the accident, he maybe went to Best Transportation's office and picked up a "small check." PX 1, p. 8. When he was in the office, he asked "Edith," who worked there, for the name of the insurance company. "Edith" told him to look at the check. The name of the insurance company was on the check.

Petitioner testified he never resumed working for Best Transportation after his visit to the Emergency Room. He saw Dr. Foreman the following week. Dr. Foreman referred him to Dr. Primus, a specialist. Dr. Primus injected his shoulder and back. [No records from Dr. Foreman or Dr. Primus are in evidence.]

Petitioner testified he later saw Dr. Singh. His attorney referred him to this doctor. He was not sure whether Dr. Primus also referred him. His attorney may have set up his appointment with Dr. Singh. [A Midwest Orthopaedics bill in PX 4 reflects Petitioner saw Dr. Verma on June 5, 2013 and began a course of care with Dr. Singh on June 24, 2013.] Dr. Singh initially treated him via therapy and injections. Dr. Singh later operated on his neck. [Documents offered by Petitioner reflect Dr. Singh performed an "ACDF," or anterior cervical decompression and fusion, at C4-C6, at Rush University Medical Center on June 13, 2014.] After the surgery, he underwent therapy and continued seeing Dr. Singh. He last saw Dr. Singh in 2015. He has not seen any other doctors for his injuries since then.

Petitioner testified he is right-handed. He cannot turn his head to the left. When he tries to turn his head to the left, he sometimes experiences double vision. He has difficulty focusing his eyes. His left shoulder still bothers him. Before the accident his left arm was his "power" arm. He no longer works on cars. He can no longer use a big wrench. He can reach up but it bothers him a little to do so. He sometimes takes Ibuprofen for his symptoms.

Under cross-examination by the Illinois Guaranty Fund, Petitioner acknowledged that, on April 6, 2015, Dr. Singh released him from care and found him capable of full-time, full duty work. PX 4. [Additional Midwest Orthopaedics at Rush records in PX 4 reflect that Petitioner returned to Dr. Singh on May 20, 2015, with the doctor's assistant taking him off work and recommending a functional capacity evaluation. At a subsequent visit, on July 20, 2015, Dr. Singh continued to keep Petitioner off

work and ordered a cervical spine CT scan and follow-up visit. It is not clear whether Petitioner returned to Dr. Singh thereafter.]

Under cross-examination by the Injured Workers' Benefit Fund, Petitioner testified he wears glasses. He obtained these glasses after the accident. He has one grandson who is 26 years old. He has two great-grandchildren. They are 7 and 2 ½ years old. As of the accident, he was 62 years old and married. He had no dependent children at that time.

Arbitrator's Credibility Assessment

Petitioner's testimony concerning the sofa delivery and mechanism of injury was detailed and believable.

Petitioner's testimony that Respondent Best Transportation was engaged in a vehicle-operated delivery enterprise as of his claimed accident was credible and supported by the documentary evidence.

There was a significant discrepancy between Petitioner's wage-related testimony and the wage-related documents in evidence. Early in the hearing, Petitioner testified both that he was paid by the delivery and that he received approximately $125 per day. Petitioner offered two checks into evidence, neither one of which was issued by Best Transportation. Respondent Illinois Guaranty Fund offered into evidence documents from Contractor Resource Solutions concerning the weekly payments made to Kewanee Home Services between January 7 and May 16, 2011 and to Petitioner between March 25 and April 29, 2011. RX 12-13. The amounts varied widely in both cases. None of the weekly payments Petitioner received in 2011 came anywhere close to $625.00. RX 13.

Arbitrator's Conclusions of Law

Was Respondent Best Transportation operating under the Act as of April 21, 2011?

Section 3 of the Act states that the provisions of the Act "shall apply automatically and without election" to any employer engaged in any of seventeen enumerated "extra hazardous" activities. Petitioner's credible testimony establishes that, as of the claimed accident of April 21, 2011, Best Transportation was engaged in two of those activities, namely "carriage by land . . . and loading or unloading in connection therewith" and the use of "electric, gasoline or other power driven equipment." The Arbitrator finds that Respondent Best Transportation was operating under the Act as of April 21, 2011.

Did Petitioner establish that, as of April 21, 2011, the relationship between him and Best Transportation was one of employee and employer?

An employment relationship is a prerequisite for an award of benefits under the Act. The question of whether a person is an employee remains "one of the most vexatious *** in the law of compensation." O'Brien v. Industrial Commission, 48 Ill.2d 304, 307 (1971). The inquiry is fact-driven and not governed by any hard or fast rule. In the leading case of Roberson v. Industrial Commission, 225 Ill.2d 159 (2007), the Illinois Supreme Court held that the most important question to be asked in determining whether an injured individual was an employee or independent contractor is whether the respondent had the "right to control" the individual's activities. The claimant in Roberson, like

Petitioner, was a truck driver. The Court upheld the Commission's finding of an employment relationship but characterized the case as "close."

Petitioner established some measure of control, via his testimony that he interacted with Best Transportation's dispatcher and did not decide the order in which deliveries were made. He did not, however, come forward with the array of control-related evidence produced by the claimant in Roberson. He never suggested he was obligated to make a pre-trip inspection or keep a logbook, in compliance with DOT regulations. He did not claim he was obligated to post Best Transportation's name or any other identifying information on either of the vehicles he used, i.e., Kewanee's truck or his own van. He did not testify he was required to report any accidents to Best Transportation. He did not claim that Best Transportation provided him with a card with which to make fuel- and repair-related purchases. He conceded he often drove the truck home after completing his route. He also conceded the existence of an intermediary between him and Best Transportation, insofar as the truck was concerned. It was his acquaintance, Kewanee, who owned the truck and paid him when he used the truck to make deliveries.

Like the claimant in Roberson, Petitioner signed an independent contractor agreement before his claimed injury. In Roberson, however, there was evidence showing that, per the terms of this agreement, the respondent, P.I. & I. Motor Express, retained control "in the results to be obtained" from the services the claimant provided. The Commission and Supreme Court attached significance to this provision.

The evidence bearing on another, somewhat less significant test, method of payment, also fails to support a finding of an employment relationship. Petitioner's testimony that he was paid at the rate of $125 per day could support the conclusion he was an employee but neither of the checks he offered into evidence was issued by Best Transportation. Additionally, his testimony conflicts with the settlement sheets offered into evidence by the Illinois Guaranty Fund. Those sheets reflect widely varying amounts paid to both Petitioner and Kewanee.

The Arbitrator finds that Petitioner failed to meet his burden of proving that, as of the claimed accident, he and Best Transportation had an employment relationship.

Did Petitioner sustain an accident on April 21, 2011 arising out of and in the course of his employment by Best Transportation?

The Arbitrator has no reason to doubt Petitioner's testimony concerning the sofa delivery of April 21, 2011. The Arbitrator concludes that Petitioner sustained an accidental injury while making a delivery on that date but, based on the foregoing analysis, is unable to conclude that this injury arose out of and in the course of Petitioner's claimed employment by Best Transportation.

Did Petitioner provide Best Transportation with timely notice of his claimed accident?

Petitioner testified that he informed Best Transportation's dispatcher of the April 21, 2011 accident within 72 hours of the accident. The Arbitrator relies on this testimony, along with the original Application (Arb Exh 2), in finding that Petitioner provided Best Transportation with timely notice of the accident. Petitioner filed his Application on May 20, 2011, well within the statutory 45-day notice period. The proof of service on the reverse side of the Application is also dated May 20, 2011.

Did Petitioner establish causal connection?

As noted earlier, the Arbitrator finds credible Petitioner's testimony concerning the events immediately preceding the accident and the mechanism of injury. It is certainly plausible that the mechanism Petitioner described could have resulted in injuries to the left shoulder and/or spine. However, with the exception of several bills and brief status notes, Petitioner offered no medical records into evidence. The Arbitrator thus has no information concerning the history recorded by the initial Emergency Room providers. In the status notes, Dr. Singh responded "yes" to queries asking whether the cervical spine fusion/decompression diagnosis was related to the "alleged industrial accident" but the date of that accident is not identified. The very limited medical evidence does not permit the Arbitrator to conclude that the sofa-related accident of April 21, 2011 led to the need for the cervical spine surgery performed more than three years later, in June 2014.

The Arbitrator, having found that Petitioner failed to meet his burden of proof on the issues of employment, accident and causal connection, views the remaining disputed issues as moot and makes no findings as to those issues. Compensation is denied.

Affirm and Adopt (No Changes) No Affirm with Changes No No Reverse Reason Yes Modify Up	Injured Workers' Benefit Fund (§4(d)) No Rate Adjustment Fund (§8(g)) No Second Injury Fund (§8(e)18) No PTD/Fatal denied No

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC000332
Case Name	HOTT, BRYAN v. AT&T
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0159
Number of Pages of Decision	20
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Kevin Morrisson
Respondent Attorney	Frank Johnston

DATE FILED: 5/4/2022

/s/Stephen Mathis, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BRYAN HOTT,

Petitioner,

vs. NO: 20 WC 000332

AT&T,

Respondent.

DECISION AND OPINION ON REVIEW

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

Petitioner was employed as a premise technician by Respondent. He was 36 years of age and had been employed by Respondent for about 6 years. His work duties included lifting, getting into crawl spaces to run wiring, using extension ladders and climbing poles. He sustained a work accident on November 5, 2018. On the date of the accident, he was carrying an extension ladder on his right shoulder when he was startled by a stray dog and slipped on wet grass while trying to control the ladder. Petitioner testified that he felt a tear in his left shoulder.

Petitioner reported the injury that day and sought medical care. He had an MRI of the left shoulder on February 2. 2019 and consulted Dr. Jones, an orthopedic surgeon on February 19, 2019. Dr. Jones placed Petitioner on work restrictions and ordered physical therapy. On April 29, 2019, Dr. Jones performed an arthroscopic repair of the anterior labrum and sub-acromial decompression.

Petitioner underwent physical therapy that continued through 2019 and most of 2020. During this time Petitioner remained off work. On August 20, 2019, Dr. Jones allowed Petitioner to return to restricted duty work, but Respondent offered no accommodations. Dr. Jones recommended work hardening but it was twice denied by Respondent.

Petitioner underwent a Section 12 evaluation at the request of Respondent on July 6, 2020. Dr. Li opined that Petitioner was at MMI and required no further medical treatment. Dr. Li concluded that Petitioner could return to full duty work.

On August 24, 2020, Petitioner underwent a valid Functional Capacity Evaluation. The evaluator reported Petitioner could perform occasional 35 lb. overhead lift. It was recommended that Mr. Hott avoid ladders and avoid tasks that require repetitive or sustained overhead activities with the left arm. Petitioner's Employer Provided Job Description requires, in relevant part, lifting up to 80 lbs., use of hand tools, such as screwdrivers, pliers, drills, and wrenches, ability to climb ladders up to 28 feet and ability to work aloft with hand tools.

Dr. Jones examined Petitioner on December 22, 2020 and determined he had achieved MMI. He cleared Mr. Hott to return to work within the restrictions recommended by the FCE. Petitioner subsequently attended a course of work hardening commencing May 2021.

On June 24, 2021, after completing work hardening Petitioner again consulted Dr. Jones who placed him under a permanent 10 lb. lifting restriction with his left arm and discharged him from care. The Commission finds that Petitioner has been diligent in his pursuit of rehabilitation opportunities but has not been successful in achieving a level of strength that would permit the safe return to his livelihood as a premise technician. This level of disability is confirmed by both a valid FCE and permanent restrictions imposed by Dr. Jones. Additionally, the assessment performed by Ivy Rehab in conjunction with work hardening concluded Petitioner could lift only 7 lbs. over head with his left arm.

We find the opinions expressed by Respondent's Section 12 expert Dr. Li to be unpersuasive. Dr, Li admitted on cross examination that he had not reviewed the FCE and that depending upon the findings, his opinions could be impacted.

It is not disputed that Respondent requires compliance with the specific abilities mandated in its job description (PX1) in order for Petitioner to return to work. Respondent has offered no work accommodations.

The Commission finds based upon its review of the facts and medical evidence that Petitioner was totally incapacitated from work for the period commencing November 6, 2018, through December 22, 2020, when Dr. Jones found Petitioner to be at MMI and hereby modifies the Arbitrator's Decision accordingly.

Section 9110.10 provides that a written vocational rehabilitation assessment is required when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which he was engaged at the time of the injury and the period of total incapacity for work exceeds 365 days. The evidence presented by Petitioner at hearing clearly satisfies the criteria provided by the Commission Rules. The Commission modifies the Decision of the Arbitrator and hereby awards a vocational rehabilitation assessment to Petitioner.

Based upon the foregoing analysis the Commission hereby modifies the Decision of the Arbitrator filed October 21, 2021, on the issues of temporary total disability, and a vocational rehabilitation assessment pursuant to Commission Rule 9110.10, and affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $730.68 per week for a period of 111 1/7 weeks, (commencing November 6, 2018 through December 22, 2020) 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 provide to Petitioner a Vocational Rehabilitation assessment pursuant to Rule 9110.10.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to all reasonable and necessary medical expenses relative to the left shoulder injury sustained on November 5, 2018, pursuant to Sections 8(a) and 8.2 of the Act and the medical fee schedule.

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 $50,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

May 4, 2022

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

SJM/msb

o-3/16/22
44

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC000332
Case Name	HOTT, BRYAN v. AT&T
Consolidated Cases	No Consolidated Cases
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Dennis OBrien, Arbitrator

Petitioner Attorney	Kevin Morrisson
Respondent Attorney	Frank Johnston

DATE FILED: 10/21/2021

THE INTEREST RATE FOR THE WEEK OF OCTOBER 19, 2021 0.06%

/s/*Dennis OBrien, Arbitrator*

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

BRYAN HOTT
Employee/Petitioner

Case # **20** WC **000332**

v.

Consolidated cases: _____

AT&T
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 **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Springfield**, on **August 5, 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 **VOCATIONAL REHABILITATION**

FINDINGS

On the date of accident, **November 5, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**56,993.04**; the average weekly wage was $**1,096.02**.

On the date of accident, Petitioner was **36** 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, $**0.00** 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 all amounts paid by its group health insurer under Section 8(j) of the Act.

ORDER

Petitioner was not temporarily totally disabled as a result of the accident of November 5, 2018 for the period claimed by Petitioner.

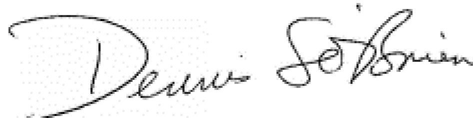
Petitioner has not proved he is entitled to vocational rehabilitation as a result of his injuries incurred in the accident of November 5, 2018.

The medical bills introduced into evidence are related to Petitioner's November 5, 2018 injury, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in the accident of November 5, 2018, and are to be paid pursuant to the medical 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.



Signature of Arbitrator

OCTOBER 21, 2021

ICArbDec19(b)

FINDINGS OF FACT:

TESTIMONY AT ARBITRATION

Petitioner

Petitioner testified that at the time of arbitration he was 38 years old and he believed he was still employed by Respondent. He said he was employed by Respondent in November of 2018 as a premise technician, installing telephone lines and internet inside homes and working on the telephone poles. He said he had worked for Respondent in that position for six or seven years at that time. He said his work involved running wiring in the house, getting into crawl spaces at times, using extension ladders and climbing poles, which could involve having gaffs, spikes, attached to his shoes to dig into the pole. He said the work could involve lifting, such as lifting a 30 to 32 foot ladder weighing 50 to 60 pounds over his shoulder. Some days he would use a ladder 75 to 80 percent of the day, other days he would not use it at all.

Petitioner identified Petitioner's Exhibit 1 as a work description for the premise technician job. He said the description was accurate and set out the requirements of the job he performed.

Petitioner testified that on the date of accident it was raining, and he was carrying his ladder. He had to cross a ditch to get to the pole he needed to climb, and as he was carrying the ladder on his right shoulder, a stray dog came around the corner and startled him, he slipped, and while trying to control the ladder he felt a tear in his left shoulder. He said he reported the injury that day and sought medical care.

Petitioner said he had an MRI of the left shoulder on February 2, 2019, and then saw Dr. Jones for the first time on February 19, 2019. Petitioner testified that after the accident his main complaint was pain when lifting, especially overhead lifting. He said Dr. Jones placed him on work restrictions and ordered physical therapy for him. Petitioner said Dr. Jones performed surgery on his left shoulder on April 29, 2019. After the surgery he began treating with Ivy Rehab for therapy on his left shoulder. He said Dr. Jones kept him on work restrictions after his surgery. Work hardening was ordered by Dr. Jones in mid 2020, but Petitioner said he did not do it at that time as it was denied by the insurance company. Dr. Jones ordered a functional capacity evaluation, and it was performed at ATI Physical Therapy on August 24, 2020. He said that facility used the job description in Petitioner Exhibit 1 while doing that evaluation.

Petitioner testified that in August of 2020 his left shoulder remained painful when lifting overhead and he also had problems with the shoulder at times when lifting to the side. He said he returned to see Dr. Jones in December of 2020 and was given permanent restrictions. In 2021 he went to work hardening at Ivy Rehab through June 15, 2021, and then he saw Dr. Jones again. Permanent restrictions were again given, but no additional work hardening was ordered. At that time Petitioner said he still had pain when lifting overhead, and once in a while it would bother him when not doing overhead work. He said reaching straight forward and then upwards was not nearly as painful as lifting it away from his side and upwards, where he would have pain at about the shoulder level. He said his work for Respondent involving carrying and extending a ladder as well as working on top of the ladder and reaching out to the side would cause him pain, as would gaffing a pole or reaching overhead for wiring while in a crawl space.

Petitioner said he felt his shoulder had improved since August 24, 2020, but it was not where he thought it would be safe for him to work aloft, especially when working overhead. He said there was only a slight difference between his ability to lift in 2020 above his head versus what he could lift at the time of arbitration. He said he would experience more pain when lifting heavier weights. Petitioner said he had never had pain in his left shoulder prior to 2018.

Referring to Petitioner Exhibit 1 Petitioner said it would be difficult for him to lift 80 pounds, and that working aloft up to 28 feet with hand tools would be a problem as he had in the past used his arms to catch himself from falling, so he did not believe that would be safe. He said gaffing a pole, climbing the pole, would be difficult, and working overhead for a long period of time with tools would be difficult.

Petitioner said he had not been employed anywhere since August 12, 2020, and he had not received any compensation from anyone since that time.

On cross examination Petitioner said that he did not fall to the ground or drop down to a knee at the time of his accident, he slipped with the ladder in his arm, and the ladder did not fall, either, he retained it when this occurred. He said the 30 to 32 foot ladder was the bulk of the heavy lifting he would have to do overhead, but below shoulder level he would have to carry concrete bags and satellite dishes. He said while he had not tried to do those things, he felt he would be comfortable carrying the concrete bags, even though he would not have 100 percent trust in his arm, as that would be on the ground and he would not be exposed to a greater injury.

Petitioner said the majority of his complaints were of pain when lifting overhead, and that had been true since the time of the injury as well as after the surgery. He agreed that work hardening had improved his shoulder condition slightly. He said when Dr. Jones discharged him from care on December 22, 2020 work restrictions were imposed which were consistent with the functional capacity evaluation, which indicated he could lift 35 pounds from waist to overhead.

Petitioner said Dr. Jones had now imposed work restrictions on him of 10 pounds overhead, despite his testimony that he had slightly improved in regard to lifting overhead. He said that as of the date of arbitration he was basically in the same condition he had been in August of 2020. He said he did not believe the surgery he had involved the rotator cuff.

On redirect examination Petitioner said he believed he knew what the functional capacity evaluation conclusions were, and that they included lifting 50 pounds from floor to waist height occasionally, lifting 35 pounds from waist height to overhead occasionally, avoiding tasks that required repetitive or sustained forceful gripping with the left hand, and avoiding ladder climbing. He said when Dr. Jones released him in June he said Petitioner was to do no lifting over 10 pounds above the head.

MEDICAL EVIDENCE

An MRI of the left shoulder was performed on February 2, 2019 and was interpreted as showing no rotator cuff tear, but a tear of the superior labrum extending into the posterior labrum and inferior labrum posteriorly. (PX 2 p.48,49)

Petitioner saw Dr. Jones on February 19, 2019, giving a history of slipping on wet grass while carrying an extension ladder on November 5, 2018, and of having left posterior and scapular pain since that time. Physical examination of the left shoulder on that date revealed some restriction of motion and a positive impingement and Speed tests. The diagnosis on that day was left shoulder pain. He was given restrictions of no work above the left shoulder level and no lifting over 5 pounds. (PX 2 p.1-6)

Dr. Jones performed arthroscopic surgery on April 29, 2019, performing an anterior labral repair with a an anchor as well as a subacromial decompression. He found no evidence of a rotator cuff tear, and Dr. Jones felt an excellent repair of the labrum had been accomplished. (PX 2 p.22)

Petitioner saw Dr. Jones on May 9, 2019 and reported improvement, with only mild pain. Physical therapy was scheduled to begin in two weeks, and Petitioner was to remain off work. (PX 2 p.26,29,30)

Petitioner began receiving physical therapy at Ivy Rehab Physical Therapy on May 21, 2019. By June 17, 2019 he was reporting soreness since surgery, but noted it was improving. The therapist noted Petitioner was performing his exercises correctly and reported no change in pain. The therapist said Petitioner was progressing in an excellent fashion and had good tolerance of the treatment. On June 24, 2019 it was noted that Petitioner said he was improving with all of his daily activities and was using his arm more. As therapy progressed Petitioenr noted continued difficulty with overhead activities. He then said on July 29, 2019 that his discomfort was reduced with only 2 spots where he felt pain while doing moderate to heavy activity. Petitioner temporarily ceased physical therapy on August 26, 2019. After three months of physical therapy the therapist was describing Petitioner progress as good, though slow. (PX 2 p.42,44,45; PX 5 p.52,58,83,93,113,114)

Petitioner resumed physical therapy on November 5, 2019. He said his pain was a 3 at its best and a 6 at its worst. On November 7, 2019 Petitioner told his therapist that not much had changed as a result of the three month period without physical therapy. Physical therapy again stopped on November 25, 2019. (PX 5 p.116,124,138)

Petitioner returned to physical therapy for a re-evaluation on February 18, 2020.Petitioner at that time told the therapist that his left shoulder was "about the same maybe a little better" since the last time he had received physical therapy, though he continued to complain of pain when lifting his arms overhead and sleeping. At this point the therapist noted that Petitioner might be a candidate for work conditioning. Petitioner again ceased having physical therapy on March 10, 2020, at which time he stated he could not tell if he was getting any better. (PX 5 p.146,149,159)

Petitioner was again seen by Dr. Jones on June 18, 2019, reporting mild that varied between mild and moderate. Dr. Jones felt Petitioner was doing well, with good range of motion and continued his physical therapy. He was advised he could return to work with a 5 pound lifting limit, no use of the left arm, no overhead work, no pushing and no pulling. (PX 2 p.36,39,41)

Dr. Jones saw Petitioner again on August 20, 2019. He noted Petitioner had not been allowed to return to work for Respondent, that he had to be 100 percent to do so. Petitioner advised the doctor he felt he was at 60 percent. Petitioner's pain grading remained the same as on the prior visit. Left shoulder physical examination revealed tenderness in the anterior lateral acromion area of the shoulder, and five out of six muscle groups had normal strength, with the subscapularis being diminished at 4/5. All shoulder tests were negative, Petitioner had

good grip strength bilaterally and the left shoulder was not atrophied. Physical therapy was to continue for another month. It was noted that if permissible with his employer Petitioner could work with his restrictions. (PX 2 p.67,70-72)

Petitioner saw Dr. Jones again on September 24, 2019 with the same general physical examination findings. Dr. Jones decided to continue physical therapy and ordered a functional capacity examination to help gauge Petitioner's potential return to work. When next seen by Dr. Jones on November 26, 2019 Petitioner noted he had just been released from the hospital where he had been treated for deep venous thrombosis and pulmonary embolism. His physical examination in regard to the left shoulder was objectively normal with the exception of some limitation in forward flexion. Dr. Jones ordered continued physical therapy and added work hardening. Petitioner's work limitations were changed to reflect limited overhead work and a lifting limit of 20 pounds. (PX 2 p.75,75,77,79,80)

Petitioner's next visit with Dr. Jones was on February 18, 2020. His left shoulder physical examination on that date revealed no tenderness, normal grip strength, and no atrophy. It was noted that he still complained of ongoing left shoulder pain. He had been denied for work hardening twice by workers' compensation. He was told to continue the same light duty restrictions. (PX 2 p.84,85)

On April 20, 2020 was again seen by Dr. Jones with the exact same physical examination findings, most or all of which were objectively normal. Dr. Jones felt it was appropriate to increase Petitioner's weight restriction to 25 pounds as Petitioner had improved since the time of his last visit. Petitioner returned to Dr. Jones on May 28, 2020. Again, his left shoulder physical examination findings were unchanged, and objectively normal. While Petitioner said he had some catching with reaching above, it was noted Petitioner had full range of motion of the left shoulder. Petitioner said he continued to improve. Dr. Jones ordered a functional capacity evaluation and continued his work restrictions. (PX 2 p.88,89,93,94)

Respondent had Dr. Li perform an independent medical examination on Petitioner on July 6, 2020. Dr. Li examined eight sets of medical records and obtained a history of accident, medical treatment and current complaints from Petitioner. Petitioner advised him he could not abduct beyond 150 degrees as he felt pain at that point, and that he felt popping in his left shoulder with certain movements. Petitioner said that about a month prior to this examination he had been putting up a gazebo and pushing up the top of the gazebo when he felt a pop and could not hang on to the gazebo anymore. He said he had been moving dirt from a trailer to a hole about six weeks prior to the examination when he also felt a pop in the shoulder. On physical examination Dr. Li found Petitioner to have active equal flexion (at 180 degrees), abduction (at 175 degrees), external rotation (at 90 degrees) and internal rotation (to L3) bilaterally. Strength testing of the supraspinatus and external rotation was 5/5 and he had negative Neer and Hawkins tests. When asked to show him how the arm would give out Petitioner was unable to do so, but some crepitation was present. Dr. Li found no evidence of atrophy. The opinions of Dr. Li in the report will be dealt with in his deposition testimony summary. (RX 1)

A functional capacity evaluation was performed by ATI Physical Therapy on August 24, 2020. After testing they found Petitioner to be able to work at the medium work level, while noting that his previous job with Respondent fell into the medium-heavy work level. Testing revealed Petitioner was capable of lifting 50 pounds occasionally from floor to waist, carrying 50 pounds occasionally, lifting 35 pounds occasionally from wait to overhead, and they felt he should avoid tasks that required repetitive or sustained forceful gripping with

the left hand, as well as avoiding ladder climbing. They found Petitioner to have poor left shoulder strength and function, poor bilateral pinch grip strength and overall physical de-conditioning. They did not consider Petitioner to be safe to return to his full-duty work as a Premises Technician for Respondent. The testing facility noted that Petitioner gave a consistent, maximal effort during the testing, and the test results were considered to be a valid representation of Petitioner's abilities. (PX 4)

Petitioner was not seen again by Dr. Jones until six months later, on December 22, 2020. Since his last examination Petitioner had undergone a functional capacity evaluation and had been seen for a second opinion by a company doctor. Petitioner's physical examination findings were as they had been since the preceding February. Dr. Jones explained to Petitioner that it was appropriate for him to work with the restrictions which had been recommended in the functional capacity evaluation. Dr. Jones declared him at maximum medical improvement on this date. (PX 2 p.94,97)

Dr. Jones saw Petitioner six months later, on May 13, 2021. Petitioner was requesting an order for work hardening, noting it had been approved. At this point Petitioner was complaining of moderate to severe pain. And complained of tenderness in the acromion during his physical examination. All three shoulder muscle groups tested on this occasion were diminished at 4/5. All provocative testing of the shoulder was negative. Dr. Jones noted that Petitioner did have a pop with the full elevation of his arm during this visit. He was to continue with his current restrictions. (PX 2 p.98,101,102)

Petitioner began work hardening at Ivy Rehab Physical Therapy on May 18, 2021. His initial evaluation there showed he was able to perform 73.6 percent of the physical demands of his job as a Premise Technician and to work within the medium physical demand category. They felt at the onset that he was able to work full time for up to 8 hours a day, though he might have to alternate sitting and standing. They also noted that the Premise Technician job was classified as a medium physical demand job. By June 8, 2021 they noted that Petitioner had progressed after 14 sessions and was able to perform 86.2 percent of the physical demands of his job. On that date he was able to lift 53 pounds, frequently lift 35 pounds, bilateral carry 40 pounds and bilateral shoulder lift 30 pounds. On the last date of work hardening, June 15, 2021 it was noted that Petitioner had met one of his six goals and had made good progress on the other five goals. (PX 5 p.171,274,297)

When seen on June 24, 2021, Petitioner told Dr. Jones that physical therapy had helped but he felt he could not lift over 8 pounds with his left arm. Physical examination revealed no tenderness, and "abnormal" external and forward flexion, though it was not quantified in any way. Dr. Jones said there was nothing surgical to be done. He limited lifting to ten pounds overhead. He was released on an as needed basis. (PX 2 p.103,106)

DEPOSITION TESTIMONY OF DR. TYLER JONES

Dr. Jones testified on behalf of the Petitioner by deposition of November 18, 2020. The Arbitrator notes a scrivener error on page 1 of the deposition which states the deposition took place on November 18, 2019, but that page 4 of the deposition reflects it occurring on that date in 2020 and testimony refers to events which occurred subsequent to 2019. Dr. Jones testified that he is a board certified orthopedic surgeon whose practice includes arthroscopic surgery of the shoulder, but not shoulder replacement surgery. He said approximately 40 percent of his practice involved treatment of the shoulder. Dr. Jones's testimony in regard to history,

complaints, diagnoses and treatment of Petitioner from February 19, 2019 through Nay28, 2020 was consistent with the medical summary, above, and is not repeated herein. (PX 3 p.1,4,7-12; Pet. Exh. 1 to PX 5)

Dr. Jones testified that the surgery he performed upon Petitioner's left shoulder was a labral repair as well as a decompression, which made more room for the rotator cuff tendon, which he had found to be intact. He said that post-operatively Petitioner's exam was always relatively within normal limits. He said pain was subjective to everybody, but while some people can tolerate pain, others cannot. He said that in Petitioner's last two visits to the office his pain was described as zero to two, and that his pain had improved since surgery, especially with reaching above. He said Petitioner motion was essentially full, with no examination findings indicating limited motion, just a continued description of discomfort in his shoulder. (PX 3 p.9,11-13)

Dr. Jones testified in regard to a functional capacity evaluation which had taken place subsequent to his last visit with Petitioner, on August 24, 2020. He said he had to go by the functional capacity evaluation recommendations, which were 50 pounds occasional lifting from floor to waist, occasional 50 pound carrying limit, 35 pound occasional lifting limit from waist height to overhead, avoid tasks that require repetitive or sustained forceful gripping with the left hand, and avoid ladder climbing. He said he would have to see and evaluate Petitioner to determine where he was with the shoulder and recommending an attempt at work hardening. He said if Petitioner did work hardening and did not improve in four to six weeks, these restrictions would be permanent for Petitioner. (PX 3 p.14,16-18)

Dr. Jones said he assumed Petitioner injured his shoulder when, while carrying an extension ladder, he slipped in the grass, which was consistent as a mechanism for tearing his labrum. (PX 3 p.19,20)

On cross examination Dr. Jones agreed that on May 28, 2020 Petitioner had full range of motion and did not have any strength deficits, that his sole symptom was his complaint of pain, which ranged from zero to two. He said that while Petitioner complained of catching during his May 28, 2020 examination, it could not be reproduced at that time and his examination found nothing consistent with the complaint of catching. (PX 3 p.21,22)

Dr. Jones agreed that he did not have an opinion as to whether Petitioner's restrictions were permanent or not. He agreed that an FCE is to evaluate a person's return to work capabilities when a person has completed treatment or is at MMI, and is to try to come up with some objective basis as to how the person can return to work. He said the sole reason for work hardening and an FCE was based on Petitioner's subjective pain complaints. (PX 3 p.23-26)

On redirect examination Dr. Jones said that while he had not seen Petitioner since May 28, 2020 he still considered him to be under work restrictions. He said it was unusual for the FCE to suggest further treatment, work hardening, and he wanted to try it. (PX 3 p.26,27)

On recross examination Dr. Jones agreed that without seeing Petitioner again he could not say what restrictions would be appropriate. (PX 3 p.28)

DEPOSITION TESTIMONY OF DR. LAWRENCE LI

Dr. Li testified on behalf of the Respondent by deposition of December 17, 2020. The Arbitrator notes that the page numbers listed on the deposition index on page 3 are clearly erroneous, that Dr. Li's entire testimony appears to be included in pages 4 through 20 of Respondent Exhibit 2. Dr. Li testified he was a board certified orthopedist who treats problems of the upper and lower extremities, performing approximately ten surgeries per week. He said pre-Covid he performed five independent medical examinations per week and that since Covid he was doing two or three per week. He said that constituted about five percent of his practice. HE noted he took a history of an accident where Petitioner slipped while carrying a ladder, injuring his left shoulder, and reviewed medical records. He said those records indicated Petitioner had an arthroscopic anterior labral repair and arthroscopic subacromial decompression, which he described as a common surgery where recovery is fairly quick, with therapy concluded in three months. (RX 2 p.5-10)

Dr. Li said his examination showed Petitioner's rotator cuff was fine, that while he had some crepitation, that was common after a shoulder surgery, the shoulder would be a little noisy, but it did not cause problems. He said he found no abnormalities during his examination. He said his diagnosis for Petitioner was left shoulder arthroscopy with repair to his flat tear and arthroscopic subacromial decompression, but he found no objective findings during his examination as Petitioner had recovered full strength, full range of motion and everything looked good. He thought Dr. Jones had done a very good job. He did not believe Petitioner needed any additional treatment and was capable of working full duty as he did not see any structural issues with the shoulders whatsoever. He did not feel Petitioner needed a functional capacity evaluation, he felt he should be able to do everything. He said with shoulder injuries he would order such an evaluation if a patient had a more significant injury, such as a full-thickness rotator cuff tear that was large and more likely to cause residual weakness, to determine the extent of the weakness, but in this case a subacromial decompression and a tear of the labrum are not things which weaken the lifting capability of the shoulder. (RX 2 p.10-14)

Dr. Li felt Petitioner was at MMI. He felt Petitioner's symptomatic complaints were mild and vague, that he could not point out specific activities which caused him symptoms, saying it would simply give out randomly. He said such complaints raised a red flag for him as it is not a complaint which makes physiological sense, so he was concerned about malingering, making up a complaint that was impossible to prove or disprove. He said he knew of no condition in the shoulder where the shoulder would give out randomly. (RX 2 p.14,15)

Dr. Li said the labrum is not used in lifting or reaching and would not produce weakness and would not cause a shoulder to go out once it was repaired. He said Petitioner's complaints did not correlate with this type of an injury. (RX 2 p.15,16)

On cross examination Dr. Li said Petitioner's need for his flap tear repair was caused by his injury at work. He said he does use functional capacity examinations, and that one of the things that is evaluated is effort, and the testers often comment on whether it is valid or invalid, and the testers might mention in their report if they felt a person was malingering. He said he had not reviewed a functional capacity evaluation subsequent to writing his report. He said he could not say if such a report might affect his opinions unless he reviewed the report. (RX 2 p.16-18)

On redirect examination Dr. Li said he did not order functional capacity evaluations after each surgery he performed, and nothing he reviewed indicated a functional capacity evaluation was necessary in this case. He said a functional capacity evaluation would be rare in the case of a labral tear as it is not a muscle or tendon

which, if torn, would cause permanent weakness, it was a soft-tissue structure that did not have any active function, only a static function, so it cannot be tested on a functional capacity level, the test would not be useful. (RX 2 p.18,19)

ARBITRATOR'S CREDIBILITY ASSESSMENT

Petitioner testified in a forthright manner and answered all questions put to him with no apparent attempt to evade or refuse to answer said questions. He did not have any physical appearance that either showed current pain being experienced or any attempt to exaggerate pain or discomfort. Petitioner appeared to be a credible witness.

Both Dr. Jones and Dr. Li also appeared to testify honestly as to their physical findings and opinions. While they had differing opinions, they answered all questions put to them and did not argue with either attorney, attempt to evade questions, etc.. Both willingly answered questions which were helpful to both attorneys. Both appeared to be credible witnesses.

CONCLUSIONS OF LAW:

In support of the Arbitrator's decision relating to what temporary benefits Petitioner is entitled to as a result of the accident of November 5, 2018, and whether Petitioner is entitled to vocational rehabilitation as a result of the accident of November 5, 2018, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The parties stipulated that all temporary total disability benefits which were owing prior to August 12, 2020 had been paid by Respondent and that the only period of temporary total disability being sought was from August 20, 2020 through the date of arbitration, August 5, 2020.

No evidence was admitted by either party in regard to any job search conducted by Petitioner since August 12, 2020. No vocational rehabilitation testimony was introduced at arbitration by either party.

Dr. Li examined Petitioner at Respondent's request on July 6, 2020. Dr. Li said his examination showed Petitioner's rotator cuff was fine, and that found no abnormalities during his examination. He said his diagnosis for Petitioner was left shoulder arthroscopy with repair to his flat tear and arthroscopic subacromial decompression, but he found no objective findings during his examination as Petitioner had recovered full strength, full range of motion and everything looked good. He did not believe Petitioner needed any additional treatment and was capable of working full duty as he did not see any structural issues with the shoulders whatsoever. He did not feel Petitioner needed a functional capacity evaluation, he felt he should be able to do everything. He said in this case a subacromial decompression and a tear of the labrum are not things which weaken the lifting capability of the shoulder. Dr. Li felt Petitioner was at MMI. He felt Petitioner's symptomatic complaints were mild and vague, that he could not point out specific activities which caused him symptoms, saying it would simply give out randomly. He said such complaints raised a red flag for him as it is not a complaint which makes physiological sense, so he was concerned about malingering, making up a complaint that was impossible to prove or disprove. He said he knew of no condition in the shoulder where the

shoulder would give out randomly. Dr. Li said the labrum is not used in lifting or reaching and would not produce weakness and would not cause a shoulder to go out once it was repaired. He said Petitioner's complaints did not correlate with this type of an injury.

The only medical testing or treatment which occurred during the period of claimed temporary total disability were the functional capacity evaluation performed by ATI Physical Therapy on August 24, 2020, three visits with Dr. Jones on December 22, 2020, May 13, 2021, and June 24, 2021, and the work hardening from May 18, 2021 through June 5, 2021 at Ivy Rehab Physical Therapy.

After performing the functional capacity testing the therapists found Petitioner to be able to work at the medium work level. Their testing revealed Petitioner was capable of lifting 50 pounds occasionally from floor to waist, carrying 50 pounds occasionally, lifting 35 pounds occasionally from wait to overhead, and they felt he should avoid tasks that required repetitive or sustained forceful gripping with the left hand, as well as avoiding ladder climbing. They found Petitioner to have poor left shoulder strength and function, poor bilateral pinch grip strength and overall physical de-conditioning. They did not consider Petitioner to be safe to return to his full-duty work as a Premises Technician for Respondent.

Dr. Jones saw Petitioner for the first time in seven months on December 22, 2020, over four months after the functional capacity evaluation was performed. Dr. Jones on that date explained to Petitioner that it was appropriate for him to work with the restrictions which had been recommended in the functional capacity evaluation and declared him at maximum medical improvement on December 22, 2020.

Dr. Jones next saw Petitioner six months later, on May 13, 2021. Petitioner at that time was requesting an order for work hardening, as it had been approved. Dr. Jones found all three shoulder muscle groups he tested on this occasion to be diminished, at 4/5, but all provocative testing of the shoulder was negative. He had Petitioner continue with his current restrictions on this date, which would be the restrictions or limitations set out in the functional capacity evaluation the previous summer.

Petitioner began work hardening at Ivy Rehab Physical Therapy over a year later, on May 18, 2021. His initial evaluation there showed he was able to perform 73.6 percent of the physical demands of his job as a Premise Technician and to work within the medium physical demand category. They felt at the onset that he was able to work full time for up to 8 hours a day, though he might have to alternate sitting and standing. They also noted that the Premise Technician job was classified as a medium physical demand job. By June 8, 2021 they noted that Petitioner had progressed after 14 sessions and was able to perform 86.2 percent of the physical demands of his job. On that date he was able to lift 53 pounds, frequently lift 35 pounds, bilateral carry 40 pounds and bilateral shoulder lift 30 pounds. On the last date of work hardening, June 15, 2021 it was noted that Petitioner had met one of his six goals and had made good progress on the other five goals. (PX 5 p.171,274, 297)

When Dr. Jones next saw Petitioner on June 24, 2021, Petitioner told Dr. Jones that physical therapy had helped him, but he felt he could only lift 8 pounds with his left arm. Dr. Jones's Physical examination revealed no tenderness, and "abnormal" external and forward flexion, though that was not quantified in any way. Dr. Jones said there was nothing surgical to be done. Dr. Jones limited Petitioner's lifting to ten pounds overhead and released him from his care on an as needed basis. No explanation was noted in Dr. Jones' records for the drastic change in restrictions, nor were the findings of work hardening mentioned in his records for that date.

Temporary total disability is to be paid until an employee has reached maximum medical improvement. "To be entitled to TTD, claimant must prove not only that he did not work but that he was unable to work. (citation omitted) The dispositive test is whether the condition has stabilized, because a claimant is entitled to TTD when a 'disabling condition is temporary and has not reached a permanent condition.' (citation omitted) The Commission reviews the evidence to ascertain whether claimant has reached maximum medical improvement, *i.e.*, the condition has stabilized. (citation omitted)" Freeman United Coal Mining Co. vs. Industrial Commission, 318 Ill.App.3d 170,175 (2000).

The Illinois Supreme Court in National Tea Co. vs. Industrial Commission, 97 Ill.2d 424 (1983) set out factors which were to be considered in determining whether vocational rehabilitation was appropriate.

> Generally, a claimant has been deemed entitled to rehabilitation where he sustained an injury which caused a reduction in earning power and there is evidence rehabilitation will increase his earning capacity. (citation omitted) Related factors concern a claimant's potential loss of job security due to a compensable injury (citation omitted), and the likelihood that he will be able to obtain employment upon completion of his training. (citation omitted) In contrast, rehabilitation awards have been deemed inappropriate where the claimant unsuccessfully underwent similar treatment in the past (citation omitted); where he received training under a prior rehabilitation program which would enable him to resume employment (citation omitted); where he is not "trainable" due to age, education, training and occupation (citation omitted); and where claimant has sufficient skills to obtain employment without further training or education. (citation omitted)
>
> Other factors which we consider appropriate are "the relative costs and benefits to be derived from the program, the employee's work-life expectancy, and his ability and motivation to undertake the program, [and] his prospects for recovering work capacity through medical rehabilitation or other means." (citation omitted) Whether a rehabilitation program should be designed to restore claimant to his pre-injury earning capacity depends upon the particular circumstances. However, as this court suggested in *Hunter*, such a standard should not be inflexibly applied.
>
> We do not mean to imply, by the foregoing discussion, that the Commission should consider only the interests of the employee in determining an appropriate rehabilitation program. Because the employer is required to "underwrite" the expenses attendant to rehabilitation, it is essential that any program selected be reasonable and realistic. Consequently, where rehabilitation is ordered, the Commission should establish boundaries which reasonably confine the employer's responsibility. National Tea Co. vs. Industrial Commission, 97 Ill.2d 424, at 432 (1983)

The only evidence submitted by Petitioner addressing any of these factors were the functional capacity evaluation and work hardening records. The functional capacity evaluation report noted that Petitioner's reduced performance was at least in part due to his overall physical de-conditioning. The subsequent work hardening records confirmed that, showing a significant improvement from 73.6 to 86.2 of the physical demands of his job after just 14 sessions. Dr. Li testified that in his opinion Petitioner was physically capable of performing his prior job, and that he was at maximum medical improvement at the time of his July 6, 2020 examination.

On the first occasion he saw Petitioner after Dr. Li's examination, December 22, 2020, Dr. Jones also declared Petitioner to be at maximum medical improvement.

The functional capacity evaluation found Petitioner to be capable of performing work at the medium work level. Again, that level would have been due in part to Petitioner's general de-conditioning, which improved during work hardening.

Dr. Jones had initially advised Petitioner that his restrictions were those set out in the functional capacity evaluation, lifting 50 pounds occasionally from floor to waist, carrying 50 pounds occasionally, lifting 35 pounds occasionally from waist to overhead, and avoiding tasks that required repetitive or sustained forceful gripping with the left hand, as well as avoiding ladder climbing. While Petitioner's physical conditioning improved after 14 sessions of work hardening, Dr. Jones inexplicably, with no objective evidence cited, reduced Petitioner's restrictions on June 24, 2021 to ten pounds lifting overhead.

The Arbitrator finds that Petitioner was not temporarily totally disabled as a result of the accident for the period claimed by Petitioner. This finding is based upon the Arbitrator's rejection of the limitation opinions of Dr. Jones of June 24, 2021 as not being supported by objective medical evidence and, indeed, as being totally contrary to the objective medical evidence contained in the functional capacity evaluation and the work hardening reports. The only obvious reason for making this restriction is Petitioner's having told him that day of a subjective feeling that he was not capable of lifting 8 pounds overhead. No objective findings support that subjective statement by Petitioner or Dr. Jones's restrictions. Dr. Jones testified that Petitioner's objective physical examination findings were normal, as did Dr. Li. The Arbitrator accepts the opinions of Dr. Li that Petitioner was capable of returning to full duty work, and finds that the improvement during just 14 work hardening sessions supports the theory that general de-conditioning is Petitioner's only limiting factor. The finding is also based upon Petitioner's having reached maximum medical improvement as of July 6, 2020, an opinion Dr. Jones also came to at his next examination of Petitioner.

The Arbitrator further finds that Petitioner has not proved he is entitled to vocational rehabilitation as a result of his injuries incurred in the accident of November 5, 2018. This finding is based upon Petitioner's not being temporarily totally disabled as a result of that accident as of the date of arbitration, Dr. Li's testimony that Petitioner was capable of full, unrestricted work, Petitioner's failure to submit into evidence proof of a job search proving he does not have sufficient skills to obtain employment without further training or education, his failure to introduce evidence that his injury has caused a reduction in earning power, or evidence of the costs and benefits of a rehabilitation program, and his failure to address all other factors necessary to sustain an award of vocational rehabilitation.

In support of the Arbitrator's decision relating to whether the medical services that were provided to Petitioner were reasonable and necessary as a result of the Accident of November 5, 2018, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The findings in regard to temporary total disability and vocational rehabilitation, above, are incorporated herein.

The only medical bills introduced into evidence were the physical therapy bills of Ivy Rehab Network for physical therapy and work hardening services from May 21, 2019 through June 17, 2021. All of these services were ordered by Dr. Jones and no evidence was introduced indicating they were not necessary to test, treat or cure Petitioner for the injuries he incurred on November 5, 2018.

The Arbitrator finds that all of the bills introduced into evidence are related to Petitioner's November 5, 2018 injury, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in this accident, and are to be paid pursuant to the medical fee schedule. This finding is based upon the medical records introduced into evidence and the testimony of Petitioner and Dr. Jones.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC033223
Case Name	RYAN, BOZENA v. HMS HOST CORP
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0160
Number of Pages of Decision	21
Decision Issued By	Maria Portela, Commissioner, Thomas Tyrrell, Commissioner

Petitioner Attorney	David Menchetti
Respondent Attorney	JASON ALLAIN

DATE FILED: 5/5/2022

/s/Maria Portela, Commissioner
Signature

DISSENT
/s/Thomas Tyrrell, Commissioner
Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BOZENA RYAN,

Petitioner,

vs. NO: 14 WC 33223

HMS HOST CORP.,

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 causation, medical expenses, temporary total disability and nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Arbitrator engaged in a chain-of-events analysis and concluded "there is a causal connection between Petitioner's current condition of ill-being of her right shoulder and the accidental injuries of June 30, 2014." *Dec. 6 (unnumbered).* The question remains, however, what exactly is the *current* condition of ill-being as it pertains to Petitioner's right shoulder? It appears the Arbitrator found Petitioner suffered from a rotator cuff (RC) tear because he mentioned that even Respondent's §12 examiner, Dr. Verma, admitted Petitioner had a RC tear (Dec. 7 and 9). However, the Arbitrator did not specifically find whether the work accident caused this RC tear or caused a pre-existing degenerative tear to become aggravated.

It is also unclear whether Petitioner's primary-care-physician, Dr. D'Souza, diagnosed a right shoulder sprain/strain or a RC tear. His medical notes reflect a sprain/strain but his "Fit for Work" forms indicate a RC tear. Dr. Shah's MRI report, dated November 1, 2014, reflects the following impression:

> 1) Limited exam secondary to patient motion on multiple sequences despite repeated attempts; 2) Tears of the supraspinatus tendon which are near complete full-thickness distally as described above. There is mild fluid filling the tendon gap and coursing within the subacromial/subdeltoid bursa; 3) Subscapularis and infraspinatus tendinosis; 4) Suspected partial thickness tear of the biceps tendon. Please correlate w/ clinical findings; 5) Minimal volume shoulder joint effusion and mild subcoracoid/subscapularis bursitis; 6) Mild hypertrophic AC joint arthritis. There is a type 2 acromion morphology which downslopes laterally.

Petitioner was subsequently referred to Dr. D'Silva who, on December 17, 2014, reviewed the MRI and, on examination, found painful range of motion (ROM) with forward flexion, positive impingement sign and mild tenderness over the biceps tendon. He diagnosed right shoulder tendinitis and supraspinatus tear. He administered a Depo-Medrol/Xylocaine injection in the right subacromial space and recommended therapy.

Significantly, although the records of both D'Souza and D'Silva reflect the history of Petitioner having been injured by her co-worker, neither doctor gave an affirmative causation opinion in their records and neither testified.

Also, although nearly all of Dr. D'Souza's records through 2017 reflect exam findings that include "right shoulder tender with decreased ROM," it seems likely that these are relics from previous exams because this finding is included even in later records that no longer include assessments or treatment for the right shoulder (and instead are for things such as back pain, congestion, unrelated *left* shoulder pain, cancer, etc.). At the hearing on March 8, 2019, Petitioner testified that the last time she complained about her right shoulder was "about a year and a half ago." *T.55*. She testified that after seeing Dr. D'Souza in April 2015 for her right shoulder, she did not see him again for right shoulder pain until January 2017. *T.53*.

The records indicate that on July 3, 2015, Dr. D'Souza included treatment specifically for the RC sprain/strain but that was only a B12 shot. After that, Petitioner had many visits with Dr. D'Souza that did not include assessment or treatment of the right shoulder. It wasn't until January 13, 2017 that Petitioner returned to Dr. D'Souza complaining of right shoulder pain and Petitioner was referred to physical therapy. However, Petitioner testified that she did not attend therapy because there was a waiting list and she also did not have the money. *T.54*. After that visit with Dr. D'Souza, there does not seem to be any further treatment specifically rendered *for* the right shoulder. We note that on March 31, 2017, Petitioner was given a Toradol injection *in* the right deltoid, but it is unclear if this was actually treatment *for* the right shoulder or, rather, to address Petitioner's complaints of low back pain that day.

Petitioner was not evaluated by Respondent's §12 physician, Dr. Verma, until December 23, 2015, almost eighteen months after her accident. He noted Petitioner was a poor historian regarding her treatment, but she had been seen by a specialist and received one injection that resulted in "increasing pain with no benefit." On examination, he noted that Petitioner had no acromioclavicular (AC) or sternoclavicular (SC) joint pain, full active and passive ROM, and no evidence of instability, but did have "some vague pain with palpation over to the distal part of

the upper arm and forearm, but this is inconsistent throughout the examination." Dr. Verma wrote:

> At this point, my impression is the patient had a right shoulder strain, resolved. I do not see any objective examination findings. She does indicate that she has had treatment to date including an MRI scan and these records are required to provide an updated opinion. Based on her current objective examination, it is my opinion, she may return to her normal occupational status. [Maximum medical improvement] is indeterminate pending medical record review.

Dr. Verma issued subsequent reports after reviewing medical records and, eventually, the MRI films. On January 16, 2017, Dr. Verma wrote:

> The MRI scan does demonstrate evidence of a tear of the rotator cuff. This may be in part responsible for the patient's ongoing symptoms. However, in reviewing my prior records, it indicates that the patient had full range of motion of the shoulder with some pain over the distal upper arm and forearm. These would not be consistent findings with a full-thickness rotator cuff tear. In addition, the patient's mechanism of being grabbed by the arm would be highly atypical for formation of the rotator cuff tear. On this basis, I am unable to relate the patient's current condition of work injury through MRI findings of full-thickness tear.
>
> Although more treatment may be required in the form of arthroscopy to the shoulder, again, I would not relate this to the work injury based on the lack of inconsistency between the mechanism and findings of a rotator cuff tear.

Respondent argues that the Arbitrator's "conclusions with respect to Dr. Verma's opinions are incomplete and misleading." *R-brief at 7.* The Arbitrator wrote, "Dr. Verma admitted that Petitioner sustained injury to her right shoulder on June 30, 2014. Dr. Verma admitted that Petitioner had a rotator cuff tear. Dr. Verma admitted that rapid rotation of the arm can cause the onset of symptoms for a rotator cuff tear." *Dec. 7 (unnumbered).*

Respondent argues that the injury Dr. Verma diagnosed as being related to the accident was a resolved right shoulder *strain* and, although Petitioner did have a rotator cuff tear, he testified that he was "unable to relate the tear to the event based on the mechanism of injury described." *Rx1 at 16.* Dr. Verma explained:

> …it takes a fair amount of force to tear a rotator cuff. It generally occurs from a traumatic injury, such as a fall either to the side or onto the shoulder and outstretched arm. I don't believe that the type of force exhibited by somebody grabbing your arm to change your direction or pull you in a certain direction would be sufficient enough to actually tear the rotator cuff. I've never seen that. *Id.*

Significantly, Dr. Verma did not admit that the mechanism of injury in Petitioner's accident could cause a RC tear. In fact, on cross-examination, he testified to the opposite: that he did not

believe the force exerted on Petitioner's right arm was sufficient to cause a tear. *Id. at 22*. He then clarified:

> What I said was the mechanism as described would not be consistent with an acute or traumatic rotator cuff tear. I've never seen somebody get grabbed in the absence of a trauma -- traumatic fall or such and sustain a rotator cuff tear.
> …
> I don't think that the mechanism in the absence of a fall or a traumatic impact would be sufficient by one person grabbing another person's arm to cause that. *Id. at 22-23*.

Dr. Verma testified that the majority of RC tears are degenerative and just because an MRI shows a tear "doesn't mean that it's related to a trauma, nor does it mean that it's responsible for the symptoms that a patient may be exhibiting." *Id. at 23*. He did admit that rapid rotation of the arm "over years" could cause a rotator cuff tear and gave the example of a baseball player who throws a baseball for ten years. *Rx1 at 24*. However, Dr. Verma also gave the following testimony:

> Q. But there's a date sometimes on which that manifests itself; right? I mean, a pitcher throws one pitch, and he says now I'm done; right?
> A. Well, that's a different -- now, you're asking a different question. You're now asking about was the rotator cuff tear caused by that one pitch, or did the pitch cause the onset of symptoms.
> Q. So a pitch, because of that rapid rotation of the arm, can cause the onset of symptoms for a rotator cuff tear; is that correct?
> A. It can. *Id*.

In other words, there can be one event that causes the onset of RC tear symptoms. In the abstract, it seems that Dr. Verma's testimony could be interpreted to support a finding that, in Petitioner's case, even if she had a pre-existing degenerative RC tear, the incident with her co-worker caused it to be symptomatic. This seems to be the Arbitrator's conclusion when he wrote, "Dr. Verma admitted that rapid rotation of the arm can cause the onset of symptoms for a rotator cuff tear." *Dec. 7*.

That conclusion, however, would still not be consistent with Dr. Verma's medical opinion because he specifically testified that Petitioner's symptoms and examination findings were *not* consistent with a RC tear. He testified:

> Rotator cuff tears cause functional disability with regard to movement of the arm and weakness. In this case the patient had full range of motion and no weakness. And also rotator cuff problems do not cause palpatory findings or distal findings below the elbow. In this case the patient had vague pain with palpation at the elbow and below; and, in fact, had made similar complaints of numbness or other distal symptoms to Dr. D'Silva, which would be inconsistent with rotator cuff pathology.
> …
> In this case even though there's MRI evidence of rotator cuff pathology, her exam does

> not associate with that. Her palpable tenderness does not associate with that. And her lack of response to an injection, even on a temporary basis, does not associate with that. So I don't find that symptomatically one can equate the findings on the MRI scan to her current complaints of pain.
> …
> Where she was tender was just above the elbow and just below the elbow.
> Those types of findings would not be consistent with a diagnosis of a rotator cuff tear.

Rx1 at 26-28.

We agree that the Arbitrator's characterization of Dr. Verma's testimony could imply that Dr. Verma admitted causation, which is not true. Therefore, we modify the decision to clarify Dr. Verma's opinions on this issue.

Nevertheless, the primary question is how to explain the discrepancy between the findings of Dr. D'Silva and Dr. Verma? On December 17, 2014, Dr. D'Silva found limited right shoulder forward flexion ROM with pain, positive impingement sign and mild tenderness over the biceps tendon. Dr. D'Silva diagnosed right shoulder tendinitis and a supraspinatus tear. In contrast, Dr. Verma's exam was over a year later, on December 23, 2015. He found an essentially normal exam with no AC or SC joint pain, full active and passive ROM of the right shoulder and no evidence of instability. He did note "some vague pain with palpation over to the distal part of the upper arm and forearm, but this is inconsistent throughout the examination." He diagnosed a resolved right shoulder strain with "no objective examination findings."

So, assuming both examinations are accurate and reflect Petitioner's complaints at those times, how can one account for these differences over the course of one year? We believe the evidence shows that Petitioner's right shoulder RC tear was only temporarily aggravated by the work accident and, after one cortisone injection on December 17, 2014, the RC tear was no longer symptomatic. This would explain Dr. Verma's negative examination on December 23, 2015. However, Dr. Verma noted that Petitioner still had some "vague pain with palpation over to the distal part of the upper arm and forearm, but this is inconsistent throughout the examination." *Rx1 at 10; Rx1-DepX2*.

We note that Dr. D'Silva, in addition to diagnosing a supraspinatus tear on December 17, 2014, also diagnosed tendinitis as supported by the MRI report. Therefore, it appears that Dr. Verma's opinions did not contradict the possibility that Petitioner's residual symptoms are related to the tendinitis that Dr. D'Silva diagnosed even if they were no longer related to an aggravation of the RC tear.

Based on the above, we find that tendinitis is supported by the evidence as an explanation for the inconsistent "vague pain with palpation over to the distal part of the upper arm and forearm" that Dr. Verma found. We also note that, following his examination of Petitioner on December 23, 2015, Dr. Verma wrote, "She does note that she was seen by a specialist, received 1 injection and had increasing pain with no benefit." He testified that Petitioner "had received an injection that did not provide benefit, and actually worsened her pain." *Rx1 at 9*. He later testified that, "her lack of response to an injection, even on a temporary basis, does not

associate" with rotator cuff pathology. *Id. at 27*. However, Dr. Verma's records review report, dated January 20, 2016, specifically notes that Dr. D'Souza's January 23, 2015 record stated, "she was status post a shoulder injection and the right shoulder was doing better." In other words, according to that record, the cortisone injection performed by Dr. D'Silva on December 17, 2014, provided at least some temporary benefit. Perhaps Petitioner told Dr. Verma that the injection made her worse, but this is inconsistent with Dr. D'Souza's records. It is not clear how Dr. Verma's opinion may have changed if he had been specifically questioned about this discrepancy in his understanding of whether the injection helped. Regardless, it does not change the fact that, at the time of his exam, he found "no evidence of ongoing shoulder dysfunction." *Rx1 at 11*.

In the absence of affirmative causation opinions by Dr. D'Silva or Dr. D'Souza, we agree that the Arbitrator's chain-of-events analysis is appropriate in this case because there is no evidence that Petitioner had a *symptomatic* right shoulder prior to the work accident. That being said, the Arbitrator wrote, "Medical records from prior to the date of accident reveal no issues regarding the right shoulder." *Dec. 7 (unnumbered)*. However, this is not completely accurate because a chest x-ray from July 25, 2013, which was performed because Petitioner was complaining of a cough, mentions bilateral AC joint degenerative changes. Therefore, there is a medical record revealing an "issue" regarding the right shoulder. Nevertheless, it is true that there is no previous medical record to indicate that Petitioner's right shoulder was *symptomatic* prior to her work injury. We modify the decision to clarify this point.

In conclusion, we find that by December 23, 2015, Petitioner's right shoulder condition was no longer consistent with impingement or RC pathology. We believe the explanation best supported by the evidence is that Petitioner had a temporary exacerbation of a pre-existing degenerative RC tear. The work accident caused it to become symptomatic but, after one cortisone injection and the passage of time, the RC tear was no longer symptomatic at her examination with Dr. Verma. However, this does not necessarily mean that Petitioner has *no* current symptoms related to the right shoulder since Dr. Verma did not address the diagnosis of tendinitis by Dr. D'Silva, which is also mentioned in the MRI report by Dr. Shah. He also did not specifically dispute that the mechanism of injury Petitioner sustained could cause (or aggravate) tendinitis. We find that Petitioner's complaints to Dr. Verma of pain on palpation and her current complaints of right arm/shoulder pain when she reaches up, puts on a coat and swims (T.35-37) are causally related to the tendinitis that became symptomatic due to her coworker grabbing her arm and twisting it behind her back.

Temporary Total Disability

The Arbitrator awarded temporary total disability (TTD) benefits from July 15, 2014, when Petitioner first saw Dr. D'Souza and was given work restrictions through January 6, 2016, "the date on which Petitioner turned age 65 and retired." *Dec. 7 (unnumbered).*

Respondent argues that "Petitioner not advising the employer of the recommended work restrictions, coupled with the fact that Petitioner essentially retired following the [6/30/14] work accident, is the equivalent of a refusal to work and therefore authorizes a termination or non-

payment of TTD benefits." *R-brief at 10*. However, the Arbitrator specifically found that Petitioner "credibly testified without rebuttal that she provided Dr. D'Souza's restrictions to Respondent. There is no evidence that Respondent ever offered Petitioner any work within her restrictions." *Dec. 8 (unnumbered)*. We agree that Petitioner's testimony is unrebutted and credible in that, although she did not remember the exact day, she brought her work restriction note to her supervisor, Ray, after the July 15, 2014 visit with Dr. D'Souza. *T.42-48*.

However, we find that Petitioner has only proven entitlement to TTD benefits through January 23, 2015. On December 8, 2014, Dr. D'Souza gave Petitioner an off-work note "until seen by orthopedic MD (Dr. D'Silva)." *Px2*. Petitioner saw Dr. D'Silva on December 17, 2014 and was given a Depo-Medrol and Xylocaine injection in the right subacromial space. Although Dr. D'Silva prescribed formal therapy, he noted that Petitioner would get a referral from Dr. D'Souza. At Petitioner's next visit with Dr. D'Souza, on December 29, 2014, there is no mention of a physical therapy referral. At the following visit, on January 23, 2015, Dr. D'Souza wrote, "S/p shoulder injection to Rt shoulder better." *Px2*. There does not appear to be any subsequent off-work or work-restriction notes in evidence. On April 1, 2015, Dr. D'Souza again noted "shoulder better still w/ some pain" and started Petitioner on Lorazepam but did not issue any work-restriction form.

Similarly, on July 3, 2015, Dr. D'Souza's assessments included RC sprain/strain and the treatment for this condition included a B12 shot to the *left* shoulder but there is no indication that Petitioner was given a work-restriction note. Curiously, however, Dr. Verma's record review report on January 20, 2016 states:

> She was seen on [7/3/15], at which time, there was no specific complaint of shoulder pain, although the exam documented right shoulder tender w/ decreased ROM. B12 shot was provided. Additional work notes were provided, but I do not see orthopedic f/u.

Perhaps Dr. Verma received a different set of records than those in evidence because, although he seems to indicate that an additional "work note" was provided on July 3, 2015, we did not see any such note in Dr. D'Souza's records (Px2). Therefore, we find that Petitioner failed to prove that she was given any work restrictions following the January 23, 2015 visit with Dr. D'Souza when he wrote that her right shoulder was better after the injection. As such, we hereby modify the decision to award 27-4/7 weeks of TTD benefits from July 15, 2014 through January 23, 2015.

Nature & Extent

The Commission modifies the Arbitrator's application of permanency factors (ii) through (v) in §8.1b(b) of the Act as follows:

For factor (ii), occupation, we strike everything after the words "food server" and find that Petitioner testified she was required to "carry plates, coffee, drinks, ice cream, dessert and at speed, be very fast" with both hands full and sometimes was required to lift her arms over her head. *T.12-13*. We believe the Arbitrator's finding regarding the physical demand level of

Petitioner's occupation was speculative, but we still give this factor "greater weight."

Regarding factor (iii), age, we affirm the Arbitrator's analysis but give this factor "little weight."

We strike the Arbitrator's analysis regarding factor (iv), future earnings capacity, after the words "subsequently retired." We find that Petitioner presented no evidence of an impairment in future earning capacity and never attempted to return to work following her work incident. Since there is no evidence of any permanent work restrictions and Petitioner chose to retire and collect Social Security benefits in January 2016, we give this factor no weight.

For factor (v), evidence of disability corroborated by treating records, we strike the Arbitrator's analysis completely. Instead, we note that Petitioner had not sought medical treatment for over 1½ years prior to the hearing, she was not currently prescribed any medication or treatment for her right shoulder, and there was no recommendation for surgery. Petitioner's most significant treatment was one Depo-Medrol/Xylocaine injection. Although she was given multiple B12 injections, the records are confusing as to whether they were all for her RC strain/sprain or for other health conditions. Petitioner had been prescribed physical therapy but it was never provided. Although Petitioner's initial complaints seem to be corroborated by Dr. Silva's finding of positive impingement, the later records indicate that the single cortisone injection helped. Petitioner's subsequent records are devoid of any specific complaints. Petitioner testified that she currently has right arm/shoulder pain when she reaches up, puts on a coat and swims. *T.35-37.* We find these complaints are related to Dr. D'Silva's diagnosis of tendinitis, which Dr. Verma never addressed. Significantly, Petitioner's records do not reflect problems with weakness. On December 17, 2014, Dr. D'Silva noted 5/5 strength of the RC musculature with resisted external rotation, internal rotation and abduction. This finding was supported by Dr. Verma's exam on December 23, 2015, when he noted Petitioner's "strength is 5/5 with elevation in the scapular plane and external rotation at the side with negative belly-press test." We find that Petitioner's current complaints are corroborated by the diagnosis of tendinitis and find that, although Petitioner may have had a temporary exacerbation of a pre-existing RC tear, that condition was no longer symptomatic as of the date of Dr. Verma's examination. We assign "moderate weight" to this factor.

Based on the above, we reduce Petitioner's permanency award from 12.5% to 7.5% loss of the person as a whole.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $466.67 per week for a period of 27-4/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $420.00 per week for a period of 37.50 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use of 7.5% of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit under §8(j) of the Act for payments made by its group insurance carrier, as stipulated by the parties; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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

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 $28,800.00. 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.

May 5, 2022

/s/ *Maria E. Portela*

/s/ *Kathryn A. Doerries*

SE/
O: 3/8/22
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DISSENT

I respectfully dissent in part from the opinion of the majority and would affirm the Arbitrator's nature and extent award. After a careful review of the evidence, I believe Petitioner met her burden of proving she sustained a 12.5% loss of use of the whole person due to the June 30, 2014, work injury. I agree with the remainder of the majority Decision.

The majority has determined that Petitioner sustained only a 7.5% loss of use of the whole person as a result of the work injury. However, I believe the credible evidence supports the Arbitrator's permanency award of a 12.5% loss of the use of the whole person. On the date of accident, Petitioner was a 63-year-old food server who sustained a significant injury to her right shoulder after she was physically assaulted by a co-worker. A right shoulder MRI revealed a near-complete full thickness tear of the supraspinatus tendon as well as a partial thickness tear of the biceps tendon. Her doctor diagnosed Petitioner with right shoulder tendinitis and a supraspinatus tear. Petitioner underwent conservative treatment, including vitamin B12 injections and a right shoulder steroid injection. While the steroid injection did provide some relief to Petitioner, the credible evidence shows that Petitioner's symptoms never fully resolved. Petitioner credibly testified that she continues to experience pain in her right arm and shoulder

while performing certain ADLs such as combing her hair and getting dressed. She testified that she experiences right shoulder pain when swimming as well as pain when she turns onto her right side while sleeping. The Arbitrator's award of a 12.5% loss of use of the whole person is appropriate given the credible evidence.

For the forgoing reasons, I would affirm the Arbitrator's conclusion that Petitioner sustained a 12.5% loss of use of the whole person due to the June 30, 2014, work incident.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RYAN, BOZENA
Employee/Petitioner

Case# **14WC033223**

HMS HOST CORP
Employer/Respondent

On 3/20/2020, 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 0.30% 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

5001 GAIDO & FINTZEN
JASON P ALLAIN
30 N LASALLE ST SUITE 3010
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

Bozena Ryan
Employee/Petitioner

Case # **14WC033223**

v.

Consolidated cases: **NA**

HMS Host 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 **CHARLES WATTS**, Arbitrator of the Commission, in the city of **Chicago**, on **March 8, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **06/30/2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**36,400.00**; the average weekly wage was $**700.00**.

On the date of accident, Petitioner was **63** years of age, ***single*** with **0** dependent children.

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

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

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

Respondent is entitled to a credit for all medical bills paid under Section 8(j) of the Act.

ORDER

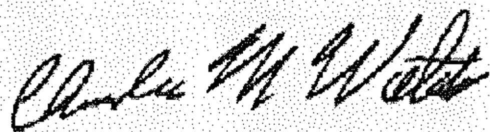
Respondent shall pay all reasonable and necessary medical expenses incurred by Petitioner for treatment for her right shoulder by Dr. D'Souza and Dr. D'Silva. The parties stipulated that Respondent paid all such medical bills under a group medical plan that qualifies under Section 8(j) of the Act and Respondent shall have credit for such amounts so paid. The Respondent shall hold the Petitioner harmless from any and all claims that may be made against the Petitioner by reason of such payments to the extent of such credit.

Respondent shall pay Petitioner temporary total disability benefits of $466.67 per week for 77 & 2/7 weeks, commencing from July 15, 2014 through January 6, 2016 as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $420.00 per week for 60 weeks because the injuries sustained caused 12.5% loss of the person as a whole as provided in Section 8(d)2 of the Act.

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

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



Signature of Arbitrator

MAR 2 0 2020

March 19, 2020
Date

Bozena Ryan v. HMS Host Corporation
14WC033223

FINDINGS OF FACTS

On June 30, 2014, the Petitioner BOZENA RYAN (Petitioner) was working for the Respondent HMS HOST CORPORATION (Respondent) as a food server. T.9. Petitioner had been working for Respondent for 37 years and had never been disciplined in that time. T.10. On June 30, 2014, Petitioner was working as a food server at Fox at O'Hare Airport Terminal 2. T.11. Petitioner was required to serve food to customers, carrying plates and other items at a very fast pace. T.12. Petitioner was required to reach above her head for trays and other items. T. 13.

Prior to June 30, 2014, Petitioner had never had any problems with or medical treatment for her right arm. T.8. Petitioner is right-handed. T. 8.

It was stipulated by the parties that on June 30, 2014, Petitioner sustained accidental injuries that arose out of and tin the course of her employment with Respondent. Arb. X 1; T.77. Around 12:30 pm on that date, a co-worker named Junie grabbed Petitioner by the right arm, put Petitioner's right arm behind Petitioner's back and turned Petitioner around by her arm. T.17. Junie grabbed Petitioner's arm a second time and swung Petitioner around. T.18. Junie turned Petitioner around at least five times. T.20. When Junie released Petitioner's right arm, Petitioner noticed that her whole right arm hurt from her shoulder down to her fingers. T.22.

After the incident, Petitioner continued working after a break until about 5:30pm, noticing pain in her right arm and using her left arm to carry. T. 25. After the incident, Petitioner called her doctor and was told to come in on the 14th. T.27. Petitioner continued to work after the incident T. 26.

On July 15, 2014, Petitioner sought medical treatment from Dr. Godwin D/Souza, MD. PX 2, pg. 14. Petitioner saw Dr. D'Souza on an emergency basis and gave a history to Dr. Souza of being in a fight at work and getting her right arm pulled and was now having pain in the right arm. PX 2, pg. 14. Dr. D'Souza noted Petitioner's right arm was tender with decreased range of motion. PX 2, pg. 15. Dr. D'Souza diagnosed rotator cuff (capsule) sprain and strain and recommended MRI and X-ray of the right shoulder, referral to orthopedic surgery and physical therapy. PX 2, pg. 15. Dr. D'Souza restricted petitioner to no use of the right hand and 15 pounds weight lifting restriction. PX 2, pg. 17. After seeing Dr. D'Souza on July 15, 2014, Petitioner has never returned to work for Respondent. T. 29.

On July 23, Petitioner followed up with Dr. D'Souza who reported that Petitioner was better without working. PX 2, pg. 23. Petitioner was not able to do x-ray or therapy because of issues with workers compensation. PX 2, pg. 23. Petitioner's right arm was tender with decreased range of motion. PX 2, pg. 24. Dr. D'Souza gave Petitioner a vitamin B12 shot into the shoulder. PX 2, pg. 23. (Dr. D'Souza's notes say left shoulder, but Petitioner testified that she was treating with Dr. D'Souza only for the right shoulder at the time and that all injections were

into her right shoulder. PX 2, pg. 23.) Dr. D'Souza restricted Petitioner from then until released by him and until Petitioner completed physical therapy. PX 2, pg. 25.

On July 30, Petitioner followed up with Dr. D'Souza. PX 2, g. 26. Her shoulder still hurt. PX2, pg. 26. Dr. D'Souza referred Petitioner to orthopedic surgery. PX 2, pg. 26.

On August 20, 2014, Petitioner followed up with Dr. D'Souza for WC follow up. PX 2, pg. 28. Petitioner had not yet had the MRI or been seen by the specialist. PX 2, pg. 28. Dr. D'Souza reported that Petitioner was not able to go back to work yet. PX 2, pgs. 28 & 30.

On September 16, 2014, Petitioner followed up with Dr. D'Souza who noted Petitioner had right shoulder pain PX 2, pg. 32. Dr. D'Souza gave petitioner a B12 shot into the shoulder. PX 2, pg. 32. (Dr. D'Souza's notes say left shoulder, but Petitioner testified that she was treating with Dr. D'Souza only for the right shoulder at the time and that all injections were into her right shoulder. PX 2, pg. 32.)

On October 17, 2014 Petitioner followed up with Dr. D'Souza. PX 2, pg. 36. Petitioner reported right shoulder pain for 3 months with no improvement. Dr. D'Souza recommended MRI of the right shoulder and referred petitioner to Dr. D'Silva. PX 2, pg. 36.

On November 1, 2014, Petitioner underwent MRI of the right shoulder at MRI Lincoln Imaging Center. PX 2, pg. 39. MRI showed tears of the supraspinatus tendon with near complete full-thickness tear; mild fluid filling the tendon gap and coursing within the subacromial/ subdeltoid bursa; suspected partial thickness tear of the biceps tendon; and minimal shoulder joint effusion and mild bursitis. PX 2, pg. 41.

On November 14, 2014 Petitioner followed up with Dr. D'Souza who reported that Petitioner had yet to see orthopedics and that her shoulder still hurt. PX 2, pg. 43. On December 8, 2014, Dr. D'Souza reported that petitioner was unable to return to work until evaluated by orthopedics. PX 2, pg. 49.

On December 17, 2014, Petitioner was seen by Dr. Joseph D'Silva, MD at Illinois Bone & Joint Institute. PX 3, pg. 1. Dr. D'Silva noted a history of Petitioner being grabbed by the right arm by a co-worker and being swung around. PX 3, pg. 1. Physical examination revealed positive impingement sign and mild tenderness over the biceps tendon. PX 3, pg. 2. Dr. D'Silva noted that the MRI showed near-complete full thickness tear, subscapularis and supraspinatus tendinosis, partial thickness tear to the biceps tendon and hypertrophic acromioclavicular arthrosis. PX 3, pg. 1. Dr. D'Silva diagnosed right shoulder tendinitis and supraspinatus tear. PX 3, pg. 2. Dr. D'Silva performed steroid injection into Petitioner' right shoulder and prescribed physical therapy. PX 3, pg. 2.

On January 23, 2015, Petitioner followed up with Dr. D'Souza who reported that Petitioner was status post shoulder injection to right shoulder and that is was better. PX 2, pg. 53. On April 1, 2015, Dr. D'Souza reported that Petitioner's shoulder was better but that there still

was some pain. PX 2, pg. 56. On January 13, 2017, Dr. D'Souza reported that Petitioner was still experiencing right shoulder pain. PX 2, pg. 109.

On December 23, 2015, Petitioner was examined by Dr. Nikhil Verma, MD at the request of the respondent pursuant to Section 12 off the Act. RX 1, pg. 95. Dr. Verma took a history and performed a physical examination that elicited vague pain over the distal part of the upper right arm and forearm. X 1, pg. 96. Dr. Verma diagnosed resolved right shoulder strain and released Petitioner to her normal occupation status and reported that maximum medical improvement was indeterminate pending medical record review. RX 1, pg. 96. After reviewing the MRI report, Dr. Verma reported that it showed a near full thickness tear of the rotator cuff, suspected partial thickness tear of the biceps, minimal fluid in the subacromial space, and hypertrophic changes of the AC joint. RX 1, pg. 101. After reviewing the MRI films, Dr. Verma reported on January 16, 2017 that the MRI scan demonstrated evidence of the tear of the rotator cuff and that this may be in part responsible for the Petitioner's on-going symptoms. RX 1, pg. 103.

On October 24, 2018, Dr. Verma gave his evidence deposition by agreement of the parties. RX 1, pg. 4. Dr. Verma believed that Petitioner sustained a work-related injury, diagnosed as a strain, to her right shoulder on June 30, 2014. RX 2, pg. 18. Dr. Verma had no idea about the condition of Petitioner's right arm prior to June 30, 2014. RX 1, pg. 19. Dr. Verma saw evidence of a rotator cuff tear on the MRI films. RX 1, pg. 21. Dr. Verma did not say that the only way to develop a rotator cuff tear was a fall or traumatic impact. RX 1, pg. 23. Dr. Verma stated that rapid rotation of the arm, like during a baseball pitch, can cause the onset of symptoms for a rotator cuff tear. RX 1, pg. 24.

Petitioner testified that she called her boss Ray at Respondent after the incident and Petitioner recalled that she brought Ray the note about her work restrictions from Dr. D'Souza on a Tuesday or Wednesday about 7 pm. T. 45 & 47. Petitioner testified that Respondent did not tell her that they had a job for her. T. 46. Petitioner never returned to work in any job after July 15, 2014 and retired when she reached age 65. T. 48. Respondent has never offered to take Petitioner back to work. T. 63. Petitioner was never fired by Respondent for not returning to work. T. 64. Respondent contacted Petitioner in May 2018 to congratulate Petitioner on her 40th anniversary with Respondent. T. 64; PX 1. Petitioner turned 65 on January 6, 2016. T. 64.

The Respondent paid medical bills through a Blue Cross Blue Shield policy that the parties stipulated qualified under Section 8(j) of the Act. RX 2.

Petitioner notices pain in her right arm and shoulder when she does her hair or puts on a blouse. T. 36. When petitioner has swum while on vacation, her right shoulder hurts. T. 37. When Petitioner turns on to her side at night, her right shoulder hurts. T. 37. Petitioner does not claim any injury to her left shoulder as a result of this incident. T. 41.

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 completely credible. Petitioner's demeanor at trial and manner in which she answered questions exhibited forthrightness because her answers were easily and quickly made. Petitioner never seemed to search for answers or appear rehearsed.

CAUSAL CONNECTION

The Arbitrator concludes that there is a causal connection between Petitioner's current condition of ill-being of her right shoulder and the accidental injuries of June 30, 2014. The parties stipulated that Petitioner sustained accidental injuries to her right shoulder on that date.

Petitioner bears the burden of proving by a preponderance of the evidence all of the elements of his claim. R & D Thiel v. Workers' Compensation Comm'n, 398 Ill. App. 3d 858, 867 (2010). Among the elements that the Petitioner must establish is that his condition of ill-being is causally connected to his employment. Elgin Bd. of Education U-46 v. Workers' Compensation Comm'n, 409 Ill. App. 3d 943, 948 (2011). The workplace injury need not be the

sole factor, or even the primary factor of an injury, as long as it is a causative factor. Sisbro, Inc. v. Indus. Comm'n, 207 Ill. 2d 193, 205 (2003).

"A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in a disability may be sufficient circumstantial evidence to prove a causal connection between the accident and the employee's injury." Int'l Harvester v. Industrial Comm'n, 93 Ill. 2d 59, 63-64 (1982). If a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. Schroeder v. Ill. Workers' Comp. Comm'n, 79 N.E.3d 833, 839 (Ill. App. 4th 2017).

Petitioner credibly testified that she was in a previous condition of good health as it related to her right shoulder before the stipulated accidental injuries of June 30, 2014. Medical records from prior to the date of accident reveal no issues regarding the right shoulder. The prior condition of good health is evinced further by the fact that Petitioner was working in her full-duty capacity as a food server for Respondent prior to the date of accidental injuries.

The parties stipulated to the accidental injuries to Petitioner's right shoulder on June 30, 2014. After the stipulated accidental injuries, as soon as July 15, 2014, Petitioner had sustained disability according to Dr. D'Souza. Since then, Petitioner has consistently complained of symptoms relating to her right shoulder.

Dr. Verma, Respondent's expert, had no knowledge of Petitioner's right shoulder condition prior to June 30, 2014. Dr. Verma admitted that Petitioner sustained injury to her right shoulder on June 30, 2014. Dr. Verma admitted that Petitioner had a rotator cuff tear. Dr. Verma admitted that rapid rotation of the arm can cause the onset of symptoms for a rotator cuff tear.

MEDICAL EXPENSES

The Arbitrator concludes that all medical treatment rendered or prescribed by Dr. D'Souza or Dr. D'Silva was reasonable and necessary and is related to the accidental injuries of June 30, 2014. The Arbitrator awards all such medical treatment to the Petitioner. The parties stipulated that Respondent paid all such medical bills under a group medical plan that qualifies under Section 8(j) of the Act and Respondent shall have credit for such amounts so paid. The Respondent shall hold the Petitioner harmless from any and all claims that may be made against the Petitioner by reason of such payments to the extent of such credit.

TEMPORARY TOTAL DISABILITY

The Arbitrator concludes that Petitioner was temporarily totally disabled (TTD) for 77 & 2/7 weeks from July 15, 2014, the date on which Petitioner first saw Dr. D'Souza when he placed restrictions on her ability to work, through January 6, 2016, the date on which Petitioner turned age 65 and retired. The determinative inquiry for deciding whether Petitioner is entitled to

TTD is whether the Petitioner's condition has stabilized, or in other words whether the Petitioner has reached maximum medical improvement. Interstate Scaffolding v. IWCC, 236 Ill.2d 132 (2010).

Petitioner credibly testified without rebuttal that she provided Dr. D'Souza's restrictions to Respondent. There is no evidence that Respondent ever offered Petitioner any work within her restrictions. There is no evidence that Respondent ever fired Petitioner for failing to show up for work within restrictions. Petitioner denied that Respondent ever offered her employment after July 15, 2014. There is no evidence that Respondent ever offered Petitioner any employment after July 15, 2014.

Dr. Verma did not place Petitioner at maximum medical improvement on December 23, 2015 even though Dr. Verma released Petitioner to her normal occupational status at that time.

PERMANENT PARTIAL DISABILITY

The Arbitrator concludes that Petitioner sustained accidental injuries that caused 15% loss of her whole person pursuant to Section 8(d)2 of the Act and the holding in Will County Forest Preserve District v. IWCC, 2012 Il App (3d) 110077WC (shoulder injuries are to be awarded under Section 8(d)2, not under Section 8(e)). Pursuant to Section 8.1b(b), five factors are to be weighed in determining the level of permanent partial disability (PPD) for accidental injuries occurring on or after September 1, 2011.

With regard to subsection (i) of Section 8.1b(b), the Arbitrator notes that neither party submitted an AMA impairment report. Therefore, the Arbitrator gives no weight to this factor.

With regard to subsection (ii) of Section 8.1b(b), the occupation of the employee, the Arbitrator notes that the Petitioner was employed as a food server and was required to lift and carry heavy items. The Arbitrator finds this to be at least medium work and heavy work at least on an occasional basis and therefore, gives this factor greater weight.

With regard to subsection (iii) of Section 8.1b(b), the Arbitrator notes that Petitioner was 63 years old at the time of the accidental injuries. The Arbitrator considers Petitioner to be an older individual who had to live with the disability caused by the accidental injuries of June 30, 2014 until she retired in January 2016 and therefore, the Arbitrator gives this factor some weight.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner never returned to work as a food server or in any other job. Petitioner subsequently retired. The Arbitrator finds that the accidental injuries had at least some negative impact on Petitioner's future earning capacity after June 30, 2014 and therefore, gives this factor some weight.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner's credible complaints are corroborated by the medical records of Dr. D'Souza and Dr, D'Silva. Even Dr. Verma, the

Respondent's expert, reviewed the treating medical records and determined that Petitioner had a torn rotator cuff.

The determination of PPD is not simply a calculation but an evaluation of the five factors in Section 8.1b(b). In making this evaluation of PPD, no single enumerated factor is the sole determinant of PPD. Therefore after applying Section 8.1b(b), and considering the relevance and weight of each of the five factors, the Arbitrator concludes that as result of the accidental injuries, Petitioner has sustained 12.5% loss of use of his whole person under Section 8(d)2.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC038268
Case Name	DUNN, STEPHEN v. SPRINGFIELD COAL CO
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0161
Number of Pages of Decision	17
Decision Issued By	Thomas Tyrrell, Commissioner

Petitioner Attorney	Roman Kuppart
Respondent Attorney	Julie Webb

DATE FILED: 5/5/2022

/s/Thomas Tyrrell, 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 SANGAMON	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stephen Dunn,

Petitioner,

vs. NO: 15 WC 038268

Tri-County 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, occupational disease, and permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as set forth below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission corrects a scrivener's error in the Arbitrator's Decision on page 3, the first sentence of the first paragraph, should read as follows, "Petitioner, a 55 year old coal miner…"

The Commission corrects a scrivener's error in the Arbitrator's Decision on page 6, the first sentence of the second full paragraph should read as follows, "On 10/16/17 the evidence deposition of Dr. Istanbouly was taken on behalf of the petitioner."

The Commission corrects a scrivener's error in the Arbitrator's Decision on page 8, the fourth sentence of the third full paragraph should read as follows, "Dr. Meyer saw no evidence of coal worker's pneumoconiosis."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 2, 2020, denying compensation, is modified as stated herein, and is otherwise affirmed and adopted.

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.

May 5, 2022

o: 3/8/2022
TJT/ahs
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 ARBITRATOR DECISION

DUNN, STEPHEN
Employee/Petitioner

Case# **15WC038268**

TRI COUNTY COAL 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:

5236 CULLEY FEIST KUPPART & JORDAN
ROMAN P KUPPART
3 S MAIN ST SUITE 2
HARRISBURG, IL 62946

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

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

STEPHEN DUNN,
Employee/Petitioner

Case # **15** WC **38268**

v.

Consolidated cases: ______

TRI COUNTY COAL, LLC.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **10/29/20**. 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 **Sections 1(c)-(f) and 6(c) of the Occupational Disease Act**

FINDINGS

On **7/19/11**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 $**61,969.48**; the average weekly wage was $**1,191.72**.

On the date of accident, Petitioner was **55** years of age, ***single*** with **no** dependent children.

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

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

Respondent shall be given a credit of $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

The petitioner has failed to prove by a preponderance of the credible evidence that he sustained an occupational disease (coal worker's pneumocomiosis) that arose out of and in the course of his employment by respondent on 7/19/11.

The petitioner has failed to prove by a preponderance of the credible evidence that his current condition of ill-being is causally related to the alleged injury on 7/19/11.

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

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

Signature of Arbitrator

11/19/20
Date

DEC 2 - 2020

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 55 year coal miner, alleges he sustained an occupational disease that arose out of and in the course of his employment by respondent on 7/19/11, his last alleged date of employment with respondent. Petitioner was terminated by respondent on 6/30/11 for reasons unrelated to his work duties. On 6/30/11 petitioner had been off work for over 365 days due to an unrelated injury at work, and there was no indication that he would be able to return to work in his regular capacity. Pursuant to the union contract with respondent, petitioner was terminated on 6/30/11.

Petitioner testified that he worked in the coal mines for 35 ½ years. Prior to beginning his coal miner career petitioner graduated from high school in 1973 and worked on a farm for a year. Then he did welding for about a year and a half with Schien Body Equipment. He then worked for Pressar's Dozer Service running equipment and doing maintenance for about a year.

Petitioner began his coal mining career with Freeman United Coal Mine at the Crown #2 mine on 1/3/77. He worked there until 1981 when he went to work at the Crown #3 mine. In July of 1982 he moved to the Industry Mine, a surface mine, and worked there until 1991. At that time, he transferred back to Crown #3 mine and worked there until he was terminated. Petitioner testified that he went back to work for respondent for one day on 7/19/11.

The classification petitioner last worked was 'inby". His duties included working at the tail of the conveyor belt to the face of the mine where the coal is mined. Petitioner would haul coal from the face to the conveyor. He testified that conditions are very dusty at the end of the conveyor belt. Petitioner testified that he also did roof bolting; operated the continuous miner and Ram car; and, worked as a utility man. However, he did roof bolting, or operating a Ram car the most. He described his work as heavy manual labor that required a lot of exertion. He testified that on 7/19/11 he worked underground and was exposed to and breathed in coal dust. Petitioner testified that he has not worked since 7/19/11.

While a coal miner petitioner also worked on the surface as a driller helper, driller, blaster, gob truck driver, plant operator, plant repairmen, heavy equipment operator, and hoisting engineer. He testified that underground work was classified as inby and outby. Petitioner also did some work as an examiner.

Petitioner testified that he started noticing breathing problems about 5 years before he was terminated. He stated that he would get out of breath carrying heavy materials and walking around. He testified this occurred slowly over time. He specifically testified that he experienced shortness of breath when carrying cribs and timbers up to ¼ mile over rough terrain and boulders. He testified that the timbers weighed up to 100 pounds and were carried by two people.

Petitioner testified that while working the inby classification he would shovel coal, moved power, and moved machinery.

Petitioner moved to Florida in December of 2012. He stated that he moved there because the weather was better for all his unrelated orthopedic problems. He also has two sisters that live there. Petitioner testified that currently he can walk about a block before noticing changes in his breathing. He stated that he walks about that far to get his mail. Once he gets there he is winded and rests before heading back. He also testified that climbing stairs takes the wind out of him. He testified that since the onset of his breathing problems, his breathing has gotten gradually worse. Petitioner testified that he does not take any breathing medications, and never has.

Petitioner testified that his breathing affects his activities of daily living. He testified that he cannot fish or do anything that exerts himself. He testified that he does his own grocery shopping, but gets winded lifting a case of soda. Petitioner lives on 10 acres, but does not farm on it. He lets his neighbors run cattle on it. He also has an additional 80 acres upstate that he 'cash rents' to farmers.

Petitioner testified that on a normal day he watches birds, goes on the internet, takes a 3 hour nap, watches TV and watches people at the beach. Petitioner testified that he wanted to work until he was 65 years old.

Other than the one day he claims he worked on 7/19/11, petitioner testified that he had not worked for 365 days prior to 6/30/11, which was the reason he was terminated. The reason he was off work was because of unrelated orthopedic problems resulting from another unrelated injury in the mine, where he sustained injuries to multiple parts of his body. As a result of this injury petitioner underwent a cervical fusion, has shoulder problems, has numbness and tingling in his arms, has knee pain, and has back pain. He testified that he has also undergone surgery for his carpal tunnel, and surgery on his elbow. He testified that he also recently found out that he is going to need surgery on his low back.

He testified that it was harder to do his job at the end of his career because of all the injuries to his body, and his black lung problems.

On cross examination petitioner testified that he had bilateral hand problems in February of 2010, hand/neck pain in October of 2010, and underwent an MRI of the neck in April of 2011. A week after this MRI, petitioner was involved in a rock fall at work which resulted in injuries to his back and neck. He testified that this was the main reason he stopped working and ultimately left. He stated that he settled his case with respondent with respect to the rock fall incident about a year ago.

In May of 2011 he underwent an epidural steroid injection into his neck; in June of 2011 he underwent another MRI of the spine; that same June of 2011 he also underwent an MRI of the right knee that showed a meniscal tear; and in July of 2011 he saw Dr. Borowiecki, an orthopedic surgeon.

After his unrelated rock fall injury, petitioner received Accident and Sickness Benefits. Pursuant to an agreement between the respondent and the union, these benefits are only paid for 365 days. Thereafter, if the employee is unable to return to work, they are terminated. This is what happened to petitioner on 6/30/11. This termination was in no way related to his work.

After petitioner's Accident and Sickness Benefits ran out, he applied for Social Security Benefits and was awarded the same in 2012. After being terminated on 6/30/11 petitioner applied for his union pension benefits and began receiving his pension right away. Petitioner had over 30 years of employment with the UWMA, thus entitling him to a full pension without reduction. Petitioner was never released by his treating doctors to return to work after the rock fall incident.

Petitioner testified that the main reason he left the coal mine was because of the injuries he sustained as a result of the rock fall. Petitioner settled this claim with the Illinois Industrial Commission in Spring of 2020.

Petitioner testified that from time to time while he was working as a coal miner for respondent he underwent the NIOSH screenings for black lung. After these tests were performed NIOSH would send petitioner a letter telling him what his chest x-ray revealed. Petitioner did not bring any of these results with him to trial.

On 10/18/15 Dr. Henry Smith, D.O.. AOBR Board Certified Radiologist from 1975, and NIOSH Certified B-Reader from 1987-2019, provided an expert B-read interpretation services on behalf of petitioner. He was of the opinion that there was interstitial fibrosis of classification p/s, all lung zones involved bilaterally, of a profusion of 1/1; no chest wall plaques or calcifications; normal heart size; minimal thoracic atherosclerosis; mild lower dorsal dextrscoliosis and spondylosis. His impression was simple coal worker's pneumoconiosis with small opacities, primary p, secondary s, all lung zones involved bilaterally, protrusion 1/1. The date of the radiograph was 10/7/15.

On 4/21/16 petitioner was seen at Southern Illinois Respiratory Disease Consultants, LLC. by Dr. Suhail Istanbouly, at the request of this attorney. Dr. Istanbouly's specialty is pulmonology and critical medicine. Petitioner was referred for evaluation of possible coal worker's pneumoconiosis. He provided a consistent history of his work history in the mines. He stated that he had significant coal dust inhalation during his coal mining career. He stated that he did not recall being diagnosed with asthma or COPD in the past. He further stated that he never smoked. He reported that he had been coughing on a daily basis for years, and the cough

was mostly dry and occasional around the clock. He could not specify any triggering factor for the cough. He stated that occasionally it was productive of slight clear sputum, with a few episodes of blood tinged sputum in the past, but not recently. He complained of exertional dyspnea, and shortness of breath with walking one block. He also reported that his unrelated back pain also restricts his physical capacity. He noted that in the past 6 months his physical capacity had declined a little bit. He denied any chest pain, but complained of chest tightness, retrosternal, with occasional episodes of wheezing. He reported extensive cardiac workup since being in Florida and it was normal. He complained of mild dysphagia and stated that he currently undergoes esophageal dilation every year.

Dr. Istanbouly reviewed some records and performed some tests. The Spirometry test was within normal range with FEV1 4,05 liters, 125% predicted; FVC 4.81 liters, 119% predicted; and FEV1/FVC84%. He also reviewed the x-rays dated 10/7/15 which revealed mild bilateral interstitial changes consistent with simple coal worker's pneumoconiosis with perfusion 1/,1 per the B-reader Dr. Henry Smith. His noted that petitioner's chest examination was within normal limits. Dr. Istanbouly was of the opinion that the coal worker's pneumoconiosis was related to long-term coal dust inhalation (early stage). He was of the opinion that this condition was a significant contributor to petitioner's chronic respiratory symptoms. He opined that petitioner should not return to work in the coal mines to avoid any further coal dust inhalation.

On 10/16/17 the evidence deposition of Dr. Istanbouly was taken on behalf of the respondent. He testified that 30% of his practice deals with the care and treatment of coal miners. He testified that he has and continues to do Black Lung Examination for the US Department of Labor. Dr. Istanbouly testified that he was the Medical Director of the Pulmonary Department at Herrin Hospital since 2005. He noted that petitioner was a lifelong nonsmoker. Dr. Istanbouly was of the opinion that a person can have a positive x-ray for coal worker's pneumoconiosis and be asymptomatic. He noted that this was not unusual in the early stages of the disease. He testified that petitioner's physical examination of the chest was normal, but abnormalities are not needed in order to have coal worker's pneumoconiosis. He was of the opinion that normal pulmonary function studies do not mean the lungs have not been damaged, but the damage is not significant enough to be revealed on the PFT. Dr. Istanbouly is not a B-reader. He testified that he relies on his training and experience to diagnose coal worker's pneumoconiosis.

Dr. Istanbouly opined that the cause of petitioner's pneumoconiosis was long-term coal dust inhalation, and that an abnormal physical examination of the chest is not necessary to make that diagnosis. Dr. Istanbouly was of the opinion that every coal miner who is exposed to coal dust does not get coal worker's pneumoconiosis; that coal worker's pneumoconiosis causes scarring and a form of emphysema to occur; that the scarring or fibrosis is permanent; and that such scarring cannot carry on the function of a normal healthy

lung tissue. Dr. Istanbouly opined that if you have coal worker's pneumoconiosis, you have an impairment of the function of the lung at least at the site of the scar. He further opined that petitioner has a certain degree of pulmonary impairment due to long term coal dust inhalation.

On cross examination Dr. Istanbouly stated that he does 5-7 examinations for state black lung claims a month, always at the request of the petitioner. He testified that petitioner did not provide a past history of respiratory disease; did not provide a trigger for his cough; admitted that his orthopedic problems could be a factor restricting his physical capacity; and did not provide a history that he was on Social Security Disability. Dr. Istanbouly testified that dyspnea on exertion can be due to things other than pulmonary disease, that include deconditioning. Dr. Istanbouly testified that he did not review any of petitioner's treatment records, and only reviewed the narrative report and B-reading of Dr. Smith for a film taken 10/7/15, and the film itself. He testified that petitioner did not tell him he left the mine because of respiratory disease or symptoms, or on the advice of a physician because of respiratory problems or disease. Dr. Istanbouly was of the opinion that none of petitioner's pulmonary testing showed any indication of obstruction. He was further of the opinion that petitioner does not meet the definition of COPD by the Global Initiative on Obstructive Lung Disease. He also testified that on physical examination petitioner demonstrated no adventitious sounds.

On 2/13/19 the evidence deposition of Dr. Henry Smith, D.O., was taken on behalf of the petitioner. Dr. Smith is a diagnostic radiologist. He had a current B-Reader certification. He has been board certified in radiology since 1973. He was first certified as a B-Reader since 1987. He does recertification every 4 years, and he did not pass his fourth and fifth time because he claims he needed glasses and could not read the x-rays properly. He testified that since he got his eye script proper he has not failed any recertifications. He testified that prior to retirement he and an associate would B-read 100-125 x-rays a day. He testified that similarly qualified physicians could read the same film differently.

Dr. Smith testified that he when performing B-reading he starts with determining the quality of the film and then determines if there are any small opacities present. If so, he decides if there are enough to diagnose pneumoconiosis. Then he will decide if they are round (most likely coal worker's pneumoconiosis) or linear or irregular (probably asbestos related). He testified that the 10/7/15 x-ray of petitioner's showed no mottle on the film and showed small opacities, classification P/S in all lung zones of profusion 1/1. He was of the opinion based on these findings, that petitioner's chest x-ray was consistent with damage to his lungs caused by pneumoconiosis.

On cross examination Dr. Smith testified that he was a D.O. and not an M.D. He testified that when he failed the test due to his eyesight and glasses he was overreading the xrays, which is finding more disease than was present on the standard film. Dr. Smith said he founded Smith Radiology in 1988 and ran it until he closed

it and retired in 2016. He testified that medical legal readings were 10% or less of his practice. He testified that overtime he had 20 law firms send him films for interpretation of black lung disease, with more for the petitioner than the respondent. He testified that the work he is doing now is primarily for the petitioner. He stated that he has been reading films for petitioner's attorneys' firms for about 10 years.

Dr. Smith testified that he has not sat on any committees with NIOSH, has not held office in any capacity with either the College of Osteopathic Medicine or the Osteopathic Board of Radiology; has not published anything on pulmonary disease; and has not has a manuscript reviewed for any treatise or journal. He testified that he was aware that Dr. Chris Meyer was an author of the current syllabus for the B-Reading exam that was authored by NIOSH.

Dr. Smith noted that in the current syllabus, it states that small opacities associated with the exposure to silica and coal dust are usually rounded. When asked if he agreed with that, he testified that he does for the most part, but not exclusively. He testified that scarring that is reflected by opacities on chest imaging is permanent. He further stated that profusion and opacity size will not regress either. He also agreed that the syllabus stated that the small, rounded opacities usually involve the upper lung zone first, and as the dust exposure continues, all zones may become involved. Dr. Smith agreed that underinflation can accentuate the pulmonary vasculature, especially in the lower lung zones, and that can mimic disease. He further agreed that simple pneumoconiosis is unlikely to progress once the exposure ceases. He was of the opinion that it is necessary to undergo a valid pulmonary function test to determine if there is any functional impairment, and to what degree. Dr. Smith could not say if the monitors he uses for interpreting chest x-rays meet the Guidelines set for by the Code of Federal Regulations, or whether his equipment complied with the DICOM standard set forth in the Code of Federal Regulations.

Dr. Christopher Meyer, a Board certified radiologist since 1992, and B-Reader since 1999, reviewed petitioner's 10/7/15 chest x-ray, at the request of respondent. Dr. Meyer was of the opinion that the film quality was a 2 due to quantum mottle, which is a sort of measure of noise or graininess of the image, which can simulate small opacities, if it is severe. Dr. Meyer was of the opinion that there were no small round or large opacities on petitioner's 10/7/15 chest x-ray. Dr. Meyer same no evidence of coal worker's pneumoconiosis.

On 6/2/17 the evidence deposition of Dr. Meyer was taken on behalf of respondent. Dr, Meyer testified that he was on the American College of Radiology Pneumoconiosis Task Force, which was engaged in redesigning the B-reading course, the exam, and the submission of cases for the B-reader training module and exam. He testified that the faculty for the B-reader course are typically experienced senior level B-readers. Dr. Meyer testified that radiologists have a 10% higher pass rate on the B-reading exam than other specialties. He was of the opinion that one of the most important parts of the B-Reader training and examination was making

the distinction between 0/1 profusion and 1/0 profusion film. Dr. Meyer was of the opinion that different pneumoconioses are seen in different regions of the lung, with coal worker's pneumoconiosis typically an upper zone predominant process. He was also of the opinion that the profusion is basically trying to define the density of the small opacities in the lung.

On cross-examination, Dr. Meyer agreed that a negative chest x-ray for coal workers' pneumoconiosis does not necessarily rule out the disease. He agreed that coal worker's may have had a negative chest x-ray for coal worker's pneumoconiosis, but a biopsy or autopsy may show that they actually had pneumoconiosis.

Dr. James Castle, a pulmonologist who is board certified in internal medicine, with a subspecialty of pulmonary disease, was asked to review petitioner's medical records and chest x-ray dated 10/7/15. He was a certified B-reader from 1985 through 6/30/17. Dr. Castle worked for 30 years in Virginia, and his practice was limited to pulmonary disease and chest disease. He also treated patient's with occupational lung disease, some with coal worker's pneumoconiosis.

Dr. Castle reviewed petitioner's x-ray of 10/7/15 and was of the opinion that petitioner had no radiographic evidence of coal worker's pneumoconiosis, based on the absence of any parenchymal abnormalities. He agreed with the position of the American Thoracic Society that an older worker with mild pneumoconiosis may be at a low risk for working in the current permissible dust exposure levels in the mine until he reaches retirement age. He did not believe, consistent with the MSHA, that a miner with pneumoconiosis needs to cease all exposure to coal dust. Dr. Castle was of the opinion that it is very unlikely that simple pneumoconiosis would progress once the exposure ceases.

After reviewing petitioner's medical records Dr. Castle did not believe petitioner suffered from chronic bronchitis, and based on his pulmonary function testing, found that he is capable of heavy manual labor from a respiratory standpoint. Dr. Castle opined that petitioner does not suffer from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust during his employment. Dr. Castle was of the opinion that while petitioner underwent epidural injections and surgical procedures as a result of his musculoskeletal and neurological problems, he never had any complaints of any respiratory symptoms. He was also of the opinion that petitioner did not demonstrate any consistent physical findings indicating the presence of an interstitial pulmonary process, and noted that the only pulmonary function study by Dr. Istanbouly was not only valid, but was entirely normal and showed no evidence of obstruction or restriction. He also noted that the diffusing capacity test petitioner underwent at Indian River Hospital was normal.

On cross-examination Dr. Castle admitted that he did not speak to petitioner or perform any type of examination on him. He agreed that a miner could have a negative chest film for coal worker's

pneumoconiosis, a normal PFT, and normal ventilatory function, and still have the disease. He also agreed it is possible for a miner to have coal worker's pneumoconiosis without any abnormalities on a chest examination. Lastly, he agreed that having a normal pulmonary function does not mean there is no damage to the lungs.

In addition to the examinations, testing, and record review of both petitioner's and respondent's experts, respondent offered into evidence voluminous records from petitioner's primary care physicians and orthopedic specialists from at least 2006 through 2019, from Springfield Clinic and Quality HealthCare. There are no specific records from any treating pulmonologists because petitioner admitted that he never treated for any breathing problems. During this period petitioner had many, many visits at which he was asked about respiratory problems, and/or had examinations of his lungs.

On 2/10/06 his lungs were clear to auscultation, bilaterally; on 10/31/07 review of systems respiratory was negative, and his chest clear to auscultation, bilaterally; on 2/28/08 his lungs were clear to auscultation with no rales, rhonchi or wheezes; on 3/19/08 he had no shortness of breath and his lungs were resonant to percussion and clear to auscultation; on 3/19/09 he had no shortness of breath and his lungs were resonant to percussion and clear to auscultation; on 2/16/10 he had no pulmonary symptoms, and no dyspnea, cough or wheezing; on 12/10/10 he denied any shortness of breath and his lungs were clear to auscultation bilaterally; on 3/25/11 his review of systems respiratory was negative; on 4/13/11 he denied any chronic cough and his chest was clear to auscultation bilaterally; on 7/18/11 he denied any respiratory complaints; on 7/27/11 his review of systems respiratory remained negative; on 8/26/11 his review of systems pulmonary was negative, and he had no cough or shortness of breath, and his chest was clear to auscultation; on 11/28/12 his lung examination showed his lungs were clear; on 12/10/14 his review of systems respiratory showed no shortness of breath, wheeze or cough, and his lungs were clear to auscultation; on 2/2/15 his review of systems respiratory was negative for shortness of breath, wheeze or cough, and his examination of his chest revealed lungs clear to auscultation; on 3/11/15 his review of systems respiratory was negative for shortness of breath, wheeze or cough, and his examination of his chest revealed lungs clear to auscultation; on 3/26/15 his review of systems respiratory was negative for shortness of breath, wheeze or cough, and his examination of his chest revealed lungs clear to auscultation; on 5/18/15 his review of systems respiratory was negative for shortness of breath, wheeze or cough, and his examination of his chest revealed lungs clear to auscultation; on 6/25/15 he denied any shortness of breath and dyspnea, and his review of systems respiratory revealed no shortness of breath, wheeze or cough, and his lungs were clear to auscultation; on 6/3/15 a CT of petitioner's lungs was negative; on 7/15/15 his review of systems respiratory was negative for shortness of breath, wheeze or cough; on 2/5/16 his review of systems respiratory was negative for shortness of breath, wheeze or cough, and his lungs were clear to auscultation; on 7/26/16 his review of systems respiratory was negative for shortness of breath, wheeze or

cough, and his lungs were clear to auscultation; on 9/9/16 his review of systems respiratory was negative for shortness of breath, wheeze or cough, and his lungs were clear to auscultation, bilaterally; on 11/15/16 his review of systems respiratory was negative; on 11/29/16 his review of systems respiratory was negative, and his respiratory exam was negative and normal; on 1/5/17 his review of systems respiratory was negative, and his respiratory exam was negative and normal; on 1/27/17 his review of systems respiratory was negative, and his respiratory exam was negative; on 2/24/17 his review of systems respiratory was negative, and his respiratory exam was negative; on 3/10/17 his review of systems respiratory was negative, and his respiratory exam was negative; on 5/2/17 his review of systems respiratory was negative, and his respiratory exam was negative; on 5/16/17 review of systems respiratory was negative, and his respiratory exam was negative; on 7/25/17 he had no palpitations, shortness of breath or chest pain, and his review of systems respiratory and respiratory examination remained negative; on 11/29/17 his review of systems were negative; on 2/28/18 his review of systems respiratory and respiratory examination remained negative; on 6/5/18 his review of systems respiratory was negative; on 9/28/18 his review of systems respiratory was negative and his lungs were clear to auscultation bilaterally; on 11/30/19 he denied any shortness of breath and his review of his systems respiratory were negative; on 1/16/19 his review of systems respiratory was negative for cough or shortness of breath with rest or exertion, he denied any wheezing, and his lungs were clear to auscultation bilaterally; on 4/9/19 his review of his systems respiratory were negative, and his lungs were clear to auscultation bilaterally; and, on 6 /14/19 his review of his systems respiratory were negative, and his lungs were clear to auscultation bilaterally.

A thorough review of his medical records for all these years revealed only two instances where he had any respiratory complaints. On 3/10/06 he was seen for bronchitis because he had a cough. However, his examination showed his lungs were clear to auscultation bilaterally. On 2/28/08 he complained of a cough, nasal congestion and fatigue for the past 2-3 days. An examination of his lungs again showed he was clear to auscultation with no rales, rhonchi or wheezes.

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

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

Petitioner alleges he sustained an occupational disease (coal worker's pneumoconiosis) that arose out of and in the course of his employment by respondent on 7/19/11, based on petitioner's testimony that he worked that day, despite the fact that he had been terminated on 6/30/11, for reason that were related to his time off following any unrelated injury in the mine, and not related to this claim or his work performance.

In support of this argument petitioner is relying solely on the reading of Dr. Smith of his 10/7/15 chest x-ray, and the examination and opinions rendered by Dr. Istanbouly. In support of their position, respondent

offered into evidence the opinions of Dr. Meyer and Dr. Castle, and volumes of medical records from 2006 through 2019 from Springfield Clinic and Quality HealthCare.

When simply looking at the B-Readers' interpretations of the 10/7/15 you have Dr. Smith who found evidence of coal worker's pneumoconiosis on the 10/7/15 chest x-ray, and Dr. Meyer and Dr. Castle, who both found no evidence of coal worker's pneumoconiosis on the 10/7/15 x-ray. Of the three, the arbitrator finds the opinions of Dr. Meyer most persuasive given the fact that he is not only a certified B-Reader, but is also on the ACR Pneumoconiosis Task Force, which is engaged in redesigning the B-reading course, the B-reading exam, and the submission of cases for the training modules and exam. When comparing Dr. Smith and Dr. Castle, Dr. Smith is a radiologist and Dr. Meyer testified that radiologists have a 10% higher pass rate on the B-reading exam than other specialties. Dr. Castle is a pulmonologist, but not a radiologist. Based on this, the arbitrator gives Dr. Smith's opinions a little more weight than Dr. Castle, but not as much weight as Dr. Meyer. For this reason, the arbitrator adopts the opinions of Dr. Meyer and finds that petitioner did not have radiographical coal miner's pneumoconiosis.

However, radiographic evidence is not the be all and end all of proving whether or not someone has coal worker's pneumoconiosis. In this case, there is the petitioner's testimony, a pulmonary exam and pulmonary function tests performed by Dr. Istanbouly, and volumes of medical records for petitioner from 2006 to 2019 from Springfield Clinic and Quality Health Care.

With respect to the opinions of Dr. Istanbouly, the arbitrator notes that Dr. Istanbouly is not a B-Reader, but is certified in pulmonology. Dr. Istanbouly reviewed the x-ray of 10/7/15 and was of the opinion that it showed evidence of coal worker's pneumoconiosis consistent with what Dr. Smith opined. However, the arbitrator gives little weight to his opinions based on the chest x-ray of 10/7/15 given that he is not a B-Reader. With respect to the findings on the 10/7/15 x-ray the arbitrator finds the opinions of Dr. Meyer most persuasive.

On 4/21/16 petitioner was seen at Southern Illinois Respiratory Disease Consultants, LLC. by Dr. Suhail Istanbouly, at the request of this attorney. Dr. Istanbouly's specialty is pulmonology and critical medicine. Petitioner was referred for evaluation of possible coal worker's pneumoconiosis. He provided a consistent history of his work history in the mines. He stated that he had significant coal dust inhalation during his coal mining career. He stated that he did not recall being diagnosed with asthma or COPD in the past. He further stated that he never smoked. He reported that he had been coughing on a daily basis for years, and the cough was mostly dry and occasional around the clock. He could not specify any triggering factor for the cough. He stated that occasionally it was productive of slight clear sputum, with a few episodes of blood tinged sputum in the past, but not recently. He complained of exertional dyspnea, and shortness of breath with walking one block. He also reported that his unrelated back pain also restricts his physical capacity. He noted that in the

past 6 months his physical capacity had declined a little bit. He denied any chest pain, but complained of chest tightness, retrosternal, with occasional episodes of wheezing. He reported extensive cardiac workup since being in Florida and it was normal. He complained of mild dysphagia and stated that he currently undergoes esophageal dilation every year.

Dr. Istanbouly performed a Spirometry test on petitioner that was normal. He examined petitioner's chest and that was normal. Based on his examination, Dr. Istanbouly was of the opinion that none of petitioner's pulmonary testing showed any indication of obstruction. He was further of the opinion that petitioner does not meet the definition of COPD by the Global Initiative on Obstructive Lung Disease. He also testified that on physical examination petitioner demonstrated no adventitious sounds.

The arbitrator finds it significant that despite no corroborating medical records to the same, petitioner told Dr. Istabouly that he has coughed daily for years, and that the cough was dry and around the clock. He also reported occasional slight clear sputum, exertional dyspnea, and shortness of breath, that are not reported in any of his medical records. The arbitrator finds it significant that petitioner also reported back pain that restricts his physical ability, and over the past 6 months his physical ability declined and he has been wheezing, despite there being no reference in any of his medical records to wheezing. The arbitrator also finds it significant that petitioner did not provide a past history of respiratory disease; did not provide a trigger for his cough; and admitted that his orthopedic problems could be a factor restricting his physical capacity. Dr. Istanbouly even testified that dyspnea on exertion can be due to things other than pulmonary disease, that include deconditioning, which petitioner was experiencing due to his chronic back problems.

The arbitrator finds it significant that Dr. Istanbouly did not review any of petitioner's treatment records, given that in the records from 2006 to 2019, that were very voluminous, there were only two instances where any respiratory complaints were made, and on every other visit all chest examinations were negative, and petitioner never had any respiratory complaints. The arbitrator finds these records inconsistent with the history petitioner provided at trial, and the history he provided to Dr. Istanbouly.

Based on the above, as well as the credible record, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an occupational disease (coal worker's pneumocomiosis) that arose out of and in the course of his employment by respondent on 7/19/11. The arbitrator further finds the petitioner has failed to prove by a preponderance of the credible evidence that his current condition of ill-being is causally related to the alleged injury.

Based on these findings the arbitrator finds the remaining issues moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC012352
Case Name	HAMANN, RONALD JOSEPH v. STATE OF ILLINOIS/DHS TREATMENT & DETENTION CENTER
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0162
Number of Pages of Decision	11
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Kayla Koyne

DATE FILED: 5/5/2022

/s/*Deborah Simpson, Commissioner*

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ronald Hamann,
Petitioner,

vs. NO: 19 WC 12352

State of Illinois-DHS Treatment and Detention Center,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 20, 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.

May 5, 2022

o4/27/22
DLS/rm
046

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC012352
Case Name	HAMANN, RONALD v. STATE OF ILLINOIS-DHS TREATMENT AND DETENTION CENTER
Consolidated Cases	19WC012353
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Maureen Pulia, Arbitrator

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Warren Wilke

DATE FILED: 10/20/2021

THE INTEREST RATE FOR THE WEEK OF OCTOBER 19, 2021 0.06%

/s/Maureen Pulia, Arbitrator

Signature

CERTIFIED as a true and correct copy

pursuant to 820 ILCS 305/14

October 20, 2021

/s/ Brendon O'Rourke

Brendan O'Rourke, Assistant Secretary

Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

RONALD HAMANN,
Employee/Petitioner

Case # **19** WC **12352**

v.

Consolidated cases:

STATE OF ILLINOIS-DHS TREATMENT AND DETENTION CENTER,
Employer/Respondent

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen H. Pulia**, Arbitrator of the Commission, in the city of **Quincy**, on **10/6/21**. By stipulation, the parties agree:

On the date of accident, **3/20/19 and 4/4/19**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**116,635.65**, and the average weekly wage was $**2,242.99**.

At the time of injury, Petitioner was **45** years of age, ***married*** with **no** dependent children.

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

Respondent shall be given a credit of $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

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

ORDER

Respondent shall pay Petitioner the sum of $**813.87**/week for a further period of **132.90** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused. **petitioner a 15% loss of use of his right hand, a 15% loss of use of his left hand, a 15% loss of use of his right arm, and a 15% loss of use of his left arm.**

Respondent shall pay Petitioner compensation that has accrued from **3/20/19** through **10/6/21**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

OCTOBER 20, 2021

ICArbDecN&E p.2

FINDINGS OF FACTS:

Petitioner, a 45 year old Stationary Engineer Chief, sustained an accidental injury to his bilateral hands and arms, that arose out of and in the course of his employment by respondent, and manifested itself on 3/20/19 (19WC12352) and 4/4/19 (19WC12353). This is a consolidated hearing, and the parties have requested a consolidated decision.

Petitioner was hired by respondent in 2006. He worked a few months as a Stationary Engineer before being promoted to Stationary Engineer Chief. His duties for respondent varied from "A-Z", or the full spectrum of all the duties of the different tradesmen that worked for him. Petitioner's duties included anything from sedentary duties such as writing and typing reports, to medium duties such as daily maintenance of the security systems, mowing and weeding, along with heavy duty activities that included using power tools, installing carpets and flooring, using a jackhammer to break up concrete, and pouring concrete.

Petitioner testified that several months prior to the date of accident he began to notice sleepless nights due to numbness, tingling and pain in his hands, forearms, and elbows. He stated that the final straw was when he was working on an overhead rollup door putting bolts in and he could not feel the bolts, and could not keep his arms up. After this, petitioner reported his symptoms to the work comp coordinator, and the assistant facility director on 3/20/19.

On 4/4/19 petitioner presented to Brittney Taylor, APRN, at Culbertson Clinics, with complaints of increasing bilateral hand numbness/tingling for the past few months. He stated that his fingertips were numb. He reported that he did a lot of repetitive work that included typing, using hand tools, wrenches, etc. He reported dropping things and having difficulty picking things up due to the numbness. Following an examination, he was told he needed to get wrist splints. An EMG was ordered.

On 5/6/19 petitioner underwent an EMG/NCS performed by Dr. Trudeau. The impression was bilateral median neuropathies at the wrists, severe on the right, moderately severe on the left; bilateral ulnar neuropathies at the elbows, mild and neurapraxic on either side, right greater than the left; and, no evidence of proximal median neuropathy, distal ulnar neuropathy, cervical radiculopathy, and brachial plexopathy.

On 5/15/19 petitioner presented to the office of Dr. Mark Greatting at Springfield Clinic, and was seen by Mirjam Naughton, APRN/CNP. He provided a consistent history of his complaints, and his treatment to date. He reported that he was trying to use wrist braces at night, which offered some relief, but did not alleviate his symptomatology. He rated his pain at a 3/10 at rest, and up to 10/10 with exacerbating activities. Following an examination and review of the EMG results, Naughton discussed possible treatment that included surgical releases with Dr. Greatting.

On 6/26/19 petitioner presented to Dr. Greatting to discuss further treatment of his chronic numbness and tingling in both arms secondary to chronic bilateral cubital and carpal tunnel syndrome, as well as a mass on the lateral aspect of the right elbow. Following an examination, Dr. Greatting recommended that petitioner undergo an excision of a mass/ganglion at the right elbow, and right cubital and carpal tunnel releases, followed by left cubital and carpal tunnel releases. Petitioner agreed with the recommendation. Petitioner returned to Dr. Greatting on 7/2/19, and his condition was unchanged. Again, Dr. Greatting's surgical recommendations were reiterated.

On 7/9/19 petitioner underwent an excision of a mass/ganglion 3.5 inches in diameter from the lateral aspect of the right elbow; a right cubital tunnel release; and a right carpal tunnel release, performed by Dr. Greatting. His post-operative diagnosis was mass on the lateral aspect of the right elbow; right cubital tunnel syndrome; and, right carpal tunnel syndrome. Petitioner followed-up post-operatively with Dr. Greatting.

On 7/22/19 petitioner followed-up with Dr. Greatting. He reported that the numbness in his hand was improved. Dr. Greatting noted good strength in his radial, median and ulnar nerve distributions.

On 8/6/19 petitioner underwent a left release of the ulnar nerve of the left elbow, and a left carpal tunnel release, performed by Dr. Greatting. His post-operative diagnosis was left cubital tunnel syndrome, and left carpal tunnel syndrome. Petitioner followed-up post-operatively with Dr. Greatting.

On 8/20/19 petitioner followed-up with Dr. Greatting. He reported that the numbness in both hands was markedly improved. He also reported that he was already working, doing lighter type of activities. Dr. Greatting was of the opinion that in 2 weeks petitioner could increase his activities as tolerated and resume normal activities.

On 9/19/19 petitioner returned to Dr. Greatting. He noted that the numbness in his hands had resolved. An examination revealed good motion of his elbows, forearms, wrists, and hands bilaterally; and good strength in his radial, median, and ulnar nerve distributions. Dr. Greatting released petitioner to work without restrictions on 9/23/19. He also noted that if after he is seen in 6 weeks and is doing well, he would be released from care at maximum medical improvement.

On 11/7/19 petitioner returned to Dr. Greatting. He reported that he was back doing his normal work activities. He felt the numbness in his hand was markedly improved, his strength was good. He still reported a little bit of tenderness in the left carpal tunnel incision, that was improving. An examination revealed good motion of petitioner's elbows, forearms, wrists and hands, with good strength in the lateral, median, and ulnar nerve distributions, bilaterally. Dr. Greatting was of the opinion that petitioner could work without restrictions

or limitations. Dr. Greatting released petitioner from his care and placed him at maximum medical improvement.

On 10/28/20 petitioner underwent a Section 12 examination performed by Dr. Ryan Calfee, an orthopedic surgeon, at Washington University in St. Louis, at the request of the respondent. Petitioner gave a consistent history of the onset of his symptoms and his treatment to date. Dr. Calfee noted that petitioner stated that both his hands felt about 100% better after the surgery. Petitioner reported that he still got a little of a swollen feeling in his fingers. He also stated that when driving he experiences a bit of ulnar pain in the forearm depending on how he rests his arms. Finally, petitioner reported that he noticed that his right ring finger did not fully extend at the MP joint, but he was not sure what this was from. After getting a work history and performing a record review, Dr. Calfee performed a physical examination. On examination, Dr. Calfee noted full elbow motion, as well as wrist and finger motion with the exception of mildly reduced extension of the right ring finger; ability to make a full fist; grip strength of 85 pounds on the right, and 108 pounds on the left; and pinch strength was 18 pounds on the right, and 24 pounds on the left. Subjectively, petitioner said he had good sensitivity in both hands. His measurements in mm moving from the thumb to the small finger on the right were 11, 11, 11, 9, 9; and from the thumb to the small finger on the left were greater than 15 mm for the thumb, index, and long finger, and 9 mm for the ring and small. Dr. Calfee noted that normal would be 5 mm on all fingers. Dr. Calfee diagnosed bilateral carpal tunnel and cubital tunnel syndrome treated with surgery. He was of the opinion that petitioner was not in need of any further treatment. He noted that petitioner had returned to full duty work and his remaining symptoms were fairly minimal. He noted that on his objective testing with 2 point discrimination it seemed as if the petitioner's nerves were not entirely normal, but that the remaining altered sensitivity appeared to be very well tolerated. Dr. Calfee was not aware of anything that the petitioner could not do in his normal day now. He was of the opinion that petitioner had reached maximum medical improvement.

Petitioner testified that he still experiences a feeling of swelling in his hands, although they are not swollen; loss of feeling in the tips of his fingers that makes fine manipulation and archery difficult; shooting pains from his elbow to his wrist over the forearm when driving; some numbness in his arms/hands when sitting in certain positions; reduced grip strength, left worse than right; feeling of swelling and stiffness when typing; difficulty gripping when mowing with a zero turn mower; and some level of numbness/tingling every moment of the day. Petitioner testified that he no longer does RUTAN interviewing because he cannot write all day long without his hand going dead. He testified that he does not mow as much as he used to, and does not jackhammer anymore. He also reported that he is more likely to ask for help carrying items now than he did before the injuries, because he has reduced strength. Petitioner testified that he reduced the amount of time he rides his motorcycle because of the vibration. Petitioner testified that he was big into archery, but has difficulty

now because the lack of feeling in his fingertips. He also noted occasional shooting pains when driving with his hands at 10 and 2. He reported that his biggest problems currently were with his grip strength and fine manipulation.

Petitioner testified that he works on the computer 2-3 hours a day; uses power tools 1-2 hours a day; and no longer uses the jackhammer. He testified that Dr. Greatting told him to lay off doing things that injure his hands. He testified that his left grip strength is worse than his right grip strength. Petitioner testified that he no longer has the constant shooting pains, or symptoms that kept him up all night before the surgeries. Petitioner testified that the symptoms he has now are the same as those he had when he last treated following his surgeries.

NATURE AND EXTENT OF THE INJURIES:

The nature and extent of petitioner's injury, consistent with 820 ILCS 305/8.1b, permanent partial disability, shall be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of Section 8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. No single enumerated factor shall be the sole determinant of disability. Id.

Neither party submitted an AMA rating pursuant to Section 8.1b of the Act into evidence. For this reason, the arbitrator gives no weight to this factor.

With respect to factor (ii), the occupation of the injured employee, the petitioner was a Stationary Engineer Chief for respondent, who returned to his regular duty job. Although petitioner was released to his regular duty job without restrictions, petitioner testified that he does not perform all of the duties he performed prior to the injuries. Petitioner testified that he was a "working" Stationary Engineer Chief and would do all the same job duties that he expected his staff to perform. Some of the activities petitioner no longer does is using the jackhammer. He also testified that he does not mow as much as he used to; no longer does RUTAN interviewing; and, is more likely to ask for help carrying things than he would have before. He also does not do as much fine manipulation work due to the numbness in his fingertips. Given that petitioner is the supervisor, he is able to do what he can, and delegate other jobs to his staff. For these reasons, the arbitrator gives greater weight to this factor.

With respect to factor (iii), the age of the employee. Petitioner was 45 years old at the time of the injury. When he was released from care on 11/7/19, he was released to full duty work, without restrictions by Dr. Greatting. Petitioner did return to his regular duty job with self imposed restrictions. Based on his age of 45, the arbitrator finds the petitioner may remain in the workforce for up to 2 more decades, and during that time

could continue to experience pain and limitations as they relate to his bilateral upper extremities. For these reasons, the Arbitrator gives greater weight to this factor.

With respect to factor (iv), the future earnings of the petitioner, neither party offered into the record any evidence regarding any impact these injuries had on petitioner's future earnings. For these reasons, the arbitrator gives no weight to this factor.

With respect to factor (v), evidence of disability corroborated by the treating medical records, the Arbitrator finds that as a result of the accidents on 3/20/19 and 4/4/19 petitioner underwent two surgical procedures for his bilateral carpal tunnel and cubital tunnel surgeries. On 11/7/19 petitioner noted that the numbness in his hand was markedly improved, and his strength was good. He still reported a little bit of tenderness in the left carpal tunnel incision, that was improving. An examination revealed good motion of petitioner's elbows, forearms, wrists and hands, with good strength in the lateral, median, and ulnar nerve distributions, bilaterally.

On 10/28/20 Dr. Calfee noted that petitioner stated that both his hands felt about 100% better after the surgery. Petitioner reported that he still had a little bit of a swollen feeling in his fingers. He also stated that when driving he experienced a bit of ulnar pain in the forearm depending on how he rests his arms. Finally, petitioner reported that he noticed that his right ring finger did not fully extend at the MP joint, but he was not sure what this was from. Dr. Calfee noted full elbow motion, as well as wrist and finger motion with the exception of mildly reduced extension of the right ring finger; ability to make a full fist; grip strength of 85 pounds on the right, and 108 pounds on the left; and pinch strength was 18 pounds on the right, and 24 pounds on the left. Subjectively, petitioner said he had good sensitivity in both hands. His measurements in mm moving from the thumb to the small finger on the right were 11, 11, 11, 9, 9; and from the thumb to the small finger on the left were greater than 15 mm for the thumb, index, and long finger, and 9 mm for the ring and small. Dr. Calfee noted that normal would be 5 mm on all fingers. He also noted that on his objective testing with 2 point discrimination it seemed as if the petitioner's nerves were not entirely normal, but that the remaining altered sensitivity appeared to be very well tolerated.

Petitioner testified that he still experiences a feeling of swelling in his hands, although they are not swollen; loss of feeling in the tips of his fingers that makes fine manipulation and archery difficult; shooting pains from his elbow to his wrist over the forearm when driving; some numbness in his arms/hands when sitting in certain positions; reduced grip strength, left worse than right; feeling of swelling and stiffness when typing; difficulty gripping when mowing with a zero turn mower; and some level of numbness/tingling every moment of the day. Petitioner testified that he no longer does RUTAN interviewing because he cannot write all day long

without his hand going dead. He also testified that he does not mow as much as he used to, and does not jackhammer anymore. He reported that he is more likely to ask for help carrying items now than he did before the injuries, because he has reduced strength. Petitioner testified that he reduced the amount of time he rides his motorcycle because of the vibration. Petitioner testified that he was big into archery, but has difficulty now because of the lack of feeling in his fingertips. He also noted occasional shooting pains when driving with his hands at 10 and 2. He reported that his biggest problems today are with his grip strength and fine manipulation.

For these reasons, the Arbitrator gives greater weight to this factor.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner sustained a 15% loss of use his right hand; a 15% loss of use of his left hand; a 15% loss of use of his right arm; and a 15% loss of use of his left arm to Section 8(e) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC012353
Case Name	HAMANN, RONALD JOSEPH v. STATE OF ILLINOIS/DHS TREATMENT AND DETENTION CENTER
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0163
Number of Pages of Decision	11
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Kayla Koyne

DATE FILED: 5/5/2022

/s/Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

[X] 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	[X] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ronald Hamann,
Petitioner,

vs. NO: 19 WC 12353

State of Illinois-DHS Treatment and Detention Center,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 20, 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.

May 5, 2022

o4/27/22
DLS/rm
046

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC012353
Case Name	HAMANN, RONALD v. STATE OF ILLINOIS-DHS TREATMENT AND DENTENTION CENTER
Consolidated Cases	No Consolidated Cases
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Maureen Pulia, Arbitrator

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Warren Wilke

DATE FILED: 10/20/2021

THE INTEREST RATE FOR THE WEEK OF OCTOBER 19, 2021 0.06%

/s/*Maureen Pulia, Arbitrator*

Signature

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

October 20, 2021

/s/ *Brendon O'Rourke*

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

RONALD HAMANN,
Employee/Petitioner

Case # **19** WC **12353**

v.

Consolidated cases

STATE OF ILLINOIS-DHS TREATMENT AND DETENTION CENTER,
Employer/Respondent

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen H. Pulia**, Arbitrator of the Commission, in the city of **Quincy**, on **10/6/21**. By stipulation, the parties agree:

On the date of accident, **3/20/19 and 4/4/19**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**116,635.65**, and the average weekly wage was $**2,242.99**.

At the time of injury, Petitioner was **45** years of age, ***married*** with **no** dependent children.

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

Respondent shall be given a credit of $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

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

ORDER

Respondent shall pay Petitioner the sum of $**813.87**/week for a further period of **132.90** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused. **petitioner a 15% loss of use of his right hand, a 15% loss of use of his left hand, a 15% loss of use of his right arm, and a 15% loss of use of his left arm.**

Respondent shall pay Petitioner compensation that has accrued from **3/20/19** through **10/6/21**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

OCTOBER 20, 2021

FINDINGS OF FACTS:

Petitioner, a 45 year old Stationary Engineer Chief, sustained an accidental injury to his bilateral hands and arms, that arose out of and in the course of his employment by respondent, and manifested itself on 3/20/19 (19WC12352) and 4/4/19 (19WC12353). This is a consolidated hearing, and the parties have requested a consolidated decision.

Petitioner was hired by respondent in 2006. He worked a few months as a Stationary Engineer before being promoted to Stationary Engineer Chief. His duties for respondent varied from “A-Z”, or the full spectrum of all the duties of the different tradesmen that worked for him. Petitioner’s duties included anything from sedentary duties such as writing and typing reports, to medium duties such as daily maintenance of the security systems, mowing and weeding, along with heavy duty activities that included using power tools, installing carpets and flooring, using a jackhammer to break up concrete, and pouring concrete.

Petitioner testified that several months prior to the date of accident he began to notice sleepless nights due to numbness, tingling and pain in his hands, forearms, and elbows. He stated that the final straw was when he was working on an overhead rollup door putting bolts in and he could not feel the bolts, and could not keep his arms up. After this, petitioner reported his symptoms to the work comp coordinator, and the assistant facility director on 3/20/19.

On 4/4/19 petitioner presented to Brittney Taylor, APRN, at Culbertson Clinics, with complaints of increasing bilateral hand numbness/tingling for the past few months. He stated that his fingertips were numb. He reported that he did a lot of repetitive work that included typing, using hand tools, wrenches, etc. He reported dropping things and having difficulty picking things up due to the numbness. Following an examination, he was told he needed to get wrist splints. An EMG was ordered.

On 5/6/19 petitioner underwent an EMG/NCS performed by Dr. Trudeau. The impression was bilateral median neuropathies at the wrists, severe on the right, moderately severe on the left; bilateral ulnar neuropathies at the elbows, mild and neurapraxic on either side, right greater than the left; and, no evidence of proximal median neuropathy, distal ulnar neuropathy, cervical radiculopathy, and brachial plexopathy.

On 5/15/19 petitioner presented to the office of Dr. Mark Greatting at Springfield Clinic, and was seen by Mirjam Naughton, APRN/CNP. He provided a consistent history of his complaints, and his treatment to date. He reported that he was trying to use wrist braces at night, which offered some relief, but did not alleviate his symptomatology. He rated his pain at a 3/10 at rest, and up to 10/10 with exacerbating activities. Following an examination and review of the EMG results, Naughton discussed possible treatment that included surgical releases with Dr. Greatting.

On 6/26/19 petitioner presented to Dr. Greatting to discuss further treatment of his chronic numbness and tingling in both arms secondary to chronic bilateral cubital and carpal tunnel syndrome, as well as a mass on the lateral aspect of the right elbow. Following an examination, Dr. Greatting recommended that petitioner undergo an excision of a mass/ganglion at the right elbow, and right cubital and carpal tunnel releases, followed by left cubital and carpal tunnel releases. Petitioner agreed with the recommendation. Petitioner returned to Dr. Greatting on 7/2/19, and his condition was unchanged. Again, Dr. Greatting's surgical recommendations were reiterated.

On 7/9/19 petitioner underwent an excision of a mass/ganglion 3.5 inches in diameter from the lateral aspect of the right elbow; a right cubital tunnel release; and a right carpal tunnel release, performed by Dr. Greatting. His post-operative diagnosis was mass on the lateral aspect of the right elbow; right cubital tunnel syndrome; and, right carpal tunnel syndrome. Petitioner followed-up post-operatively with Dr. Greatting.

On 7/22/19 petitioner followed-up with Dr. Greatting. He reported that the numbness in his hand was improved. Dr. Greatting noted good strength in his radial, median and ulnar nerve distributions.

On 8/6/19 petitioner underwent a left release of the ulnar nerve of the left elbow, and a left carpal tunnel release, performed by Dr. Greatting. His post-operative diagnosis was left cubital tunnel syndrome, and left carpal tunnel syndrome. Petitioner followed-up post-operatively with Dr. Greatting.

On 8/20/19 petitioner followed-up with Dr. Greatting. He reported that the numbness in both hands was markedly improved. He also reported that he was already working, doing lighter type of activities. Dr. Greatting was of the opinion that in 2 weeks petitioner could increase his activities as tolerated and resume normal activities.

On 9/19/19 petitioner returned to Dr. Greatting. He noted that the numbness in his hands had resolved. An examination revealed good motion of his elbows, forearms, wrists, and hands bilaterally; and good strength in his radial, median, and ulnar nerve distributions. Dr. Greatting released petitioner to work without restrictions on 9/23/19. He also noted that if after he is seen in 6 weeks and is doing well, he would be released from care at maximum medical improvement.

On 11/7/19 petitioner returned to Dr. Greatting. He reported that he was back doing his normal work activities. He felt the numbness in his hand was markedly improved, his strength was good. He still reported a little bit of tenderness in the left carpal tunnel incision, that was improving. An examination revealed good motion of petitioner's elbows, forearms, wrists and hands, with good strength in the lateral, median, and ulnar nerve distributions, bilaterally. Dr. Greatting was of the opinion that petitioner could work without restrictions

or limitations. Dr. Greatting released petitioner from his care and placed him at maximum medical improvement.

On 10/28/20 petitioner underwent a Section 12 examination performed by Dr. Ryan Calfee, an orthopedic surgeon, at Washington University in St. Louis, at the request of the respondent. Petitioner gave a consistent history of the onset of his symptoms and his treatment to date. Dr. Calfee noted that petitioner stated that both his hands felt about 100% better after the surgery. Petitioner reported that he still got a little of a swollen feeling in his fingers. He also stated that when driving he experiences a bit of ulnar pain in the forearm depending on how he rests his arms. Finally, petitioner reported that he noticed that his right ring finger did not fully extend at the MP joint, but he was not sure what this was from. After getting a work history and performing a record review, Dr. Calfee performed a physical examination. On examination, Dr. Calfee noted full elbow motion, as well as wrist and finger motion with the exception of mildly reduced extension of the right ring finger; ability to make a full fist; grip strength of 85 pounds on the right, and 108 pounds on the left; and pinch strength was 18 pounds on the right, and 24 pounds on the left. Subjectively, petitioner said he had good sensitivity in both hands. His measurements in mm moving from the thumb to the small finger on the right were 11, 11, 11, 9, 9; and from the thumb to the small finger on the left were greater than 15 mm for the thumb, index, and long finger, and 9 mm for the ring and small. Dr. Calfee noted that normal would be 5 mm on all fingers. Dr. Calfee diagnosed bilateral carpal tunnel and cubital tunnel syndrome treated with surgery. He was of the opinion that petitioner was not in need of any further treatment. He noted that petitioner had returned to full duty work and his remaining symptoms were fairly minimal. He noted that on his objective testing with 2 point discrimination it seemed as if the petitioner's nerves were not entirely normal, but that the remaining altered sensitivity appeared to be very well tolerated. Dr. Calfee was not aware of anything that the petitioner could not do in his normal day now. He was of the opinion that petitioner had reached maximum medical improvement.

Petitioner testified that he still experiences a feeling of swelling in his hands, although they are not swollen; loss of feeling in the tips of his fingers that makes fine manipulation and archery difficult; shooting pains from his elbow to his wrist over the forearm when driving; some numbness in his arms/hands when sitting in certain positions; reduced grip strength, left worse than right; feeling of swelling and stiffness when typing; difficulty gripping when mowing with a zero turn mower; and some level of numbness/tingling every moment of the day. Petitioner testified that he no longer does RUTAN interviewing because he cannot write all day long without his hand going dead. He testified that he does not mow as much as he used to, and does not jackhammer anymore. He also reported that he is more likely to ask for help carrying items now than he did before the injuries, because he has reduced strength. Petitioner testified that he reduced the amount of time he rides his motorcycle because of the vibration. Petitioner testified that he was big into archery, but has difficulty

now because the lack of feeling in his fingertips. He also noted occasional shooting pains when driving with his hands at 10 and 2. He reported that his biggest problems currently were with his grip strength and fine manipulation.

Petitioner testified that he works on the computer 2-3 hours a day; uses power tools 1-2 hours a day; and no longer uses the jackhammer. He testified that Dr. Greatting told him to lay off doing things that injure his hands. He testified that his left grip strength is worse than his right grip strength. Petitioner testified that he no longer has the constant shooting pains, or symptoms that kept him up all night before the surgeries. Petitioner testified that the symptoms he has now are the same as those he had when he last treated following his surgeries.

NATURE AND EXTENT OF THE INJURIES:

The nature and extent of petitioner's injury, consistent with 820 ILCS 305/8.1b, permanent partial disability, shall be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of Section 8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. No single enumerated factor shall be the sole determinant of disability. Id.

Neither party submitted an AMA rating pursuant to Section 8.1b of the Act into evidence. For this reason, the arbitrator gives no weight to this factor.

With respect to factor (ii), the occupation of the injured employee, the petitioner was a Stationary Engineer Chief for respondent, who returned to his regular duty job. Although petitioner was released to his regular duty job without restrictions, petitioner testified that he does not perform all of the duties he performed prior to the injuries. Petitioner testified that he was a "working" Stationary Engineer Chief and would do all the same job duties that he expected his staff to perform. Some of the activities petitioner no longer does is using the jackhammer. He also testified that he does not mow as much as he used to; no longer does RUTAN interviewing; and, is more likely to ask for help carrying things than he would have before. He also does not do as much fine manipulation work due to the numbness in his fingertips. Given that petitioner is the supervisor, he is able to do what he can, and delegate other jobs to his staff. For these reasons, the arbitrator gives greater weight to this factor.

With respect to factor (iii), the age of the employee. Petitioner was 45 years old at the time of the injury. When he was released from care on 11/7/19, he was released to full duty work, without restrictions by Dr. Greatting. Petitioner did return to his regular duty job with self imposed restrictions. Based on his age of 45, the arbitrator finds the petitioner may remain in the workforce for up to 2 more decades, and during that time

could continue to experience pain and limitations as they relate to his bilateral upper extremities. For these reasons, the Arbitrator gives greater weight to this factor.

With respect to factor (iv), the future earnings of the petitioner, neither party offered into the record any evidence regarding any impact these injuries had on petitioner's future earnings. For these reasons, the arbitrator gives no weight to this factor.

With respect to factor (v), evidence of disability corroborated by the treating medical records, the Arbitrator finds that as a result of the accidents on 3/20/19 and 4/4/19 petitioner underwent two surgical procedures for his bilateral carpal tunnel and cubital tunnel surgeries. On 11/7/19 petitioner noted that the numbness in his hand was markedly improved, and his strength was good. He still reported a little bit of tenderness in the left carpal tunnel incision, that was improving. An examination revealed good motion of petitioner's elbows, forearms, wrists and hands, with good strength in the lateral, median, and ulnar nerve distributions, bilaterally.

On 10/28/20 Dr. Calfee noted that petitioner stated that both his hands felt about 100% better after the surgery. Petitioner reported that he still had a little bit of a swollen feeling in his fingers. He also stated that when driving he experienced a bit of ulnar pain in the forearm depending on how he rests his arms. Finally, petitioner reported that he noticed that his right ring finger did not fully extend at the MP joint, but he was not sure what this was from. Dr. Calfee noted full elbow motion, as well as wrist and finger motion with the exception of mildly reduced extension of the right ring finger; ability to make a full fist; grip strength of 85 pounds on the right, and 108 pounds on the left; and pinch strength was 18 pounds on the right, and 24 pounds on the left. Subjectively, petitioner said he had good sensitivity in both hands. His measurements in mm moving from the thumb to the small finger on the right were 11, 11, 11, 9, 9; and from the thumb to the small finger on the left were greater than 15 mm for the thumb, index, and long finger, and 9 mm for the ring and small. Dr. Calfee noted that normal would be 5 mm on all fingers. He also noted that on his objective testing with 2 point discrimination it seemed as if the petitioner's nerves were not entirely normal, but that the remaining altered sensitivity appeared to be very well tolerated.

Petitioner testified that he still experiences a feeling of swelling in his hands, although they are not swollen; loss of feeling in the tips of his fingers that makes fine manipulation and archery difficult; shooting pains from his elbow to his wrist over the forearm when driving; some numbness in his arms/hands when sitting in certain positions; reduced grip strength, left worse than right; feeling of swelling and stiffness when typing; difficulty gripping when mowing with a zero turn mower; and some level of numbness/tingling every moment of the day. Petitioner testified that he no longer does RUTAN interviewing because he cannot write all day long

without his hand going dead. He also testified that he does not mow as much as he used to, and does not jackhammer anymore. He reported that he is more likely to ask for help carrying items now than he did before the injuries, because he has reduced strength. Petitioner testified that he reduced the amount of time he rides his motorcycle because of the vibration. Petitioner testified that he was big into archery, but has difficulty now because of the lack of feeling in his fingertips. He also noted occasional shooting pains when driving with his hands at 10 and 2. He reported that his biggest problems today are with his grip strength and fine manipulation.

For these reasons, the Arbitrator gives greater weight to this factor.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner sustained a 15% loss of use his right hand; a 15% loss of use of his left hand; a 15% loss of use of his right arm; and a 15% loss of use of his left arm to Section 8(e) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	11WC012425
Case Name	MALINOWSKI, TADEUSZ v. A&D IMPORT MOTORS, INC & IWBF
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0164
Number of Pages of Decision	23
Decision Issued By	Thomas Tyrrell, Commissioner

Petitioner Attorney	Jason Carroll
Respondent Attorney	Maxine Grief-Bless, Thomas Owen

DATE FILED: 5/6/2022

/s/Thomas Tyrrell, Commissioner

Signature

22IWCC0164

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

Tadeusz Malinowski,

Petitioner,

vs. NO: 11 WC 12425

A & D Import Motors, Inc. & IWBF,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering all issues, and being advised of the facts and law, modifies the Arbitrator Decision and corrects a scrivener's error. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission solely seeks to correct a clerical error in the Arbitrator Decision. On page nine (9) of the Decision, the Arbitrator mistakenly wrote that Mr. Dabrowski saw Petitioner the rest of that day and "…did feel he was moving around with any difficulty." This is a clerical error. The Commission modifies the above-referenced sentence to read as follows:

> However, he did see Petitioner from time to time the rest of that day and did feel he was moving around **without** any difficulty.

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 September 10, 2020, is modified as stated herein.

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

May 6, 2022

o: 3/29/22
TJT/jds
51

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MALINOWSKI, TADEUSZ
Employee/Petitioner

Case# **11WC012425**

A & D IMPORT MOTORS INC & IWBF
Employer/Respondent

On 9/10/2020, 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 0.12% 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

2255 LUCAS & APOSTOLOPOULOS
881 W LAKE ST
ADDISON, IL 60101

0639 ASSISTANT ATTORNEY GENERAL
CHARLENE COPELAND
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

- [x] 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

TADEUSZ MALINOWSKI Case # **11** WC **012425**
Employee/Petitioner
v.
A & D IMPORT MOTORS, INC. & IWBF
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **November 25, 2019 and December 4, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

T. Malinowski v. A & D Import Motors, Inc., et al, 11 WC 012425

FINDINGS

On **March 15, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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, as no accident occurred.

In the year preceding the injury, Petitioner earned $**31,475.00**; the average weekly wage was **$605.29**

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

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

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

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

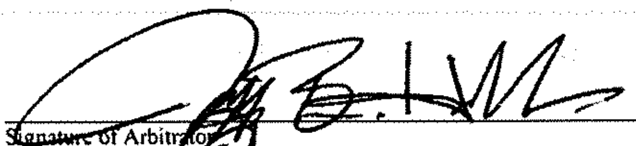
Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

Claim for compensation denied. Petitioner failed to prove that he sustained accidental injuries which arose out of and in the course of his employment by Respondent-Employer on March 15, 2011.

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

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



Signature of Arbitrator

September 6, 2020
Date

ICArbDec p. 2

SEP 10 2020

PROCEDURAL HISTORY

Prior to the November 25, 2019, arbitration hearing, there were two prior hearings in this claim. The first hearing occurred on January 12, 2018, regarding a motion to dismiss an individual Respondent, Andrzej Staniszewski, and Respondent A & D Import Motors, Inc. The second hearing occurred on February 13, 2018 on a motion to reconsider. The motion to dismiss Mr. Staniszewski was granted and the motion to dismiss A & D Import Motors, Inc. was denied. The interlocutory dismissal order was reviewed and the case was later remanded back to the Arbitrator for hearing on all issues.

All issues are in dispute in this case, as it involves a claim against the Injured Workers' Benefit Fund. Petitioner and Respondent were represented by counsel at arbitration. Respondent was uninsured on the date of accident, therefore, the Injured Workers' Benefit Fund was named as a party and it was represented by the Illinois Attorney General's office.

FINDINGS OF FACT

Petitioner testified via a Polish/English interpreter.

Tadeusz Malinowski ("Petitioner") testified he was born on January 5, 1954. As of March 15, 2011, he was married and had no children under the age of eighteen. He testified he was employed by A & D Import Motors, Inc. ("Respondent-Employer") in March of 2011. Respondent-Employer was a car body and mechanic shop that repaired all types of vehicles except for semi-trucks.

Petitioner's job at Respondent-Employer was to repair frames and other parts of damaged vehicles. In performing this work, Petitioner used a variety of tools for cutting metal, such as pneumatic tools, various grinders, a Sawzall, which he explained is a reciprocating mechanical saw, and other types of saws. Petitioner was also required to lift and carry various parts of vehicles such as doors, wheels, and hoods. He estimated these various parts to weigh between 20 and 150 pounds. He was also required to lift and move vehicle frames in the performance of his work duties. Vehicle frames weighed up to 500 or more pounds and required the assistance of a coworker to move.

Petitioner testified he normally worked five days per week from Monday through Friday. He typically began working at 8:00 a.m. each day and worked until 5:00 p.m. Petitioner identified copies of his paycheck stubs from Respondent-Employer, which were admitted into evidence as Petitioner's Exhibit Number 12. The earliest check is dated March 26, 2010 and the most recent is March 18, 2011. (PX12).

Petitioner testified he was working for Respondent on March 15, 2011, and was performing his normal work duties. Specifically, he testified he was disassembling parts off of half a Chevrolet passenger car that had been brought to the shop from a junkyard. He was working to remove the hood, door, bumper, radiator support, etc. The vehicle from the junkyard was being used as a donor car for parts to repair another damaged car. Petitioner testified that the remainder of the car was to be left for a scrapper to pick it up the next day. Petitioner testified he was instructed by his boss, Andrzej Staniszewski, to remove the donor frame that day.

Petitioner testified that his coworker, Damian Dabrowski, assisted him in moving the donor. Initially, the two attempted to simply lift and carry the frame but it proved too difficult. Instead, they lifted the frame onto a dolly and pushed it out of the building. Once outside, they pushed the frame onto the sidewalk, which Petitioner explained was dilapidated. The frame fell off the dolly as they pushed it along the sidewalk. Petitioner and Mr. Dabroski then lifted the frame back onto the dolly. Petitioner testified at this time, he "felt an excruciating sensation of warmth" in his lower back. He testified this occurred near the end of his workday around 5:00 p.m. Petitioner testified Andrzej Staniszewski became angry when the donor frame fell and told them to bring it back into the shop.

Petitioner testified he then left work and drove home, approximately one mile away. He testified it was difficult for him to find a comfortable position while driving due to the sensation he had in his lower back. When he arrived home, he called his wife to assist him in getting out of his car as he was unable to do so on his own. With his wife's assistance, he was able to climb the stairs into his home. He took Ibuprofen and aspirin for pain that night. He was unable to climb the stairs to his bedroom and slept downstairs as a result.

Petitioner testified he was scheduled to return to work for Respondent-Employer the following day. Due to his lower back pain, however, he elected to call off of work. Petitioner testified he called Andrzej

Staniszewski at 7:00 a.m. to advise him he would not be coming into work that day. Petitioner testified that he advised Staniszewski that he was having back pain following the previous day's lifting.

Petitioner testified he then sought medical treatment that same day, March 16, 2011, at a clinic near the streets of Pulaski, Milwaukee, and Belmont. When he arrived at the clinic, he told them he was injured at work. The clinic asked him what type of insurance he had and he replied he was not aware. They would not treat him at the clinic without the necessary insurance information. Petitioner testified he then called Andrzej Staniszewski and was told Respondent-Employer did not have insurance. Petitioner offered to split the medical expense with Staniszewski, and he was told to hire an attorney, which he did on March 25, 2011, and the Application for Adjustment of Claim was filed on March 30, 2011. (PX19) Due to the lack of insurance information, Petitioner did not receive treatment on March 16, 2011.

Petitioner did not return to work for Respondent-Employer. He testified that he made an appointment with Dr. Victor Forys at Central Medical Clinic of Chicago. His first visit with Dr. Forys was on March 24, 2011. Petitioner testified that he told Dr. Forys that he had significant pain in the back that travels down the right leg from lifting a heavy object at work. Dr. Forys noted Petitioner was injured at work on March 15, 2011, while lifting the front of a car with a coworker. The car part weighed 800 pounds. Petitioner complained of lower back pain radiating into his left leg down to his knee. Dr. Forys recorded that Petitioner said that his pain continued to increase over the next several days and Petitioner saw his family doctor, who referred him for PT. Petitione r presented to Dr. Forys due to increased pain. Dr. Forys' diagnosis was lumbago and a disc injury. Petitioner was advised to remain off of work. (PX 2)

Petitioner followed up with Dr. Forys on March 31, 2011 and was advised to remain off of work and proceed with physical therapy. At his April 7 and 14, 2011, visits, Dr. Forys continued to keep him off of work and noted he was proceeding with therapy. He also recommended Petitioner undergo a lumbar MRI, which was completed on April 15, 2011, at Niles Open MRI, Inc. (PX5) On April 21, 2011, Dr. Forys noted Petitioner continued to complain of sciatic pain with trouble walking or prolonged sitting. At his May 26, 2011, visit, Dr. Forys recommended Petitioner proceed with epidural steroid injections. (PX 2)

Per Dr. Forys' recommendation, Petitioner met with Dr. Julian Paskov, also at Central Medical Clinic of Chicago, for an initial consultation regarding the injections, on June 8, 2011. Dr. Paskov recommended proceeding with two lumbar epidural injections. He noted they would then reevaluate once the initial injections were completed. Dr. Paskov provided Petitioner with the initial injection on June 13, 2011, and the second injection on June 27, 2011. On July 11, 2011, Petitioner returned to Dr. Paskov's office and reported significant improvement following the first two injections. They decided to proceed with a third injection, which was completed at that same visit. (PX 17)

Following this series of injections, Petitioner continued to follow up with Dr. Forys throughout June, July, August and September of 2011. Eventually, on September 22, 2011, Dr. Forys referred Petitioner to a spine specialist, Dr. Mark Sokolowski. (PX 2, PX 1)

Petitioner's initial visit with Dr. Sokolowski occurred on September 28, 2011. Dr. Sokolowski noted Petitioner injured his back on March 15, 2011, at work while lifting a frame of a car, the patient had difficulty rising from his car when he got home that day. Dr. Sokolowski recommended a thoracic MRI and a new lumbar MRI. Both imaging studies were completed on September 30, 2011, at Niles Open MRI, Inc.. (PX 1, PX 5)

Dr. Sokolowski reviewed the two MRIs with Petitioner at his follow up visit of October 4, 2011. The lumbar MRI was most significant for a herniation at L4-L5 with resultant central, lateral recess, and foraminal stenosis, and a herniation at L3-L4 with resultant neural impingement. The thoracic MRI did not reveal any frank disc herniations. Dr. Sokolowski advised Petitioner that his treatment options included pain management, epidural steroid injections, or surgical management consisting of a lumbar decompression at L3 to L5. Petitioned said he wanted to discuss these options with Dr. Forys before deciding how to proceed. (PX 1)

Petitioner returned to Dr. Forys on October 6, 2011. Dr. Forys reviewed Dr. Sokolowski's office notes and indicated his agreement with the recommended treatment. (PX 2) Thereafter, Petitioner returned to Dr. Sokolowski's office on October 19, 2011 and advised him he wanted to proceed with surgery. On November 8, 2011, Petitioner underwent the recommended L3-L5 laminectomy and decompression performed by Dr.

Sokolowski at West Suburban Medical Center. Following surgery, he was discharged on November 10, 2011. (PX 3)

Petitioner returned to Dr. Sokolowski's office on November 21, 2011. He was pleased with his postoperative progress. Dr. Sokolowski recommended a course of physical therapy. At the December 30, 2011, follow up, Dr. Sokolowski noted Petitioner was participating in physical therapy but felt he was reaching a plateau. He suspected Petitioner would likely be unable to return to his prior work duties of automobile frame repair due the physical demands of the job. He advised Petitioner to follow up with him as needed and continue for the time being under the care of Dr. Forys. (PX 1)

As instructed, Petitioner continued to follow up with Dr. Forys in January and February of 2012. Dr. Forys continued to advise Petitioner to remain completely off of work. On February 17, 2012, Dr. Forys noted Petitioner had reached maximum medical improvement ("MMI") and recommended he proceed with a functional capacity evaluation ("FCE"). (PX 2)

Petitioner underwent the FCE at Vital Rehabilitation on March 8, 2012. (PX 4) The evaluation was provided to him by Tom Kokocinski, PT, DPT, CFCE. Mr. Kokocinski noted Petitioner had been referred to them by Dr. Sokolowski. The results of the evaluation suggested Petitioner gave a reliable effort with 32 of 33 consistency measures within expected limits. Based on the FCE, Mr. Kokocinski concluded Petitioner was able to work on an overall Light Physical Demand Category Level (exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or negligible amount of force constantly, to move objects). Mr. Kokocinski concluded Petitioner was not able to work as an Automobile-Body Repairer (DOT 807.381-010). (PX 4)

Petitioner testified he never returned to work for Respondent or for any other employer. He testified he looked for a new job and documented his job search. Petitioner identified his job search documentation as the documents marked as Petitioner's Exhibit Number 13, which was admitted into evidence without objection by Respondents. He testified he completed these job searches contemporaneously when he contacted potential employers. His job search documents list his job searches from March of 2016 through June of 2017. (PX 13)

He testified one employer offered him a position but let him go after two hours on the job. Petitioner believed the employer felt he was not able to perform his work duties when he observed him attempt to climb a ladder. Petitioner's job search activities from March of 2012 to March of 2016 were not testified to. Petitioner now receives SSDI benefits.

Petitioner testified that before the alleged accident of March 15, 2011, he did not have low back pain and he was able to do his job.

Petitioner testified he continues to take medication, including Ibuprofen, for his ongoing back pain. He continues to perform home exercises that were shown to him by a therapist. He testified his back pain is significant in the mornings and his wife assists him in getting out of bed. He also has difficulty tying his shoes due to his ongoing symptoms. On occasion, his wife assists him with putting on his socks due to the difficulty he has on his own due to his pain. He testified he no longer performs household chores such as the laundry because it is difficult for him to carry the laundry basket downstairs. Petitioner also testified he has trouble sleeping at night due to pain in his lower back.

Damian Dabrowski testified at the request of Respondent-Employer. He was subpoenaed to testify. He is currently a business owner of Exact Performance and has been so for three years. Prior to this, he worked for Elk Grove Automotive for approximately two-and-one-half years. Before that, he was employed by Respondent-Employer.

Mr. Dabrowski testified he was working for Respondent-Employer in March of 2011, as a painter and body man. He was a coworker of Petitioner. Dabrowski testified he did not recall Petitioner being injured at work on March 15, 2011. He remembers that on that day, he and Petitioner worked together to move a part. He testified this occurred sometime before lunch. He testified they moved the part using a dolly and pushed the part out of the shop to the parking lot outside. He testified Petitioner did not report any complaints of pain, not feeling right, or injuring himself on that date. He testified Petitioner seemed angry they had to move the part on uneven pavement outside.

Mr. Dabrowski testified they had difficulties pushing the part over the uneven pavement using the dolly. He testified he was not able to observe Petitioner much after they moved the part outside because they returned to work in different areas of the shop. However, he did see Petitioner from time to time the rest of that day and did feel he was moving around with any difficulty. He testified he found out about Petitioner's accident a month or two later from Andrzej Staniszewski. Dabrowski testified he heard Petitioner and Staniszewski arguing often in the shop. March 15, 2011 was the last day that Dabrowski and Petitioner worked together. Dabrowski spoke with Petitioner and his attorney regarding his recollection of the events of March 15, 2011, which was apparently different than Petitioner's recollection. Dabrowski told Petitioner that Staniszewski had surveillance video of Petitioner.

Andrzej Staniszewski (Andrzej) testified at the request of Respondent-Employer. He testified he is the owner of Respondent-Employer, which he has owned for forty years. In March of 2011, Derek Staniszewski, Damian Dabrowski, Petitioner, and one other individual named Chris were working for Respondent-Employer. Derek Staniszewski just helped in the office and he "probably" had a supervisory position.

Andrzej testified Petitioner worked for Respondent-Employer prior to 2011 but he fired him. He explained they argued every day. He testified Petitioner, "...comes with the wife and crying they don't have money to eat and don't have money to buy the food. I was so nice giving job back to him." (Id. at 167). He testified their relationship was good for about a week when Petitioner returned but then they started to argue again. He continued, "I sign his check; he don't sign my check."

Andrzej testified he remembers Petitioner was working for him on March 15, 2011, which was the last day he would do so. He testified he recalled Petitioner and Dabrowski were working together that day to move a vehicle part. He testified he was mad at them for doing this because he never told them to. He testified Petitioner worked a full day on March 15, 2011, and did not appear to be in any pain.

The next day, March 16, 2011, he testified Petitioner did not come into work. Andrzej testified he did not receive any phone calls from Petitioner on that date. He testified he never spoke to Petitioner again after March 15, 2011. Instead, he testified Petitioner's wife came in four days later to pick up his check. He testified

Petitioner's wife told him Petitioner was sick and did not feel good. He continued, "That's all it was....They get like a cold or something." He testified he first discovered Petitioner alleged he was injured at work was when a clinic called him approximately one week later, requesting his insurance. The clinic was requesting the insurance because Petitioner had an accident at work.

On cross examination, Andrzej testified he knew within seven days of March 15, 2011 that Petitioner alleged a work accident on that date. He testified he did not want to provide his workers' compensation insurance information to the clinic because he did not know there was any accident on that day.

He testified he still believes he had workers' compensation insurance on March 15, 2011. He stated, "I have it. I believe I have it. We have it all the time." Petitioner offered into evidence, without objection by Respondent, a certification from NCCI Holdings, Inc. dated August 29, 2019, confirming Respondent did not possess workers' compensation insurance on Petitioner's date of accident, March 15, 2011. (PX 11)

Derek Staniszewski (Derek) testified at the request of Respondent. He testified he is the general manager of Respondent and had been since 1981 when he was seventeen years old.

Derek testified he was working at Respondent on March 15, 2011, and saw Petitioner working that day as well. He testified Petitioner appeared to be able to perform his work duties without any difficulties throughout the day. He testified Petitioner was not required to do any heavy lifting as part of his work for Respondent. He testified any car part heavier than five or ten pounds required two or three people to lift. (Id.). He explained it is a "ludicrous lie" if somebody says they can put a hood on all by themselves. The Arbitrator notes Petitioner never testified that he installed hoods by himself but stated he received the assistance of another coworker when heavier parts needed to be lifted or moved.

Derek said that, on March 15, 2011, Petitioner was working to remove parts off of the rear quarter panel of a vehicle. Petitioner did not complain to him about getting injured while working that day. Previously, Petitioner performed construction rehabilitation work for the Staniszewskis in the summer of 2010 before a tenant moved in.

Derek testified that after March 15, 2011 he once observed Petitioner and his wife carrying twenty-four (inch) by twenty-four (inch) bricks. He testified this would have been in April of 2011. (Id.). On cross examination, he testified it occurred in either May or June of 2011. He testified Petitioner and his wife were carrying the bricks one at a time. He testified each brick likely weighed between fifty and one-hundred pounds. Petitioner did not appear to have any difficulty carrying the bricks and neither did Petitioner's wife.

On rebuttal, Petitioner confirmed that he moved patio stones with his wife, however, he testified they were six inches by six inches in size. He testified they created a border for a flower garden with the stones. (Id.). He agreed this likely occurred in May or June of 2011. He disagreed that the stones weighed between fifty and one-hundred pounds, saying they weighed up to five pounds.

Respondent submitted surveillance videos of Petitioner into evidence as Respondent's Exhibit Number 4. The videos depicted Petitioner on the following dates: October 6, 7, 8, 2015, and November 10, 2015. The Arbitrator notes these videos were taken approximately three-and-one-half-years after Petitioner reached MMI on February 17, 2012 and some six months before Petitioner's job search began.

The initial date of surveillance, October 6, 2015, began recording Petitioner at approximately 12:37 p.m. The video begins with Petitioner standing outside of a building. Beginning at 12:48 p.m., Petitioner appears to be on his knees inside the building laying down flooring tile. This continues until approximately 1:40 p.m. and is depicted for approximately eighteen minutes of video time. The remaining two hours of video depicts Petitioner throughout the day until 7:45 p.m. He is seen putting down flooring and taking breaks outside. (RX 4a)

The second date of surveillance of October 7, 2015, begins at 6:59 a.m. and lasts until 4:00 p.m. The video itself is approximately two hours and seven minutes long. From 7:00 a.m. until 10:00 a.m., Petitioner appears to be working on the floors again periodically. From 10:00 a.m. until 4:00 p.m. there is not much to visualize throughout the surveillance. (RX 4a)

The third date of surveillance was on October 8, 2015 and occurs from 6:41 a.m. through 11:00 a.m. The video itself is approximately forty-two minutes long. There is not much to see on this particular day except for Petitioner walking outside and smoking from time to time. (RX 4a)

The final date of surveillance, November 10, 2015, began recording Petitioner at approximately 9:29 a.m. (RX4b) It depicted him throughout the day with the last footage ending at approximately 1:24 p.m. From 9:29 until 10:46 a.m., Petitioner is shown going up and down on a ladder appearing to install a small piece of metal above a door. He climbs two or three steps up the ladder. Thereafter, Petitioner can be seen painting or staining what appears to be a ledge at approximately chest height as he stands. Petitioner is later seen standing outside and drinking coffee before the video ends at 1:24 p.m. (RX 4b)

Petitioner testified he helped his wife's sister, Stella Chwiesiuk, in preparing her new beauty salon. He testified she asked him to help manage the employees she had hired to do the majority of the remodeling work. He testified his duties during this project included making sure materials were delivered, advising the workers where to build a wall, and where tiles were to be laid. He testified he assisted in laying down tiles near the door of the salon. The tiles were one foot by one foot and were ceramic. Petitioner estimated that each tile weighed a quarter of a pound. He testified he laid approximately ten tiles before he began to feel pain again. He was not paid for the work he did in assisting his sister-in-law.

Dr. Alexander Ghanayem testified by way of evidence deposition on June 7, 2017. (RX 1) He is an orthopedic surgeon and specializes in spine surgery. He is board-certified by the American Board of Orthopaedic Surgery. He is chair of the Department of Orthopaedic Surgery at Loyola University Medical Center.

Dr. Ghanayem testified he examined Petitioner at the request of Respondent and the examination occurred on December 28, 2015. He testified Petitioner sustained a lifting injury at work while lifting a heavy frame with another gentleman and injured his lumbar spine. He testified he performed a physical examination of Petitioner. He concluded Petitioner had some residual mechanical low back pain following his decompressive procedure and he was at maximum medical improvement relative to his work injury.

Subsequent to his examination of Petitioner, Dr. Ghanayem was provided with and reviewed some surveillance videotapes. Given the activities he viewed on the surveillance, he augmented his prior opinions and stated Petitioner could return back to work at full duty. He testified he was happy for Petitioner that he appeared to have improved since he examined him. Dr. Ghanayem did not identify the dates of the surveillance videos that he viewed. Dr. Ghanayem acknowledged his report was silent as to whether Petitioner's lower back injury was causally related to his work accident. (RX 1)

Dr. Mark Sokolowski testified by way of evidence deposition on September 22, 2014. (PX 10) He testified he is board certified in orthopedic surgery and specializes in spinal surgery.

Dr. Sokolowski testified his first occasion to see and treat Petitioner was on September 28, 2011, upon the direct referral from Dr. Forys. He testified Petitioner advised him of his work accident of March 15, 2011. Petitioner said that he developed the acute onset of back pain radiating to his lower extremities while lifting a component of a frame of a car. Dr. Sokolowski testified his diagnosis of Petitioner at this initial visit was thoracolumbar pain, lumbar pain, thoracic radiculopathy, and lumbar radiculopathy. He recommended Petitioner undergo a new MRI of his lumbar spine and a MRI of his thoracic spine. Dr. Sokolowski testified his diagnoses were causally related to the work accident.

At Petitioner's return office visit on October 4, 2011, Dr. Sokolowski reviewed the MRIs images that had been completed on September 30, 2011. He testified, "...there was a frank disc herniation at L4/L5 with resultant central lateral recess and foraminal stenosis with a herniation also at L3/L4 with resultant neural impingement. Thoracic MRI was normal." He continued to believe this condition was causally connected to the work accident and recommended proceeding with a lumbar decompression surgery. He testified the recommended surgery was completed on November 8, 2011. He testified the surgery was reasonable and necessary for Petitioner and was causally related to the work accident.

Dr. Sokolowski testified he reviewed the functional capacity evaluation Petitioner completed at Vital Rehabilitation on March 12, 2012. The evaluation confirmed his opinion stated in his December 30, 2011,

office notes indicating Petitioner would be unable to return to his former occupation due to the extensive demands of automobile frame repair.

Approximately one week before his deposition, Petitioner returned to Dr. Sokolowski's office on September 17, 2014. Dr. Sokolowski testified Petitioner continued to be limited in some activities due to his residual back pain. He testified Petitioner would continue to have both good and bad days going forward. He explained he may continue to need, "...episodes of care consisting of analgesics, maybe physical therapy every now and then, perhaps even periodic epidural injections. He concluded that the medical treatment he provided to Petitioner had been reasonable and necessary and related to his accident. (PX 10)

Petitioner thereafter returned to Dr. Sokolowski's office on August 16, 2016. (PX 1). He reported ongoing lumbar pain with radiation to the right buttock and right lower extremity. Dr. Sokolowski recommended a new lumbar MRI and advised Petitioner to return to his office once completed. Petitioner underwent the recommended MRI at Golf Imaging Center on August 25, 2016. (PX 6) He returned to Dr. Sokolowski's office on August 31, 2016. Dr. Sokolowski reviewed the MRI images and noted a laminectomy at L3 to L5 and a relative loss of disc height at L5-S1. He again noted management of his symptoms could include medication, therapy, and possible epidural injections. At that time, Petitioner's inclination was to proceed with therapy. (PX 1)

Dr. Sokolowski also drafted a letter dated December 2, 2016, after he was provided with the surveillance video of Petitioner that was admitted into evidence in this claim as Respondent's Exhibit 4. He stated the functional capacity evaluation of March 8, 2012, was an accurate representation of Petitioner's capabilities at that time. He stated, however, that the surveillance video suggested Petitioner's function had improved as of October 6, 2015, enabling him to perform remodeling work in a retail space. (PX 1)

Petitioner returned to Dr. Sokolowski's office again on April 3, 2018. (PX 1 p. 50) He continued to complain of lumbar pain with radiation to his lower extremities. Dr. Sokolowski advised Petitioner that his symptoms would likely persist indefinitely. Management of his symptoms could include medication, therapy, and possible epidural injections. Later that year, on November 29, 2018, Petitioner again returned to Dr.

Sokolowski's office and reported progressive worsening of his back and right leg pain. He reported bending and twisting was particularly painful. Petitioner also reported numbness and tingling in his right leg. His right leg pain would awaken him at night. Dr. Sokolowski prescribed a Medrol Dosepak. Petitioner also underwent another lumbar MRI at Dr. Sokolowski's recommendation at Edgebrook Radiology on December 28, 2018. (PX 8)

CONCLUSIONS OF LAW

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

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d).

To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his employment and her injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)

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

A. WAS RESPONDENT-EMPLOYER OPERATING UNDER AND SUBJECT TO THE ILLINOIS WORKERS' COMPENSATION ACT?

Respondent-Employer was operating under and subject to the Illinois Workers' Compensation Act on March 15, 2011. It is subject to the Act pursuant to Section 3, paragraph 8, which provides for automatic coverage for, "Any enterprise in which sharp edged cutting tools, grinders or implements are used, including all enterprises which buy, sell or handle junk and salvage, demolish, or reconstruct machinery." Here, Respondent-Employer is a car repair shop engaged in the reconstruction of machinery in the form of repairing damaged automobiles. Additionally, Petitioner testified without rebuttal that he used sharp edged cutting tools and

grinders in the performance of his work duties. The Commission has jurisdiction over the claim because the alleged accident occurred in Illinois. 820 ILCS 305/3(8) and 820 ILCS 305/1(b)2

B. WAS THERE AN EMPLOYEE-EMPLOYER RELATIONSHIP?

The Arbitrator finds there was an employee-employer relationship between Petitioner and Respondent-Employer on March 15, 2011. This finding is based on the testimony of Petitioner, Dabrowski, Andrzej and Derek Staniszewski, PX 12 and RX 5.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT-EMPLOYER?
D. WHAT WAS THE DATE OF THE ACCIDENT?

Petitioner failed to prove that he sustained accidental injuries which arose out of and in the course of his employment by Respondent-Employer on March 15, 2011.

The Arbitrator, as the trier of fact in this case, has the responsibility to observe the witnesses testify, judge their credibility, and determine how much weight to afford their testimony and the other evidence presented. Walker v. Chicago Housing Authority, 2015 IL App (1st) 133788, ¶ 47

In this case, either Petitioner's testimony or the testimony of Andrzej Staniszewski is correct.

Petitioner's testimony is not corroborated by Dabrowski, the coworker that was working with him when he alleges that he was injured. Dabrowski says that they moved the donor car before lunch, Petitioner says that it was at about 5:00 p.m. Dabrowski did not see Petitioner exhibiting any injury after moving the donor (conceding that he did not see Petitioner much after they moved the donor out of the shop).

Petitioner's wife did not testify to corroborate Petitioner's testimony or dispute Andrzej's testimony. Did she really have to help Petitioner into the house after Petitioner called her from his car on the date of accident? Did Petitioner really sleep downstairs because he couldn't get upstairs on the date of accident? Did Petitioner's wife drive him to the doctor when he began receiving treatment? Did Petitioner's wife really tell Andrzej that Petitioner was sick when she picked up his paycheck? Why didn't she tell Andrzej that Petitioner had been injured at work? Petitioner's wife did not corroborate his current inability to perform ADLs.

The Arbitrator is troubled by Petitioner's failure to get immediate treatment for his injury. After the clinic on Pulaski refused treatment (if this event occurred), he should have sought emergency care. He did not do so and did not receive treatment until March 24, 2011, when he was seen by Dr. Forys. Dr. Forys charted that there was a prior visit to Petitioner's family doctor, who referred him for PT. There was no testimony about the family doctor beyond Petitioner saying that his PCP, Dr. Vinskawicz,, died before the date of accident. This is a serious flaw in Petitioner's testimony.

Petitioner testified that he called in and reported that he was not coming into work on March 16, 2011 because of pain in his lower back from the lifting on March 15. Petitioner testified that he called Andrzej later on March 16, 2011 to get insurance information. Andrzej denied that he talked to Petitioner on March 16, 2011 or on any other date after March 15, 2011. Andrzej testified that he became aware that Petitioner was claiming a work injury when a clinic called about a week after March 15, 2011. Given the lack of corroboration for Petitioner's testimony as noted above, the Arbitrator finds Andrzej's testimony to be credible.

Petitioner has not sustained his 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. The claim for compensation is, therefore, denied.

E. WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT-EMPLOYER?

Timely notice of the alleged accident was given to Respondent-Employer. This finding is based on Andrzej's testimony that he received a call from a clinic requesting insurance information about a week after March 15, 2011.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

As the Arbitrator has found that Petitioner failed to prove that he sustained accidental injuries that arose out of and in the course of his employment by Respondent on March 15, 2011, the Arbitrator needs not decide this issue. If Petitioner's testimony regarding an injury carrying the donor car out of the shop is found to be

credible, then causation is established by the chain of events, the testimony of Dr. Sokolowski and the fact that Dr. Ghanayem did not offer an opinion on causation.

G. WHAT WERE PETITIONER'S EARNINGS?
H. WHAT WAS PETITIONER'S AGE AT THE TIME OF ACCIDENT?
I. WHAT WAS PETITIONER'S MARITAL STATUS AT THE TIME OF ACCIDENT?

Petitioner offered into evidence Petitioner's Exhibit Number 12, which was a set of paycheck stubs he identified as a complete set from Respondent dated March 26, 2010, through March 18, 2011. These were admitted by the Arbitrator without objection by Respondent. The claimed average weekly wage is $605.29 and it is supported by PX 12.

Petitioner testified without rebuttal that he was born on January 5, 1954, making him fifty-seven years of age on the date of his accident. This was also confirmed by his date of birth listed within the medical records. Further, Petitioner testified without rebuttal that he was married with no minor dependent children on the date of his accident.

For these reasons, the Arbitrator finds Petitioner's average weekly wage calculated pursuant to Section 10 of the Act was $605.29. Additionally, he was fifty-seven-years-old, married, and had no dependent children.

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

K. IS PETITIONER ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS AND MAINTENANCE BENEFITS?

L. WHAT IS THE NATURE AND EXTENT OF PETITIONER'S INJURY?

Based on the Arbitrator's finding on the issue of accident, the Arbitrator needs not decide these issues.

O. OTHER-INSURANCE COVERAGE-LIABILITY OF THE IWBF:

Based upon PX 11, the Arbitrator finds that Respondent-Employer, A & D Import Motors, Inc. did not have Workers' Compensation insurance on March 15, 2011. Thus, liability of the IWBF is established and any

award of compensation in this matter should be entered against the IWBF to the extent permitted and allowed under §4(d) of the Act.

Based upon the Arbitrator's finding on the issue of accident, above, no award is entered against the IWBF.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC006063
Case Name	DAVIS, NORMA v. KRAFT-HEINZ
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0165
Number of Pages of Decision	24
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	David Galanti
Respondent Attorney	James Clune

DATE FILED: 5/6/2022

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NORMA DAVIS,

Petitioner,

vs. NO: 18 WC 006063

KRAFT-HEINZ,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses and prospective medical, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below and otherwise modifies 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 agrees with the Arbitrator's statement of facts, however, views the evidence differently than the Arbitrator, thus drawing different conclusions of law. Therefore, the Commission strikes the paragraphs comprising the section entitled "Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?" The Commission further strikes the remainder of the Arbitrator's Conclusions of Law, vacates the Arbitrator's Order as it relates to accident, causal connection, medical benefits and prospective medical, and substitutes the following paragraphs under section/Issue (C).

To obtain benefits under the Act, a claimant must prove by a preponderance of the evidence that she was injured in an accident which arose out of and in the course of her employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671-672, 2003.

> "In the course of employment" refers to the time, place and circumstances surrounding the injury. *Lee v. Industrial Comm'n*, 167 Ill. 2d 77, 81, 212 Ill. Dec. 250, 656 N.E.2d 1084 (1995); *Scheffler Greenhouses, Inc. v. Industrial Comm'n*, 66 Ill. 2d 361, 366, 5 Ill. Dec. 854, 362 N.E.2d 325 (1977). That is to say, for an injury to be compensable, it generally must occur within the time and space boundaries of the employment. 1 A. Larson, Worker's Compensation Law § 12.01 (2002). It is not enough, however, to simply show that an injury occurred during work hours or at the place of employment. The injury must also "arise out of" the employment. *Parro v. Industrial Comm'n*, 167 Ill. 2d 385, 393, 212 Ill. Dec. 537, 657 N.E.2d 882 (1995) (the occurrence of an accident at the claimant's workplace does not automatically establish that the injury arose out of the person's employment); *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 62, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989).
> 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. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989). *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671-672, 2003.

Further, as the Supreme Court of Illinois noted in *Peoria County Belwood Nursing Home v. Industrial Commission,* ll5 Ill. 2d 524, 530, 505 N.E.2d 1026 (1987), "an employee who alleges injury based on repetitive trauma must still meet the same standard of proof as other claimants alleging an accidental injury."

After reviewing the evidence and the entire record including Petitioner's testimony, the Commission finds that Petitioner failed to prove that her job duties caused her condition of ill-being in her non-dominant, left arm, and her left elbow, for the reasons delineated below.

Petitioner's burden of proof is best enunciated by the *Nunn* court as follows:

Although medical testimony as to causation is not necessarily required (*Westinghouse Electric Co. v. Industrial Com*. (1976), 64 Ill. 2d 244, 356 N.E.2d 28), where the question is one within the knowledge of experts only and not within the common knowledge of laypersons, expert testimony is necessary to show that claimant's work activities caused the condition complained of. (*Interlake Steel Co. v. Industrial Com*. (1985), 136 Ill. App. 3d 740, 483 N.E.2d 979.)*** This is especially true in repetitive trauma cases. (See *Johnson v. 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, 510 N.E.2d 502, 1987.

This burden has consistently been relied upon by the courts. "In cases relying on the repetitive-trauma concept, the claimant generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability." *City of Springfield v. Ill. Workers' Comp. Comm'n,* 388 Ill. App. 3d 297, 901 N.E.2d 1066, (2009) (quoting *Williams v. Industrial Comm'n,* 244 Ill. App. 3d 204, 209, 614 N.E.2d 177, 180, 185 Ill. Dec. 43 (1993)). In layman's terms, it is not enough for the Petitioner to merely correlate her symptoms, but she must prove causation as between the work and the resulting disability.

Job Duties

Petitioner testified that she worked for Respondent, manufacturing Capri Sun pouches for Capri Sun drinks, as a pouch machine operator. (T. 9) In this case, Petitioner testified that the video job description (RX1) shown to Dr. Paletta and Dr. Kutnik, the doctors of record, was an accurate assessment of her job duties. (T. 16-17) The Petitioner then testified regarding the four jobs that were videotaped. Petitioner testified, in operating two machines, she fills a box with a cellophane bag every four to four and one-half minutes per machine. (T. 17) The pouch machine then fills the box with pouches. (T. 18) She then inspects four pouches from each box for defects. (T. 18-19)

In her pouch roll job, the Petitioner would replace a pouch roll above the machine by moving a metal cylinder or shaft from an empty roll to a new roll. (T. 20) When doing this she testified that she would flex and extend her arm. This would happen once per day, but rarely, on occasion, twice per day. (T. 21) One roll lasts 7.5 hours.

The Petitioner would also replace bottom rolls. This would happen more often than the top roll. There are two on each machine and each individual roll would last two and a half hours. (T. 21-22)

Occasionally, the machines would jam up. Petitioner testified that there were several different kinds of jams on the machines. There could be a roller jam where the foil would bunch up behind the knife and Petitioner would have to forcibly pull them out. When the foil would bunch up, Petitioner would use a screwdriver type of tool to clear the jam. The frequency of jams depended, some days everything ran fine. (T. 23)

Finally, the Petitioner would perform a job called spooning. In this job, the Petitioner would check the seals on the pouches. (T. 24-25) This task would involve checking eight pouches every hour; four pouches on each machine per hour and the process would take about three minutes. (T. 26) Petitioner testified that the most flexing and bending with her arm would be "just changing the rolls because you had to pick them up and then put them up." The most forceful

pinching or gripping would be with the spooning. (T. 27-28) Petitioner testified that the jams might require pinching, flexing or extending her arm but the jams did not occur all the time. (T. 28)

Petitioner testified that she was using both arms in her job. (T. 29) Petitioner never measured, and was not able to measure, the force used in her various job duties. (T. 30) Petitioner agreed that when performing the spooning job the object was to check to make sure the pouch seams were intact, not to use enough force to actually poke holes through the foil pouch. (T. 30)

Medical Opinions

Dr. George Patetta, Petitioner's treating physician, testified via evidence deposition on March 4, 2020. (PX7) Dr. Shawn Kutnik conducted a §12 Independent Medical Evaluation at Respondent's request on August 5, 2019, and authored an opinion report. (RX2, DepXB) Dr. Kutnik also testified via evidence deposition on August 25, 2020. Both Dr. Paletta and Dr. Kutnik agreed with the fact that Petitioner's diagnosis is that of left-sided lateral epicondylitis and cubital tunnel syndrome. (PX7, 8,9; RX2, 23) The doctors disagreed, however, as to causation. Dr. Paletta opined that Petitioner's work duties were a causative or contributing factor to those conditions. (PX7, 10-11)

According to Dr. Kutnik, the Petitioner's job duties were not related to her condition of ill-being. (RX2, 25) Dr. Kutnik testified that it was significant that the Petitioner had complaints, in her non-dominant, left arm. (RX2, 15) Typically, Dr. Kutnik testified, he finds "that with repetitive use injuries the dominant arm is often the one that's involved either first or more significantly. If both sides are involved, it is not uncommon or unheard of for the opposite arm. But generally the dominant would be the one that would be more symptomatic in most of these cases." (RX2, 15)

Dr. Kutnik further testified that Petitioner has risk factors that could account for her pathology apart from the causative factor being repetitive trauma. Dr. Kutnik identified personal risk factors including Petitioner's older age, her gender, and the fact that she is a smoker. (RX 2, 15)

Dr. Paletta testified that at no point did Petitioner tell him that she was using her left arm or hand more than the right hand in her work activity. (PX7, 17) Dr. Paletta also testified that Petitioner's weight put her in the in the overweight category noting he was unsure if her weight would meet the threshold for obesity. Dr. Paletta testified, however, that obesity has been identified as a risk factor for peripheral compressive neuropathy such as cubital tunnel syndrome, but his understanding was that obesity had not been identified as a risk factor for tendinopathy like lateral epicondylitis. (PX7, 23-24)

More importantly, Dr. Paletta also agreed smoking is a risk factor for the development of peripheral compressive neuropathy like cubital tunnel syndrome and can also be a risk factor for any tendinopathy i.e. lateral epicondylitis, so smoking can be a risk factor for both of Petitioner's diagnosed conditions. (PX7, 23)

Petitioner underwent an injection at the radial tunnel and according to Dr. Paletta, that ruled out radial tunnel syndrome. When he last saw Petitioner, Dr. Paletta recommended that Petitioner consider surgical treatment for the lateral epicondylitis and a possible ulnar nerve transposition. (PX7, 10) Dr. Paletta testified that he had not seen Petitioner since her follow-up after her injection on November 30, 2018, and she would need to be reevaluated before he would recommend surgery again. (PX7, 10, 23)

Dr. Paletta testified that epicondylitis and cubital tunnel, if related to trauma, are from repetition and force injuries. Dr. Paletta conceded that neither the job video nor what Petitioner described provided an objective measurement of force. (PX7, 19) Instead, Dr. Paletta's conclusion was drawn based upon the job duties, the frequency of the activities and whether there was a correlation with the onset or worsening of symptoms as reported by Petitioner. He did not, however, know the amount of time Petitioner spent doing each of the activities per workday. (PX7, 18, 19)

After reviewing the Petitioner's history of her job duties, the job description, and job videos, Dr. Kutnik opined that Petitioner's video of her job duties shows that there is no significant repetition and very little force. (RX1, RX2, 17, 22)

In his §12 opinion report, Dr. Kutnik opined that Petitioner's records included videos that presumably depict her basic job responsibilities and noted:

> Of these stations, the only one that involves any substantial force is that of Pouch Roll where a heavy cylinder is retrieved, inserted, secured, and then a roll of film affixed to the outside. However, even there, the use of force is of very limited duration and far from constant. The rest of patient's job responsibilities show only use of negligible forces and weights. The development of a repetitive use injury is predicated in repetitive, forceful activities leading to overstress of the involved areas. Her only forceful activities are far from repetitive. It is therefore my medical opinion, within a reasonable degree of certainty, that the patient's left lateral epicondylitis and cubital tunnel syndromes are not causally related to her work activities. Further, Petitioner is capable of working without restriction at this time.Patient is MMI in that her conditions are not work-related. (RX2, XB)

Dr. Kutnik testified that after review of the job description videos, he did not feel that the work that was shown, in conjunction of what she was describing at his §12 evaluation of Petitioner, arose to the level as would cause any type of significant repetitive injury to the elbow to result in these conditions. (RX2, 25)

On cross-examination Dr. Kutnik testified the job videos were roughly consistent with what Petitioner told him about her job. (RX2, 33) Regardless of his opinion on causation, surgery was not unreasonable. (RX2, 33) On re-direct examination Dr. Kutnik opined that it is not uncommon to develop idiopathic epicondylitis with no known cause. (RX2, 34-35)

The Appellate Court has upheld cases where the Commission relies upon the examining physician more than the treating doctor, as noted in the following excerpt from *Prairie Farms Dairy*:

> Although we have said numerous times that the Commission *may* give more weight to a treating physician's opinion, we have never stated that it is obligated to. See *O'Neal Brothers Construction Co. v. Industrial Comm'n,* 93 Ill. 2d 30, 38, 66 Ill. Dec. 334, 442 N.E.2d 895 (1982) (Commission may give weight to treating physician or opinion rendered based on hypothetical question); *** *International Harvester Co. v. Industrial Comm'n,* 169 Ill. App. 3d 809, 815, 120 Ill. Dec. 392, 523 N.E.2d 1303 (1988) (Commission could rely on examining physician's testimony over testimony of two other physicians); accord *Dornblaser v. Industrial Comm'n,* 349 Ill. 61, 68-70, 181 N.E. 673 (1932); *Western Electric Co. v. Industrial Comm'n*, 349 Ill. 139, 145-46, 181 N.E. 638 (1932). ***
> Awards resulting from the Commission's reliance on the testimony of an examining physician over that of a treating physician have been affirmed. See, *e.g., Hartsfield v. Industrial Comm'n,* 241 Ill. App. 3d 1055, 1061, 182 Ill. Dec. 833, 610 N.E.2d 702 (1993); *Presson v. Industrial Comm'n,* 200 Ill. App. 3d 876, 881, 146 Ill. Dec. 164, 558 N.E.2d 127 (1990). The law is clear; it is the Commission's province to determine what weight to give testimony and to resolve any conflicts in testimony. This includes medical testimony and evidence. *Freeman United Coal Mining Co. v. Industrial Comm'n,* 263 Ill. App. 3d 478, 485, 200 Ill. Dec. 886, 636 N.E.2d 77 (1994); *Lo Russo v. Industrial Comm'n,* 258 Ill. App. 3d 59, 71, 196 Ill. Dec. 208, 629 N.E.2d 753 (1994).

Prairie Farms Dairy v. Industrial Comm'n (Kossman), 279 Ill. App. 3d 546, 550-551, 664 N.E.2d 1150, 1153, 1996 Ill. App. LEXIS 321, *9-11, 216 Ill. Dec. 222, 225

In this instance, the Commission finds Dr. Kutnik is more credible than Dr. Paletta, in part based upon his expertise and training including the fact that he studied the elbow as part of his fellowship training. While both doctors have lectured and written on the issue of elbow injuries, it is not clear the extent to which Dr. Paletta focuses on elbow injuries in his practice, but almost one-third of Dr. Kutnik's practice involves elbow injuries. Further, Dr. Kutnik has a particular subspecialty in elbow injuries authoring a "few textbooks about the elbow, including discussions of lateral epicondylitis" during his fellowship. (RX2, 9, 12) Finally, after reviewing the video of the Petitioner's job duties, which Petitioner agreed accurately depicted her job activities, the Commission agrees with Dr. Kutnik that the video of Petitioner's job activities with Respondent showed there is no significant repetition and very little force required.

Further, at the time of his deposition, Dr. Paletta was unaware of the fact that Petitioner had not been working for Respondent for some time, when she was terminated, nor was he aware of her new job duties or even her condition at the time of the deposition. (PX7, 21-23) Finally, the Commission rejects Dr. Paletta's causal opinion related to a correlation with the onset or worsening

of symptoms when he did not know the amount of time Petitioner spent doing each of the activities per workday and he did not know if her symptoms were better or worse since her employment with Respondent terminated. (PX7, 19-20, 21) Dr. Paletta also opined that it is possible for Petitioner to improve without surgery. (PX7, 22) The Commission also notes that both doctors agree that Petitioner had risk factors for developing her condition including her gender, her age, her body mass and smoking which comport with non-dominant arm onset. Further, Dr. Kutnik testified that in the medical literature all epicondylitis cases do not stem from work activities; it is not uncommon to develop idiopathic epicondylitis.

For the all of the afore-referenced reasons, the Commission reverses the Arbitrator's Decision on the issue of accident and vacates the award of medical benefits and prospective medical benefits.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on June 1, 2021, is hereby reversed on the issue of accident rendering all other issues including causal connection moot, the Arbitrator's Conclusions of Law are vacated and the Arbitrator's Decision is otherwise modified for the reasons stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner failed to sustain her burden of proving that an accident occurred that arose out of and in the course of her employment with Respondent on February 14, 2018.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of medical expenses contained in Petitioner's Exhibit 8 is hereby vacated, and compensation for medical benefits is denied. The Respondent shall have credit for any amounts already paid, if any, or paid through its group carrier.

IT IS FURTHER ORDERED BY THE COMMISSION that prospective medical treatment recommended by Dr. Paletta, including, but not limited to, diagnostic, surgical, follow-up and therapy services is denied.

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

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

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

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2) (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.

May 6, 2022

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC006063
Case Name	DAVIS, NORMA v. KRAFT-HEINZ
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	David Galanti
Respondent Attorney	James Clune

DATE FILED: 6/1/2021

INTEREST RATE FOR THE WEEK OF JUNE 1, 2021 0.03%

/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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Norma Davis
Employee/Petitioner
v.
Kraft-Heinz
Employer/Respondent

Case # **18** WC **006063**

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 **April 28, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

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

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

K. [x] Is Petitioner entitled to any prospective medical care?

L. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD

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

N. [ ] Is Respondent due any credit?

O. [ ] Other ____

FINDINGS

On the date of accident, **2/14/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**49,608.00**; the average weekly wage was $**954.00**

On the date of accident, Petitioner was **48** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

The Respondent shall pay the medical expenses contained in Petitioner's Exhibit 8 – with the exception of MultiCare Specialists services from November 26, 2019, through July 28, 2020 -- 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.

Petitioner is entitled to treatment as recommended by Dr. Paletta including, but not limited to, diagnostic, surgical, follow-up and therapy services that he deems necessary to treat the Petitioner's conditions.

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.

Jeanne L. AuBuchon — JUNE 1, 2021

Signature of Arbitrator

PROCEDURAL HISTORY

This matter proceeded to trial on April 28, 2020, pursuant to Sections 19(b) and 8(a) of the Illinois Workers' Compensation Act (hereinafter "the Act"). The issues in dispute are: 1) whether the Petitioner sustained accidental injuries that arose out of and in the course of her employment; 2) the causal connection between the accident and the Petitioner's left elbow and arm conditions; 3) payment of medical bills; and 4) entitlement to prospective medical care to the Petitioner's left arm and elbow.

FINDINGS OF FACT

At the time of the accident, the Petitioner was 48 years old and had been employed by the Respondent as a machine operator for 24 years, running two machines that made Capri Sun drink pouches. (T. 9) The Petitioner described four different duties she performed: box making, replacing rolls, clearing jams and testing pouches. (Id.) She testified that during her box-making duties, she would make two boxes every four and a half minutes. (T. 17) From each box, she would pull two pouches out and inspect them. (T. 19-20) When rolls of material for making the pouches would run out, she would replace the rolls (also referred to as "pouch roll"), which occurred once or twice per shift for large front rolls and every two and a half hours for the smaller bottom rolls. (T. 20-21) The Petitioner would also clear jams from the machines and "spoon" out the pouches to make sure the seals were sufficient. (T. 23-25) She would "spoon" eight pouches every hour. (T. 25) "Pouch rolls" entailed flexing and bending her arms, while "spooning" required pinching and gripping. (T. 27) Clearing jams required pinching, flexing and extending. (T. 27-28)

The Petitioner stated that for a couple of months prior to February 14, 2018, her left arm began feeling sore, with cramping in the arm and numbness in her left ring finger and pinky finger.

(T. 10). As a result, she reported her condition to the Respondent on February 14, 2018, and was sent by the Respondent's safety manager to Gateway Regional Occupational Health Services, where she was diagnosed by Dr. Christopher Knapp with left ulnar nerve pain and numbness with evidence of compromise of the ulnar nerve at the elbow. (T. 10-11, PX1) Dr. Knapp commented that there was no convincing history to say the condition was work-related "at this time," but her symptoms seemed to be more pronounced at work. (PX1) Dr. Knapp recommended that the Petitioner take ibuprofen and kept her at full duty. (Id.)

On February 15, 2018, the Petitioner sought care from her family physicians at MultiCare Specialists. (T. 11-12, PX2) Chiropractor Dr. Mark Eavenson diagnosed her with left ulnar neuropathy and left medial and lateral epicondylitis. (PX2) He ordered nerve conduction tests, an MRI of the Petitioner's left elbow and physical therapy. (Id.) He recommended that the Petitioner use wrist splints, try to avoid repetitive elbow flexion, work as tolerated but avoiding repetitive work and no lifting greater than 10 pounds. (Id.)

The MRI, conducted February 23, 2018, by Dr. David Dusek at MRI Partners of Chesterfield, revealed lateral epicondylitis with tendinosis and partial thickness interstitial tearing of the common extensor tendon with minimal reactive subcutaneous edema in the adjacent soft tissues. (PX6) The nerve conduction studies, conducted by Dr. Daniel Phillips at Neurological and Electrodiagnostic Institute, showed mild demyelinative ulnar neuropathy across the left elbow. (PX5) On February 26, 2018, the Petitioner received a steroid injection in her left elbow. (PX2) She underwent physical therapy at MultiCare Specialists from February 15, 2018, through September 4, 2018, for 50 visits. (Id.) After the injection and during physical therapy, the Petitioner's pain symptoms improved, then worsened, and she continued to experience numbness. (Id.)

In March 2018, Dr. Eavenson and fellow chiropractor Dr. Jonathan Brooks began using cervical spine manipulation to try to ease the numbness symptoms. (Id.) This was unsuccessful, and the Petitioner began experiencing pain and soreness in her neck. (Id.) The neck pain improved following a spinal epidural injection performed by Dr. Helen Blake, an interventional pain physician at Pain and Rehabilitation Specialists of St. Louis on April 25, 2018 and physical therapy. (PX 2, PX4) The arm symptoms did not improve. (PX3)

Dr. Eavenson referred the Petitioner to Dr. George Paletta, an orthopedic surgeon at The Orthopedic Center of St. Louis. (T. 12, PX2, PX3) On June 6, 2018, Dr. Paletta examined the Petitioner, reviewed the nerve conduction studies and MRI and took X-rays, which were normal. (PX3) The Petitioner informed Dr. Paletta that she worked 10-hour shifts. (Id.)

Dr. Paletta diagnosed chronic lateral epicondylitis of the left elbow (tennis elbow), mild cubital tunnel syndrome with demyelinative ulnar neuropathy and possible radial tunnel syndrome. (Id.) He recommended additional nerve conduction studies to look at the radial nerve and stated that he would consider an ultrasound-guided diagnostic injection of the radial tunnel of the nerve conduction studies were normal. (Id.)

On the same day, the Petitioner had a follow-up visit with Dr. Blake and reported to her that the neck pain improved after the injection, but the pain in her forearm and elbow persisted. (PX4)

The Petitioner underwent another steroid injection to her elbow on July 16, 2018, at Multicare Specialists, and her elbow and forearm pain improved again, but that was short-lived. (PX2) A nerve conduction test and ultrasound of the radial nerve conducted by Dr. Phillips were normal. (PX5) On August 13, 2018, the Petitioner had another follow-up visit with Dr. Blake and reported that the injection at Multicare Specialists resolved her pain, but she continued to have

numbness in her fingers. (PX4) Dr. Blake believed that the numbness was unlikely associated with radial tunnel. (Id.)

The Petitioner testified that she received relief of her symptoms for about two months after the first injection and for a couple of weeks after the second. (T. 12)

Dr. Paletta saw the Petitioner again on November 20, 2018, at which time he ruled out radial tunnel syndrome due to temporary relief produced by the injections. (PX3) He gave the Petitioner two treatment options – expectant observation or surgical treatment, which would involve open fasciotomy, debridement and partial lateral epicondylectomy. (Id.)

A Section 12 examination was performed on August 5, 2019, by Dr. Shawn Kutnik, an orthopedic surgeon at Archway Orthopedics and Hand Surgery. (PX2, Deposition Exhibit B) Dr. Kutnik examined the Petitioner, reviewed X-rays, MRI reports and records from MultiCare Specialists, Gateway Regional Occupational Health Services, Dr. Phillips, Dr. Paletta and Dr. Blake. (Id.) He viewed videos of various jobs the Petitioner performed for the Respondent and heard the Petitioner's descriptions of those activities – including changing eight "pouch rolls" every two and a half hours and a couple more at least once every shift. (Id.)

Dr. Kutnik diagnosed the Petitioner with tennis elbow and cubital tunnel syndrome and stated that further treatment (cubital tunnel release and lateral epicondylar debridement) would be appropriate. (Id.) But he determined that these conditions were not causally related to the Petitioner's work activities. (Id.) He stated that the development of a repetitive use injury is predicated on repetitive, forceful activities leading to overstress of the involved areas. (Id.) He opined that the only forceful activities by the Petitioner at work – the "pouch roll" – were far from repetitive. (Id.) Dr. Kutnik found the Petitioner to be at maximum medical improvement "in that

her conditions are not work-related." (Id.) He also determined that work restrictions were not necessary. (Id.)

Dr. Paletta agreed with Dr. Kutnik's diagnoses and treatment recommendations but disagreed with his causation opinion. (PX3) He also reviewed the job video and stated in a letter to the Petitioner's attorney on December 26, 2019, his conclusion that the activities depicted involved hand-intensive activities – especially the "pouch roll" and "spooning." (Id.) He noted that individuals have a wide variation of tolerance for repetitive grip and repetitive hand-intensive activities and that there are no well-defined and universally accepted thresholds above and below which patients will or will not develop symptoms. (Id.)

Dr. Paletta testified consistently with his reports at a deposition on March 4, 2020. (PX7) He opined that the Petitioner's tennis elbow and cubital tunnel syndrome were causally related to her work activities, in that they were a causative or contributing factor to those conditions. Because of the passage of time since the cubital nerve condition studies, he recommended new nerve conduction studies before the recommended surgery. (Id.)

Regarding his viewing of the job video and discussions with the Petitioner regarding her work activities, Dr. Paletta testified as to the specific activities he described as "hand intensive," along with use of a pneumatic tool in "pouch rolling," and how those activities could cause or contribute to the Petitioner's symptoms. (Id.) He reiterated that there is no universally accepted exposure threshold to which repetitive injuries can be attributed, stating: "…in my assessment of patients, what's most important to me are do they do hand-intensive activities or activities that could cause the work-related – the condition; do they correlate the onset of worsening – onset or worsening of symptoms to those activities. If those things are all true, then, in my opinion, it is

more likely than not that the condition is related to the work activities…" (Id.) He said this was the case with the Petitioner. (Id.)

On cross-examination, Dr. Paletta admitted that it was possible that the Petitioner's condition could improve if she were no longer performing forceful gripping activities but added that patients with the same condition also don't improve. (Id.) He testified that smoking and obesity are risk factors for the development of cubital tunnel syndrome, and obesity is a risk factor for cubital tunnel syndrome but not for tennis elbow. (Id.) The Petitioner reported smoking a pack per day for more than 30 years, and she was 5 feet, 5 inches tall, weighing 162 pounds. (Id.)

Dr. Kutnik testified consistently with his report at a deposition on August 25, 2020. (RX2) He described tennis elbow as a repetitive-use injury resulting from repetitive subacute trauma to the tendon that inserts on the outside of the elbow. (Id.) He explained that it is caused by doing a task that involves enough force and repetition that causes micro tears and injury to that tendon. (Id.) If there is inadequate rest or healing between performing that activity, the tears or degenerative areas can become larger and ultimately can lead to a very large tear or simply become symptomatic. (Id.)

Dr. Kutnik focused on the "pouch roll" activity in forming his opinion and characterized the activity as infrequent. (Id.) He stated that the Petitioner did not mention how many pouches she "spooned" per day, nor he did ask her. (Id.) After being informed that the Petitioner "spooned" 80 pouches per day, Dr. Kutnik stated that was "just not really all that much in and of itself."

On cross-examination, Dr. Kutnik testified that the Petitioner's gender was a risk factor for the development of her conditions. (Id.) He also acknowledged that different people have different susceptibilities to repetitive trauma injuries. (Id.) He agreed that some people can develop such conditions as the Petitioner's even with what seemed to be relative innocuous jobs that would not

put most people at risk to developing such conditions. (Id.) Further, he agreed that in the Petitioner's case, conservative treatment failed, and surgery would be indicated for her conditions. (Id.)

The Petitioner testified that she was terminated from her employment because her workers' compensation claim was denied, and she had used all of her time off through the federal Family and Medical Leave Act. (T. 13-14) At the time of Arbitration, the Petitioner was working as a service desk associate at Home Depot. (T. 14) She was still experiencing an achy feeling in her left forearm, numbness in her fourth and fifth fingers and a lack of grip strength. (T.15-16) She wanted to undergo the surgery recommended by Dr. Paletta. (T. 16)

CONCLUSIONS OF LAW

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

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

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 the claimant's employment and (2) that the injury arose out of the claimant's employment. *McAllister v. Ill. Workers' Comp. Com'n, 2020 IL 12484, ¶ 32.*

The phrase "in the course of employment" refers to the time, place and circumstances of the injury. *Id. at ¶34.* A compensable injury occurs in the course of employment when it is sustained while a clamant is at work or while he or she performs reasonable activities in

conjunction with his or her employment. *Id.* In this case, the Petitioner consistently reported that her work activities worsened her pain. This evidence was unrebutted. A similar set of facts can be found in *Peoria County Belwood Nursing Home v. Industrial Com., 115 Ill.2d 524, 530.* Therefore, the Arbitrator finds that the Petitioner's injury occurred in the course of her employment.

The "arising out of" component is primarily concerned with causal connection. *McAllister, 2020 IL 12484, ¶ 36*. To satisfy this requirement, it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Id.* The three categories of risk are: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics. *Id. at ¶38.*

A risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing: (1) acts he or she was instructed to perform by the employer; (2) acts that he or she had a common-law or statutory duty to perform; or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Id. at ¶46.*

The job video showed instances of the Petitioner reaching, pushing, pulling, gripping and using a pneumatic tool in the "pouch roll" activity and sustained gripping in the "spooning" activity. The Petitioner's testimony as to the frequency at which she performed the various tasks and the hand and arm movements that she described and were depicted in the job video was unrebutted. As stated above, she reported that these activities worsened her pain. There was no other explanation for the development of the Petitioner's injuries that could be attributed to a personal or neutral risk.

Next is the requirement that the risk created a causal connection between the employment and the accidental injuries. Drs. Paletta and Kutnik disagreed on this issue. This disagreement is most apparent in their approaches to analyzing the Petitioner's job duties. Dr. Kutnik isolated his analysis to the "pouch roll" activity. He characterized this activity as infrequent. By the Arbitrator's calculations, based on the testimony and what the Petitioner reported to her doctors, the Petitioner changed rolls a minimum of approximately 34 times per day – more when she worked overtime.

Dr. Kutnik's analysis of the "spooning" was more of an aside analysis performed at his deposition. When he prepared his report, Dr. Kutnik did not know the frequency with which the Petitioner performed the other functions he observed in the job videos, with the exception of the "pouch roll." After being informed at his deposition that the Petitioner "spooned" 80 pouches per day, Dr. Kutnik stated that was "just not really all that much in and of itself."

However, he did agree that some people can develop such conditions as the Petitioner's even with what seemed to be relative innocuous jobs that would not put most people at risk to developing such conditions.

The Arbitrator finds Dr. Paletta's opinions to be more persuasive. He looked at the totality of the Petitioner's work activities and found them to be hand intensive. The job video supports this finding. His analysis of whether such activities correlate to the onset or worsening of symptoms led to his conclusion that it was more likely than not that the Petitioner's conditions were related to the work activities. The Arbitrator finds this approach to be logical and based on objective findings.

Therefore, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that her injuries had their origin in a risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury.

When a claimant is injured due to an employment-related risk, 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. *Steak 'n Shake v. Ill. Workers' Comp. Comm'n, 216 IL App 3d 150500WC at ¶38.* Because the Arbitrator finds that an employment risk was present, no further analysis is necessary.

Thus, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that the Petitioner's injuries occurred in the course of and arose out of her employment.

Issue (F): Is Petitioner's current condition of ill-being, specifically her tennis elbow and cubital tunnel syndrome, causally related to the accident?

This issued is addressed above in the analysis of whether the Petitioner's injuries arose out of and in the course of her employment, and the findings above are incorporated herein.

Therefore, the Arbitrator finds that the Petitioner's current tennis elbow and cubital tunnel syndrome are 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 Workers' Compensation Act. *Hagene v. Derek Polling Const., 388 Ill. App. 3d 380, 383, 902 N.E.2d 1269, 1273 (2009).*

Petitioner's Exhibit 8 contains the Petitioner's medical billing information. The billing for MultiCare Specialists includes services for wrist and lumbar injuries from November 26, 2019, through July 28, 2020. These services were unrelated to the Petitioner's tennis elbow and cubital tunnel conditions.

Based on the findings above, all other medical services as listed in Petitioner's Exhibit 8 are found to be reasonable and necessary. Therefore, the Arbitrator orders the Respondent to pay the medical expenses contained in Petitioner's Exhibit 8 – with the exception of MultiCare Specialists services from November 26, 2019, through July 28, 2020 -- 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).

The Petitioner has continued to experience pain in her left arm as well as continued numbness in her fourth and fifth fingers. Both Dr. Paletta and Dr. Kutnik agreed that conservative treatment failed and that surgical treatment would be appropriate.

It should be noted that Dr. Kutnik found the Petitioner to be at maximum medical improvement, despite his finding that surgery would be appropriate. His rationale was that the Petitioner's conditions were not work-related. Basing the need for further treatment on whether

the injury was causally related to her work activities is illogical and does not affect the findings herein.

Therefore, the Arbitrator finds that the Petitioner is entitled to prospective medical care, specifically further evaluation and treatment, including surgical intervention, physical therapy and follow-up care as recommended by Dr. Paletta. 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	18WC030994
Case Name	DANIELS, DONALD v. STATE OF ILLINOIS – CHESTER MENTAL HEALTH CENTER
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0166
Number of Pages of Decision	17
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Aaron Wright

DATE FILED: 5/9/2022

/s/Marc Parker, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Donald Daniels,

Petitioner,

vs. NO: 18 WC 30994

State of Illinois/Chester Mental Health 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 temporary total disability, causal connection, permanent partial disability, medical expenses, prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 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.

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.

May 9, 2022

MP:yl

o 5/5/22
68

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC030994
Case Name	DANIELS, DONALD v. STATE OF ILLINOIS/CHESTER MENTAL HEALTH CENTER
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Aaron Wright

DATE FILED: 11/29/2021

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 23, 2021 0.07%

/s/*Linda Cantrell, Arbitrator*

Signature

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

November 29, 2021

/s/ *Brendon O'Rourke*

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

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DONALD DANIELS
Employee/Petitioner

Case # **18**-WC-**030994**

v.

Consolidated cases:

STATE OF ILLINOIS/CHESTER MENTAL HEALTH CENTER
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Herrin**, on **September 16, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **July 4, 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 $**55,924.48**; the average weekly wage was $**1,075.47**.

On the date of accident, Petitioner was **52** years of age, ***married*** with **1** dependent child.

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

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

Respondent shall be given a credit of **any benefits paid** for TTD, $0 for TPD, $0 for maintenance, and $**any amount paid for extended benefits**, for a total credit of **any TTD and extended benefits paid**.

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

ORDER

Respondent shall pay Petitioner's medical bills contained in Petitioner's Group Exhibit 1, as provided in Section 8(a) and Section 8.2 of the Act, directly to the medical providers and pursuant to the medical fee schedule. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits. The parties stipulate that Respondent shall receive a credit for medical bills paid through its group medical plan, if any, pursuant to Section 8(j) of the Act. Respondent shall further hold Petitioner harmless from all claims or liabilities made by the group medical plan to the extent of such 8(j) credit.

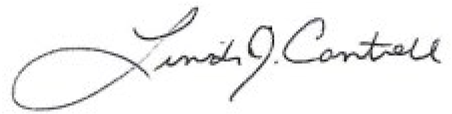
Respondent shall pay Petitioner temporary total disability benefits of $**716.98**/week for the period **March 5, 2019** through **October 31, 2019**, representing **34-3/7** weeks, related to Petitioner's left total knee replacement.

Respondent shall pay Petitioner permanent partial disability benefits of $**645.28**/week for **80.625** weeks, because the injuries sustained caused **37.5**% loss of use of the **left leg**, as provided in §8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued from 5/26/20, the date Dr. Bradley released Petitioner at MMI, through the date of arbitration on 9/16/21, 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.



Arbitrator Linda J. Cantrell

NOVEMBER 29, 2021

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DONAL DANIELS,)
)
Employee/Petitioner,)
)
v.) Case No.: 18-WC-030994
)
STATE OF ILLINOIS/CHESTER)
MENTAL HEALTH CENTER,)
)
Employer/Respondent.)

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on September 16, 2021 on all issues. The parties stipulate that Petitioner sustained injuries that arose out of and in the course of his employment with Respondent on July 4, 2018. The issues in dispute are causal connection, medical expenses, temporary total disability benefits, and the nature and extent of Petitioner's injuries. All other issues have been stipulated.

TESTIMONY

Petitioner was 52 years old, married, with one dependent child at the time of accident. Petitioner is employed by Respondent as a Security Therapy Aide. Petitioner testified that on 7/4/18 he and another STA were breaking up a fight between patients and all four went to the ground and landed on his left knee. Petitioner testified he had no injuries or history of treatment for his left knee prior to the accident. He received emergent treatment and was referred to orthopedist Dr. Davis who performed surgery. Petitioner testified he continued to have pain and swelling in his left knee following surgery. He agreed he received extended benefits pay while he was off work for his initial surgery. Following surgery he worked light duty until he underwent a total knee replacement by Dr. Bradley. He remained off work following his second surgery until 10/31/19 at which time he was released at MMI with restrictions. Petitioner returned to full duty work as a STA.

Petitioner testified he has stiffness with kneeling. He requires assistance standing up from a squatted position or has to push off the ground to stand up. He has pain with standing for long periods of time. He does not take medication for his knee condition and his hobbies have not been affected due to his knee injury.

MEDICAL HISTORY

Petitioner reported to the emergency room at Chester Memorial Hospital on the date of injury. X-rays were negative for fracture. The injury was noted to be "fall, direct blow" as he "[t]wisted, [w]restled a patient to the ground, though Petitioner was unsure if he actually struck his knee against the floor. Petitioner reported he was "taken to the floor" and "had sharp pain when [he] went down." Petitioner was advised to rest over the next few days while using ice and medication and follow up with his primary care provider. Petitioner was examined by Dr. Andrew Yochum at West Frankfort Family Medicine the next day, who noted positive examination findings of marked tenderness, decreased range of motion, and pain with use. Petitioner was given Hydrocodone and taken off work pending an MRI. The MRI revealed a complex tear of the lateral and posterior horns of the medial meniscus with some popliteus tendinopathy tendinosis. Petitioner reported increasing pain and instability and additional pain medication was prescribed. He was referred for orthopedic evaluation.

On 7/30/18, Petitioner was examined by Dr. J.T. Davis who noted progressive pain, popping, and weakness since the injury. Dr. Davis reviewed the MRI films and physical examination was positive for effusion, focal tenderness along the lateral and medial joint lines, and pain with hyperflexion and McMurray's testing laterally. Dr. Davis recommended arthroscopy with partial lateral meniscectomy. On 8/21/18, Dr. Davis performed a partial lateral meniscectomy of the complex traumatic posterior horn lateral meniscus tear, complete synovectomy of the patellofemoral, medial, and lateral compartments, and left knee injection.

On 9/4/18, Petitioner returned to Dr. Davis and physical therapy was ordered. Petitioner participated in physical therapy at NovaCare Rehab; but as therapy progressed, Petitioner's complaints of pain increased from mild to moderate. On 9/21/18, the therapist noted that Petitioner reported increased pain and his progress on range of motion stagnated due to increased pain, swelling, and muscle restrictions.

On 9/24/18, Petitioner was examined by Dr. George Paletta and reported his knee was worse since surgery. He was having difficulty walking and walked with a limp. Physical examination revealed peripatellar tenderness, marked lateral joint line tenderness, and significant limitation in flexion. Dr. Paletta reviewed Petitioner's preoperative MRI and noted multiple objective findings, including moderate soft tissue edema involving the anterior soft tissue structures of the patellofemoral joint, edema at the interphase between the bipartite fragment and the main portion of the patella, and a bipartite patella in addition to the lateral meniscus tearing. His impression was persistent knee pain status post arthroscopy with partial lateral meniscectomy and symptomatic bipartite patella of the left knee. Dr. Paletta believed that Dr. Davis appropriately addressed the lateral meniscus tear, but unfortunately did not address the patellofemoral pain likely related to the bipartite patella. Dr. Paletta recommended a course of conservative care with a Prednisone taper, and a possible revision surgery. He kept Petitioner under restrictions of no standing or walking for more than 15 minutes per hour and no lifting, carrying, pushing, or pulling. He opined Petitioner's current condition of ill-being remained causally connected to his work accident.

On 10/17/18, Dr. Paletta recommended a new MRI that revealed a diminutive and deformed lateral meniscus related to the tear, tricompartmental osteoarthritic changes, and strained lateral patellofemoral retinaculum of the bipartite patella. Dr. Paletta noted Petitioner's osteoarthritis was most severe involving the lateral patellar and tibiofemoral articulations with evidence of Grace III to IV chondrosis with areas of full thickness loss, and edema at the bipartite patella. He recommended an injection and if Petitioner's symptoms failed to improve he recommended a repeat arthroscopy and probable open excision of the bipartite patella.

On 12/12/18, Petitioner underwent an injection administered by Dr. Helen Blake that provided no improvement in his symptoms. Dr. Paletta noted it was difficult to tell how much of Petitioner's symptoms were related to aggravated degenerative joint disease or his bipartite patella; but he observed that in light of the degree of lateral joint line tenderness, a significant component of his pain was emanating from the lateral compartment. He had concern that not all of Petitioner's symptoms were related to the bipartite patella and adjusting that alone would likely not resolve Petitioner's symptoms. Dr. Paletta recommended consultation with Dr. Bradley to determine if Petitioner was a candidate for medial compartmental or total knee replacement. If Dr. Bradley did not feel Petitioner was a candidate for replacement, Dr. Paletta recommended proceeding with a revision arthroscopy.

On 12/20/18, Dr. Bradley took a history of injury and noted Petitioner injured his knee when he fell to the floor while breaking up fighting inmates. Dr. Bradley noted no interval trauma and documented Petitioner's persistent complaints despite the treatment thus far. Dr. Bradley noted Petitioner was pain-free with normal strength before his injury and had not obtained sustained relief since. Physical examination revealed pain medially and laterally. Dr. Bradley administered an ultrasound guided injection and recommended continued light duty. He believed Petitioner was suffering from post-meniscectomy degeneration pain and recommended conservative care. Petitioner returned the following month and reported re-accumulation of knee fluid and increasing pain. Dr. Bradley again performed an ultrasound injection with aspiration and took Petitioner off work. In February 2019, Dr. Bradley noted Petitioner failed to improve with multiple non-operative treatment and arthroscopy. He recommended surgery.

On 3/5/19, Dr. Bradley performed a left total knee replacement/arthroplasty with partial patellectomy, prepatellar bursectomy, and knee injection. Intraoperative findings included non-union of the bipartite patella loss and softening of cartilage over multiple areas of the medial femoral condyle in the medial and lateral tibial plateaus. Dr. Bradley thereafter referred Petitioner for physical therapy.

On 3/11/19, Petitioner was examined by Dr. Michael Nogalski pursuant to Section 12 of the Act. Dr. Nogalski noted Petitioner injured his *right* knee and underwent treatment for his *right* knee, while noting Petitioner had no evidence of knee complaints or treatment prior to the accident. Dr. Nogalski noted Petitioner did horribly following his first surgery and Petitioner reported his knee was shaved so much that he was "bone-on-bone," and his knee filled with fluid. Dr. Nogalski noted Petitioner was having significant pain and swelling but was improving and gaining greater ease of motion in his knee. Dr. Nogalski believed Petitioner suffered from preexisting chondromalacia of the medial femoral condyle and likely some meniscal degeneration in the lateral compartment along with his bipartite patella.

Dr. Nogalski stated that Petitioner was either misinformed or was exaggerating about his treatment with Dr. Davis and overly focused on his postoperative pain. He did not believe there was a causal relationship between Petitioner's current clinical status and the reported accident. He believed the description of the event was relatively vague and that the exact mechanism of injury was not well defined. Dr. Nogalski opined there was no objective correlation in the MRI study nor any objective testing that documented a specific injury to the structures of the knee. He further opined that the July 2018 MRI showed remarkable cystic changes and loss of normal meniscal tissue that were long-standing in nature and would reasonably cause some level of symptomatology. Dr. Nogalski felt there were no findings to suggest Petitioner's symptoms were coming from the patella or the lateral compartment and he felt the articular cartilage was relatively normal. He opined that the treatment by Dr. Davis was reasonable and necessary, as was the post-arthroscopy physical therapy and subsequent injections performed by Dr. Blake. However, Dr. Nogalski did not believe the total knee replacement was related to Petitioner's work accident. He opined Petitioner was not at MMI from his knee replacement and still required sedentary work restrictions.

Dr. Nogalski reviewed additional medical records and authored an addendum to his Section 12 report. He noted that Dr. Bradley's description of Petitioner's articular surface issues were much different than those of Dr. Davis. Dr. Nogalski believed that the mechanisms of injury available for consideration would not cause the type of diffuse articular cartilage change, which he stated were genetic rather than traumatically induced. His original opinion with regard to causality and the reasonableness and necessity of Petitioner's treatment was unchanged.

Follow-up visits show Petitioner made slow progress following the replacement surgery, therapy, and pain management. Petitioner had occasional complaints of weakness and pain, especially as he attempted to return to light duty work. He was given a handicap placard to reduce the amount of walking and he was kept on anti-inflammatory medication. On 8/15/19, Petitioner presented to the emergency room at Herrin Hospital for significant pain and swelling. He was assessed with possible DVT, but the ultimate impression was cellulitis. As Petitioner continued to improve, he reported stiffness and was given a brace for swelling and pain. Petitioner experienced another episode of pain and redness in his left leg that caused him to limp and prompted him to be evaluated for infection, but testing was negative for same. He was placed on Keflex and advised to continue his rehabilitation program. On 10/31/19, Petitioner reported subsidence in pain and swelling and was released to return to full duty work. Follow up visits show no loosening or complications of his hardware with marked improvement in his pain complaints. Petitioner was given a hot wrap to address his residual pain and inflammation and instructed to use same three times per hour.

Petitioner continued to report intermittent residual symptoms during his final treatment visit on 5/26/20 but was overall substantially improved. Notwithstanding, he reported aggravation of his pain with use of steps, ladders, and prolonged walking. Dr. Bradley placed Petitioner at MMI.

Dr. Nogalski testified by way of evidence deposition on 8/26/19. Dr. Nogalski testified consistent with his findings and opinions in his reports and stated that the reference to

Petitioner's right knee was a scrivener's error. He agreed that Petitioner's bipartite patella was congenital but stated there were no acute bone marrow signal changes to suggest Petitioner suffered injury or strain to that aspect of his knee. He opined there was no causal connection between Petitioner's current clinical status and the reported work accident and that Petitioner's current symptoms were emanating from preexisting conditions. He opined that Petitioner's imaging studies did not show osteoarthritis issues severe enough to warrant a total knee replacement. Dr. Nogalski stated that Petitioner's subsequent studies showed atraumatic articular changes because there was no bone marrow signal change about the preexisting pathology.

On cross-examination, Dr. Nogalski testified that he limits the number of total knee replacements he does in his practice, and unless it is a well-established, long-time patient of his, he refers them to another surgeon for the procedure. He admitted that Petitioner's records revealed no evidence of complaints or need for treatment before the accident. However, he stated there was nothing in the records to indicate Petitioner sustained a direct blow to his left knee. He testified that he did not believe a lateral meniscus tear could be caused by direct trauma but could be caused by twisting of the knee. He admitted that either twisting or direct trauma could aggravate a previously asymptomatic lateral meniscus tear. He did not agree that Petitioner's aggravation caused a structural abnormality accountable for his current symptoms. When asked whether Petitioner's accident could cause pain in his knee that would not resolve without surgery, Dr. Nogalski stated, "No. It's really kind of tricky, awkward question that I'm pausing just for a sec to think about. In the specifics of this matter, I don't think the "might or could" sort of considerations reasonably apply. It's reasonable that you could have some sort of pain in the knee if there's meniscal problems, but I don't believe there's any clear way to validate that someone's subjective complaints could continue and persist in this sort of situation especially when they weren't there to begin with. He had medial sided pain, not lateral pain before the MRI study was done. Once the MRI study was done, then it was lateral. That's a little awkward in terms of sort of pattern of facts I see here."

Dr. Nogalski testified that sometimes patients with lateral meniscal pathology have medial sided symptoms and vice versa. He stated that there is typically a more concise history of events to validate the complaints when this occurs; but he acknowledged that in an injury such as Petitioner's that occurred during a fight, it was possible, but not reasonable in his opinion, that Petitioner did not know exactly how or at what moment his injury occurred. Dr. Nogalski admitted that Petitioner did not do well following Dr. Davis' surgery, but he felt Petitioner was impatient with his post-operative recovery. He felt Petitioner's complaints were common and could often improve with rehab rather than a knee replacement. He acknowledged that Petitioner treated with Dr. Paletta and was referred for injections prior to presenting to Dr. Bradley to consider a knee replacement. Despite acknowledging no prior history of complaints he could not comment on whether Petitioner was ever able to return to his preinjury baseline following his accident because he did not know what Petitioner's complex lateral meniscus tear felt like before his accident. Dr. Nogalski did not comment or explain why Petitioner's osteoarthritic changes progressed from Grade I to II prior to his first arthroscopy to Grade III to IV following same as he was unaware of such documentation and was not in possession of the MRI review conducted by Dr. Paletta which corroborated Dr. Bradley's notation of said changes. Dr. Nogalski acknowledged that preexisting degeneration can be asymptomatic but disagreed that Petitioner's

post-injury changes represented an acceleration of normally expected degenerative changes. He disagreed that Petitioner needed a total knee replacement.

Dr. Paletta testified by way of evidence deposition on 1/29/20. Dr. Paletta is a board-certified orthopedic surgeon. He testified that based on his evaluation and review of Petitioner's diagnostic studies, Petitioner suffered from persistent knee pain following his arthroscopy and partial meniscectomy as well as symptomatic bipartite patella of the left knee. He testified that Petitioner's work injury was the type of injury to cause a meniscal tear and cause the congenital bipartite patella to become symptomatic. Dr. Paletta testified that aggravation of the bipartite patella was evident by the edema or inflammation at the interface between the two fragments. He stated that Petitioner's MRI following the arthroscopy revealed progression of arthritis involving the outside part of Petitioner's knee where the meniscus had been removed. He further testified that based on Petitioner's response to conservative care and the findings evidenced by further x-rays, it was clear to him that Petitioner was having some continued pain from his patella, in addition to pain related to the lateral compartment, and had objective evidence that the lateral compartment arthritis was progressing rapidly. Dr. Paletta believed that addressing the kneecap alone would not improve Petitioner's condition so he referred him to Dr. Bradley. Dr. Paletta testified that it was evident the need for this evaluation was a consequence of Petitioner's work accident, because over a relatively short period of time, from his injury to arthroscopy to the most recent x-rays, Petitioner had significant advancement of lateral compartment arthritis, more so than one would expect from the natural history of that condition without the intervening injury and the surgery to remove part of the meniscus.

Dr. Matthew Bradley testified by way of evidence deposition on 6/6/19. Dr. Bradley is an orthopedic surgeon that treats traumatic injuries and performs joint replacements. Dr. Bradley stated that his review of Petitioner's objective diagnostic imaging demonstrated that Petitioner underwent a very large resection of his lateral meniscus and a very significant worsening of the thinning of his cartilage or loss of cartilage, in addition to the significant inflammation about his bipartite patella. Dr. Bradley noted a significant amount of fluid on Petitioner's knee. He acknowledged that the injection ordered by Dr. Paletta provided some pain relief. Petitioner presented to him with a lot of knee pain and a recurrence of a very large effusion. He testified that following meniscal tears and arthroscopy the joint can become irritated and cause fluid, which occurred in Petitioner's case. He testified that if a patient has early signs of arthritis, which Dr. Davis documented in the operative note that Petitioner had very early signs (Grade I and II), sometimes the production of that fluid can get underneath the cartilage and cause rapid loss of cartilage. He stated that is what his impression was with respect to Petitioner's condition. He stated that once this process starts, the cartilage gets destroyed rapidly and the only treatment option is a knee replacement.

Dr. Bradley testified that the history and mechanism of Petitioner injury while breaking up an altercation was entirely consistent with a meniscal tear. He testified that Petitioner's degradation and need for knee replacement post arthroscopy was also a phenomenon occasionally seen in his practice. He opined that based on the totality of evidence the initial injury that resulted in the meniscus tear led to the need for arthroscopic surgery and the subsequent need for a knee replacement. Dr. Bradley testified that most of the time when people wear out their knee they wear it out like a tire on a car or all the way around, not just in pockets.

He testified that Petitioner's knee was different in that parts of his knee had potholes where the cartilage had been completely separated from the underlying bone and had flaked off. He observed a couple of pretty good-sized potholes, about half an inch by half an inch, in a couple of different locations. He opined that these findings come from the very large resection of Petitioner's lateral meniscus which left very little meniscus remaining putting a lot of pressure on the cartilage. He stated that bone touching bone created a significant amount of fluid in Petitioner's knee that was able to get between the cartilage and the bone and cause the cartilage to separate from the bone and flake off, leading to the large potholes.

Dr. Bradley attributed Petitioner's condition and need for treatment to the 7/4/18 work accident and strongly disagreed with Dr. Nogalski's conclusion that Petitioner's degenerative arthritis at its current severity was a long-standing condition. He based his opinion on Dr. Davis' intraoperative observance of the arthritic condition of Petitioner's knee, which was mostly very minimal degenerative changes of Grade I and II, that are very consistent with an individual of Petitioner's age and size. There were no findings of any kind of severe arthritis. He testified that at the time of Dr. Davis's surgery, no surgeon would have recommended a total knee replacement. There was a very drastic change in the thinning and appearance of the cartilage from Dr. Davis's surgery to the total knee replacement. Dr. Bradley also noted that the portions of Petitioner's cartilage that did not have "potholes" looked relatively normal, which further supported his opinion.

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, 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 III.App.3d 92, 96-97, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 111.2d 59, 442 N.E.2d 908 (1982).

In addition, the employee is entitled to benefits where a second injury occurs due to treatment for the first. See *Shell Oil Co. v. Indus. Comm'n*, 2 Ill. 2d 590, 119 N.E.2d 224 (1954); *International Harvester Co. v. Indus. Comm'n*, 46 Ill.2d 238, 263 N.E.2d 49 (1970); *Lincoln Park Coal & Brick v. Indus. Comm'n*, 317 Ill. 302, 148 N.E. 79 (1925); *Harper v. Indus. Comm'n*, 24 Ill.2d 103, 180 N.E.2d 480 (1962), *Brookes v. Indus. Comm'n*, 78 Ill.2d 150, 399 N.E.2d 603 (1979); *Tee Pak, Inc. v. Indus. Comm'n*, 141 Ill.App.3d 520, 490 N.E.2d 170 (1986). Courts have consistently held 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." *Vogel*, 354 Ill. App. 3d 780, 786, 821 N.E.2d 807,

812 (2005). Where the second injury occurs due to treatment for the first, there is no break in the causal chain. *International Harvester supra*.

In addition, a claim is not denied simply because a claimant suffers from a preexisting condition. 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).

Based upon the evidence, the Arbitrator finds that Petitioner's current condition of ill-being subsequent to his arthroscopy and partial meniscectomy is causally related to his undisputed work accident. The Arbitrator does not find the basis for Dr. Nogalski's opinions reasonable, including his assessment of the mechanism of injury as vague and insufficient to support a finding of causal connection. The Arbitrator finds his evasive testimony when questioned about the progression of Petitioner's decline following the first surgery particularly damaging to his opinion, which was further compounded by the fact he did not have Dr. Paletta's subsequent MRI review.

The Arbitrator finds the testimony of Drs. Paletta and Bradley persuasive, as it is in harmony with both circumstantial evidence, which demonstrates a clear chain of events establishing an asymptomatic condition prior to the accident with an instantaneous and persistent decline in Petitioner's left knee subsequent thereto, and the objective diagnostic and intraoperative evidence showing significant acceleration of Petitioner's ill-being as a result of his first operation. Petitioner's well-being prior to the accident is unrebutted, as is the evidence showing that Petitioner's congenital bipartite patella was aggravated by a chain of events and inflammation that followed as a natural consequence from the injury. As a result, the Arbitrator finds Petitioner's current condition of ill-being in his left knee is causally connected to his work injury of 7/4/18.

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

Upon a claimant's establishment of a causal nexus between injury and illness, employers are responsible for the employees' medical care reasonably required in order to diagnose, relieve, or cure the effects of the claimant's injury. *Plantation Mfg. Co. v. Indus. Comm'n,* 294 Ill.App.3d 705, 691 N.E.2d 13 (2000); *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill.App.3d 527, 758 N.E.2d 18 (1st Dist. 2001). Based upon the above findings as to causal connection, the Arbitrator finds Petitioner's total knee replacement reasonable, necessary, and related to the

work accident. While Dr. Nogalski found that Petitioner was "rushed to replacement," the Arbitrator does not agree based on the evidence. The medical evidence shows that the decision to proceed with replacement was not based on mere dissatisfaction or stagnation of progress with post-operative recovery but based on rapid decline following his first operation. The Arbitrator finds it significant that the therapist reported Petitioner was beginning to exhibit increased pain, swelling, and restriction of motion despite therapy. Moreover, Petitioner had already tried and failed conservative care through injections, and Drs. Paletta and Bradley both observed rapid degradation in specific areas of Petitioner's cartilage.

Therefore, the Arbitrator finds that Petitioner is entitled to medical benefits. Respondent shall pay Petitioner's medical bills contained in Petitioner's Group Exhibit 1, as provided in Section 8(a) and Section 8.2 of the Act, directly to the medical providers and pursuant to the medical fee schedule. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits. The parties stipulate that Respondent shall receive a credit for medical bills paid through its group medical plan, if any, pursuant to Section 8(j) of the Act. Respondent shall further hold Petitioner harmless from all claims or liabilities made by the group medical plan to the extent of such 8(j) credit.

Issue (K): 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. Indus. Comm'n*, 126 Ill. App. 3d 739, 743, 467 N.E.2d 1018, 1021 (1984).

Based upon the above findings as to causal connection and the reasonableness and necessity of Petitioner's need for a left total knee replacement, the Arbitrator awards Petitioner temporary total disability from the date of his knee replacement surgery on 3/5/19 through 10/31/19 when he was released to return to full duty work, representing 34-3/7th weeks.

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011, are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

(i) **Level of Impairment**: Neither Party submitted an AMA rating. Therefore, the Arbitrator gives no weight to this factor.

(ii) **Occupation**: Petitioner continues to serve as a Security Therapy Aide for Respondent. The record reflects that Petitioner has difficulty with prolonged walking, kneeling, and squatting. Given the nature of and risk posed by his employment, the Arbitrator places greater weight on this factor.

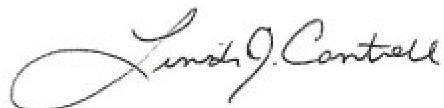
(iii) **Age**: Petitioner was 52 years old at the time of his injury. He has diminished healing capacity as a result thereof and must live and work with his disability for a number of years. The Arbitrator places some weight on this factor.

(iv) **Earning Capacity**: There is no evidence of reduced earning capacity contained in the record. Petitioner returned to his pre-accident position with Respondent. The Arbitrator places some weight on this factor.

(v) **Disability**: As a result of his work accident, Petitioner suffered a complex medial meniscal tear along with aggravation of his preexisting congenital bipartite patella compounded by rapid progression of his preexisting osteoarthritis secondary to his first surgical procedure, which ultimately led to left total knee replacement. Despite the progress resulting from extensive surgical and post-operative care, Petitioner continued to report intermittent residual symptoms during his final treatment visit on 5/26/20. He reported aggravation of his pain with use of steps, ladders, and prolonged walking. Dr. Bradley placed Petitioner at MMI with no restrictions. Petitioner testified he has stiffness with kneeling and often requires assistance standing from a squatted position. Petitioner testified he has soreness with prolonged standing. Petitioner does not take medication for his knee condition and his hobbies have not been affected. The Arbitrator places greater weight on this factor.

Based upon the foregoing factors and the record as a whole, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 37.5% loss of use of his left leg, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued from 5/26/20, the date Dr. Bradley released Petitioner at MMI, through the date of arbitration on 9/16/21, and shall pay the remainder of the award, if any, in weekly payments.



Linda J. Cantrell, Arbitrator

Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC020616
Case Name	PHILLIPS, ALEXANDER v. H&M INTERNATIONAL TRANSPORT
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0167
Number of Pages of Decision	36
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Cassandra Shashaty
Respondent Attorney	Miles Cahill

DATE FILED: 5/9/2022

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS	)		
	) SS.		
COUNTY OF COOK	)		

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ALEXANDER PHILLIPS,

Petitioner,

vs. NO: 19 WC 20616

H & M INTERNATIONAL TRANSPORT,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, temporary total disability benefits, medical expenses, prospective medical treatment, benefit rate, Section 19(k) penalties, Section 19(l) penalties and attorney's fees pursuant to Section 16, 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).

The Commission affirms the Arbitrator's decision as to accident, date of accident, causation, medical expenses, and prospective medical treatment and the duration of payment of temporary total disability benefits. However, the Commission reverses the Arbitrator with respect to the calculation of the average weekly wage and the corresponding temporary total disability rate.

The Commission further affirms the award of 19(k) penalties and Section 16 attorney's fees, but modifies the amount of the award based on calculating penalties owed at the temporary total disability rate corresponding to the average weekly wage to which the parties stipulated. The Commission also modifies the award of Section 19(l) penalties and finds same is to be calculated based on a period of 133 days, from October 8, 2020 through February 17, 2021 (the date of hearing).

The parties stipulated to an average weekly wage of $990.00. The corresponding temporary total disability rate is calculated at 2/3 of the average weekly wage which equals $660.00. Neither party offered a wage statement or earnings records into evidence. Petitioner did not provide any testimony regarding his earnings or wages. Petitioner's average weekly wage was not an issue either party disputed.

Respondent offered a temporary total disability and medical payments printout into evidence (Rx9). Said printout did not specifically identify Petitioner's average weekly wage or corresponding temporary total disability rate. The printout merely identified the periods for which temporary total disability benefit payments were made, the number of weeks for which temporary total disability benefits were paid and the amounts of temporary total disability paid.

The Arbitrator calculated the temporary total disability rate by dividing the total amount of temporary total disability benefits paid by the number of weeks temporary total disability benefits were paid, arriving at a temporary total disability rate of $929.91 and an average weekly wage of $1,394.86. The Arbitrator cites to *Old Ben Coal v. Industrial Commission*, 198 Ill.App.3d 485 (5th Dist. 1990) in support of his authority to disregard the parties' stipulation regarding average weekly wage and asserts his decision in this matter is not bound by a previous contradictory stipulation.

In *Old Ben Coal*, the parties stipulated to an average weekly wage at hearing. The Appellate Court set aside the stipulation finding that in calculating a wage differential award pursuant to Section 8(d)(1) of the Act, wage differential awards are based on the amount claimant would be able to earn at the time of the hearing if claimant were able to fully perform the duties of the occupation in which he was engaged at the time of the accident. *Old Ben Coal*, 198 Ill.App.3d at 493. (*Citing General Electric Co. v. Industrial Comm'n*, 144 Ill.App.3d (1986.))

The Appellate Court held in that other evidence produced, namely records reflecting Petitioner's classification in the union at the time of the injury, should be used to calculate the wage Petitioner would be able to earn at the time of the hearing rather than the stipulated amount he earned in the year preceding the accident. *Old Ben Coal*, 198 Ill.App.3d at 493.

In the instant case, the parties stipulated to an average weekly wage of $990.00. In the absence of evidence such as a wage statement, earning records or testimony by Petitioner regarding his wages, the temporary total disability and medical payments printout fails to provide all of the information necessary to calculate the average weekly wage or to construe the parties' stipulation as being contrary to the "correct" average weekly wage.

The Commission does not find *Old Ben Coal* to be applicable in the instant case, but instead finds this case to be similar to *Walker v. Industrial Commission,* 345 Ill.App.3d 1084 (4th Dist. 2004). In *Walker*, the Arbitrator found Petitioner was entitled to temporary total disability benefits for a period of 112 weeks. The Commission subsequently modified the Arbitrator's decision and reduced the award of temporary total disability to 29 6/7 weeks. The claimant appealed the Commission's decision arguing that because the employer had indicated on the "Request for Hearing" form the claimant was temporarily and totally disabled for 84 weeks, the Commission lacked the authority to reduce his temporary total disability benefits below that level. Claimant further contended that the Commission lacked the power to modify temporary total disability benefits to any less than 84 weeks because the statement on the Request for Hearing was in effect a

stipulation by the employer. The Appellate Court agreed with the claimant's argument and enforced the stipulation.

Additionally, the Appellate Court in *Walker* cited to the applicable administrative regulation regarding requests for hearings contained in 50 Ill. Adm. Code §7030.40. The applicable part of that section provides:

> Before a case proceeds to trial on Arbitration, the parties (or their counsel) shall complete and sign a form provided by the Industrial Commission called Request for Hearing. The completed Request for Hearing Form, signed by the parties (or their counsel) shall be filed with the Arbitrator *as the stipulation of the parties* and a settlement of the questions in dispute in this case.
> *Emphasis added*

The Appellate Court noted the language of §7040.40 indicates the Request for Hearing is binding on the parties as to claims made therein.

Accordingly, the Commission finds that in this case, the parties' stipulation to an average weekly wage of $990.00 is binding. The Commission further finds the Arbitrator exceeded his authority in disregarding the stipulation and extrapolating a different average weekly wage based on the incomplete information contained in the temporary total disability benefits and medical payments printout (Rx9).

The Arbitrator is affirmed as to the duration of temporary total disability benefits due and owing for the period from October 8, 2020 through December 17, 2020 (10.143 weeks), as that is the period of time Dr. Salehi took Petitioner off work due to an exacerbation of his lower back condition. However, the Commission modifies the award of temporary total disability benefits to apply the proper benefit rate. Based on an average weekly wage of $990.00 as per the parties' stipulation, the temporary total disability rate is $660.00. A duration of 10.143 weeks at $660.00 results in $6,694.38 in temporary total disability benefits due and owing.

Finally, the Arbitrator appropriately awarded penalties and fees. Respondent provided no good and just cause as to the failure to pay the outstanding temporary total disability, outstanding medical, or even the denial of prospective medical treatment. However, the Commission modifies these awards to reflect the proper benefit rate, as well as the proper duration of penalties.

Section 19(l) is compulsory. It serves to act as a late fee for failure to pay. Petitioner repeatedly asked for payment of benefits and authorization for surgery. Not only did Respondent fail to put in writing the reason for delay, the Respondent did not even have the courtesy to respond.

Section 19(l) states:

> (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.
> *Emphasis added.*

The evidence supports that several written demands for payment of outstanding benefits and authorization for prospective treatment were made. [Px9] Therefore, penalties under Section 19(l) are appropriate. The Commission affirms the Arbitrator's award of Section 19(l) penalties at $30/day not to exceed $10,000. However, the Commission modifies the applicable time period for which Section 19(l) penalties are awarded.

The Arbitrator awarded penalties pursuant to Section 19(l) "for each day that Respondent fails to pay TTD from October 8, 2020 through date of payment." The Commission modifies the award to reflect that Section 19(l) penalties are to be calculated for the period from October 8, 2020 through February 17, 2021, the date of hearing. Therefore, the Commission awards penalties pursuant to Section 19(l) for the period beginning October 8, 2020 through February 17, 2021 (133 days), at a rate of $30/day in the amount of $3,990.

Additionally, the evidence supports a finding of the imposition of penalties pursuant to Sections 16 and 19(k).

Section 19(k) states:

> (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.
> When determining whether this subsection (k) shall apply, the Commission shall consider whether an Arbitrator has determined that the claim is not compensable or whether the employer has made payments under Section 8(j).

Emphasis added.

Section 16 states in pertinent part:

> 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* under-payment 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.

Emphasis added.

Although the Respondent disputed the accident of November 12, 2018 at the time of trial, (*See* stip sheet) Respondent paid temporary total disability benefits from November 13, 2018 through April 28, 2019. Respondent also paid some of Petitioner's medical bills. The Commission acknowledges this is not an admission of liability. It was not until the hearing on Arbitration on February 17, 2021 that Respondent disputed accident. Moreover, Respondent did not offer any reason as to why it chose to terminate benefits as of October 2020 or why it would not authorize the surgical procedure recommended by Dr. Salehi.

As early as April 25, 2019 Dr. Salehi recommended surgery. (Px12) The recommendation for surgery was made after Petitioner failed conservative treatment and conditioned on the Petitioner quitting smoking. Additionally, Petitioner underwent 2 independent medical examinations and it was made known an addendum was requested (though Respondent failed to produce the report or respond to requests for same for over 6 months). Respondent objected to the introduction of any of the reports on the grounds of hearsay and that the Section 12 examiner was not an agent of Respondent, so the Arbitrator correctly made an adverse inference. At no time was Petitioner released from care nor determined to be at MMI.

In denying compensation, the Respondent has not reasonably relied in good faith on a medical opinion and has not met the burden of demonstrating a reasonable belief that its denial of liability was justified under the circumstances. In *Bd. of Educ. v. Indus. Comm'n (Tully)*, 93 Ill.2d 1 (1982), the Illinois Supreme Court held that where a delay has occurred in payment of worker's compensation benefits, the employer bears the burden of justifying the delay and the standard we hold him to is one of objective reasonableness in his belief. Thus it is not good enough to merely assert honest believe that the employee's claim is invalid or that his award is not supported by the evidence; the employer's belief is "honest" only if the facts which a reasonable person in the employer's position would have. *Tully*, 93 Ill.2d at 9-10. The Court added in *Bd. Of Ed. V. Indus. Comm'n* (*Norwood)*, 93 Ill.3d 20, 25 (1982) that the question whether an employer's conduct justifies the imposition of penalties is a factual question for the Commission. The employer's conduct is considered in terms of reasonableness. *Id*. The test is not whether there is some conflict in medical opinion. Rather, it is whether the employer's reliance on the medical opinion to contest liability is reasonable under all the circumstances presented. *Avon Prods. V. Indus. Comm'n*, 82 Ill.2d 297, 302 (1980). Moreover, the Appellate Court has noted that the burden of proof of the reasonableness of its conduct is upon the employer. *Consol. Freightways, Inc. v. Indus. Comm'n*, 136 Ill.App.3d 630 (1985); accord, *Ford Motor Co. v. Indus. Comm'n*, 140 Ill.App.3d 401 (1986).

The Commission affirms the Arbitrator's award of penalties under Section 19(k) for unpaid temporary total disability, however, modifies the award based on a temporary total disability rate of $660.00 representing 2/3 of the $990.00 average weekly wage to which the parties stipulated. The Commission therefore awards Section 19(k) penalties in the amount of $3,349.19 (50% of the TTD award of $6,694.38). Further, the Commission affirms the award of attorney's fees pursuant to Section 16 of the Act, in the amount of $1,338.87 (20% of the unpaid TTD of $6,694.38)

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $660.00 per week for a period of 10.143 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,946.06 for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for Petitioner's prospective surgery pursuant to the recommendations of Dr. Salehi, namely a right L4-5 transforaminal lumber interbody fusion.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner penalties of $3,347.19 as provided in Section 19(k) of the Act, $3,990.00 as provided in Section 19(l) of the Act, and shall pay attorney's fees in the amount of $1,338.87 as provided in Section 16 of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $8,741.00. 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.

May 9, 2022

/s/ *Maria E. Portela*

MEP/dmm
O: 030822
49

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION 22IWCC0167
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

PHILLIPS, ALEXANDER Case# **19WC020616**
Employee/Petitioner

H&M INTERNATIONAL TRANSPORT
Employer/Respondent

On 3/24/2021, 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:

0222 GWC INJURY LAWYERS LLC
CASSANDRA SHASHATY
ONE E WACKER DR 38TH FL
CHICAGO, IL 60601

1872 SPIEGEL & CAHILL PC
MILES CAHILL
15 SPINNING WHEEL RD
HINSDALE, IL 60521

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

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

Alexander Phillips
Employee/Petitioner
v.
H&M International Transport
Employer/Respondent

Case # **19** WC **20616**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **February 17, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. ☒ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

H. ☐ What was Petitioner's age at the time of the accident?

I. ☐ What was Petitioner's marital status at the time of the accident?

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

K. ☒ 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, **11-12-18**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**72,532.72**; the average weekly wage was $**1,394.86**.

On the date of accident, Petitioner was **41** years of age, ***married*** with **2** dependent children.

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

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

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

ORDER

Respondent shall pay the reasonable and necessary medical expenses as follows subject to the fee schedule, 8(a) and 8.2 of the Act: **$53.84** to Illinois Orthopedic Network and **$1,892.22** to Concentra.

Respondent shall pay Petitioner temporary total disability benefits of **$929.91**/week for **10.143** weeks, commencing **October 8, 2020** through **December 17, 2020**, as provided in Section 8(a) of the Act.

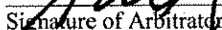
Respondent shall authorize and pay for Petitioner's prospective surgery pursuant to the recommendations of Dr. Salehi, namely a right L4-L5 transforaminal lumbar interbody fusion.

Respondent shall pay to Petitioner penalties of **$1,886.42,** as provided in Section 16 of the Act; **$4,716.04**, as provided in Section 19(k) of the Act; and **$30 per day, not to exceed $10,000.00 for each day that Respondent fails to pay TTD from October 8, 2020 through the date of payment**, as provided in Section 19(l) of the Act.

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

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

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



Signature of Arbitrator

03-22-21
Date

MAR 2 4 2021

Alexander Phillips
Employee/Petitioner

Case # **19** WC **20616**

v.

H&M International Transport
Employer/Respondent

DECISION OF ARBITRATOR

FINDINGS OF FACT

Alexander Phillips ("Petitioner") was an employee of H&M International Transport ("Respondent") on November 12, 2018 ("date of accident"). On this date, Petitioner alleges accidental injuries to his abdomen and low back sustained while performing his normal job duties for Respondent.

In his regular course of employment with Respondent, Petitioner serves as a diesel mechanic working on trucks in the UP rail yard. His job is to repair and maintain diesel engines for trucks. Petitioner is a full-time employee and usually works 60-70 hours per week. (Tx. 8). Petitioner has been an employee of the Respondent for approximately 20 years. (Tx. 8). Petitioner testified that on November 12, 2018 he felt fine and had no problems in any of his body parts prior to reporting to work for the Respondent. (Tx. 9). Petitioner reported for work for the Respondent on this date and was working on a spotter truck, which he described as a mini semi-truck. (Tx. 9). Specifically, the axel of the spotter truck was just rebuilt, and it was his job to put that axel back on the truck, to install and bolt it back into place. (Tx. 10). In order to do this, he needed to lift and move a brake drum that weighed approximately 85 pounds. (Tx. 10). Petitioner testified that while the brake drum was in his hands, his right leg slid on oil on the ground, causing him to slip into a split position and twist his body. (Tx. 9 -11). Petitioner testified that a truck tire caught his fall and his back sat on the tire. (Tx. 36). Petitioner stated this caused him pain in his stomach and the

lower part of his back. (Tx. 13). Petitioner was unaware of the oil on the ground, as he testified that he learned there was a truck behind him with a blown hydraulic line. (Tx. 9-10). Petitioner stated that after falling, he shouted for help and another mechanic, Glen Glies, came to his attention. (Tx. 37). After falling, Petitioner did not want to be touched so remained seated for approximately 15 minutes. (Tx. 37-38). After getting himself off the ground, he reported his injury to his terminal manager, Andrew, and completed an accident report. (Tx. 12). During his testimony, Petitioner expressed being in significant pain after the fall so he did not want to be bothered and did not want to immediately see a doctor. (Tx. 40). Petitioner had no intention to "self-treat" himself after his accident, he simply did not want to be moved and bothered immediately after his sudden onset of pain. (Tx. 40). Petitioner testified he went to Concentra approximately 20-30 minutes later, at the instruction of his employer. (Tx. 41).

Petitioner presented to Concentra on November 12, 2018. Petitioner saw Taral Patel, PT and presented with complaints consistent with an umbilical hernia, pain across his lower back, and stiffness in his right leg. (Px. 1). Mr. Patel relayed that Petitioner was experiencing increased pain with walking, standing, and prolonged sitting. (Px. 1). Mr. Patel stated Petitioner's mechanism of injury was "picked up a brake drum, right leg slid on oil and he twisted." (Px. 1). Physical therapy for two weeks, three times a week was ordered and Petitioner was placed on physical restrictions. (Px. 1). The Respondent was unable to accommodate Petitioner's restrictions, so Petitioner did not return to work. (Tx. 13). Instead, Petitioner was issued temporary total disability ("TTD") benefits from the Respondent. (Rx. 9).

Petitioner presented for a follow up appointment at Concentra on November 14, 2018 and saw Dr. Jose Ayala. Petitioner reported his back pain to be unchanged since his last visit at an 8/10, and he had radiation of pain and stiffness to his lower right extremity. (Px. 1). Dr. Ayala

noted that Petitioner's symptoms occurred constantly and the pain is sharp and aching in nature. (Px. 1). Dr. Ayala's assessment of Petitioner was a lumbar strain and an umbilical hernia. (Px. 1). Dr. Ayala ordered a lumbar MRI and provided Petitioner with work restrictions of no lifting, pushing or pulling more than 5 pounds occasionally; may bend occasionally; no driving the company vehicle, and no operating heavy machinery. (Px. 1).

Petitioner underwent a lumbar spine MRI on November 15, 2018 at Preferred Open MRI. The MRI revealed a disc bulge at L4-5 causing moderate to severe foraminal and central canal stenosis; disc bulges at L3-4 and L5-S1 causing moderate foraminal and central canal stenosis; and multilevel spondylosis. (Px. 3).

Petitioner followed up with Dr. Ayala on November 21, 2018. Petitioner presented on this date with unchanged pain complaints in his lower back and pain radiating into his right lower extremity. (Px. 1). Dr. Ayala stated that Petitioner has been taking his medication as prescribed but his symptoms have not resolved. (Px. 1). Dr. Ayala referred Petitioner to neurosurgery and issued work restrictions of no lifting, pushing or pulling more than 5 pounds occasionally and may bend occasionally. (Px. 1).

On November 26, 2018, Petitioner attended a consultation with general surgeon, Dr. Irvin Wiesman at Concentra. Dr. Wiesman stated that Petitioner works as a semi-truck mechanic and on November 12, 2018 he was lifting approximately 100 pounds and slipped awkwardly. (Px. 10). Dr. Wiesman stated that Petitioner then developed back pain and felt a pop in his abdomen before developing a mass in the umbilical region. (Px. 10). Dr. Wiesman noted that Petitioner had no history of prior hernias. In reference to Petitioner's past medical history, Dr. Wiesman stated it is "significant only for orthopedic issues." (Px. 10). Dr. Wiesman kept Petitioner on his same work restrictions and ordered hernia repair surgery. (Px. 10).

Petitioner underwent hernia repair surgery with Dr. Wiesman on December 18, 2018 at Illinois Orthopedic Network's surgical facility. (Px. 4). The indication listed on the operative report states that Petitioner "suffered a strain at work" and his subsequent exam was consistent with an umbilical hernia. (Px. 4). No surgical complications were noted.

Petitioner attended a post-operative appointment with Dr. Wiesman on December 26, 2018. Petitioner presented with tenderness around the incision, which appeared to be well-healed. (Px 4). Dr. Wiesman stated Petitioner should remain off-work while healing from surgery and should follow up with him in 3-4 weeks. (Px. 4).

Petitioner followed up with Dr. Wiesman for his hernia repair again on January 21, 2019. Dr. Wiesman stated Petitioner was doing well and there was no sign of recurrent hernia. (Px. 10). Dr. Wiesman discharged Petitioner from his care. (Px. 10). Petitioner required no further treatment for his hernia after this date.

Petitioner attended a consultation with Dr. Sean Salehi from Concentra's neurosurgery department on January 28, 2019. Dr. Salehi stated that Petitioner was injured at work on November 12, 2018 while lifting a brake drum when he slipped on oil on the ground, twisting his body. (Px. 10). He stated Petitioner felt a pop in his stomach and his low back immediately. (Px. 10). Dr. Salehi confirmed that Petitioner had hernia surgery as a result of this injury. (Px. 10). Dr. Salehi described Petitioner's current complaints as right-sided low back pain with radiation down his right leg to his right big toe. (Px. 10). Dr. Salehi observed Petitioner's slow gait and stated he had a positive straight leg raise test. (Px. 10). Dr. Salehi reviewed Petitioner's November 15, 2018 lumbar spine MRI and interpreted disc disease at L4-L5 and significant bilateral foraminal stenosis at L4-L5. (Px. 10). Dr. Salehi recommended that Petitioner undergo one to two right L4-L5 transforaminal epidural steroid injections and to resume physical therapy. Dr. Salehi noted

Petitioner was taking 4 tabs of Ultram a day and also prescribed him Mobic, Tramadol, and Robaxin. (Px. 10). Dr. Salehi ordered Petitioner to follow up with him in 4 weeks and issued work restrictions of no lifting, pushing or pulling more than 10 pounds, no bending or twisting more than 3 times an hour, and to alternate sitting and standing every 30-45 minutes as needed. (Px. 10).

Petitioner participated in physical therapy at Concentra on February 1, February 5, February 7, February 12, and February 14, 2019. Petitioner transitioned his therapy prescription to ATI, where he attended an initial evaluation on February 19, 2019. Therapy notes from this date state that Petitioner presented with low back pain and associated right lower extremity pain from work injury on November 12, 2018. (Px. 6). Notes from this date further state that Petitioner presented with decreased lumbar range of motion, strength, flexibility, joint mobility, sensation, soft tissue mobility and increased pain. (Px. 6). Petitioner attended approximately 26 physical therapy session at ATI between February 19, 2019 and April 12, 2019. (Px. 6).

Petitioner testified that he attended an independent medical examination ("IME") with Dr. Robert Strugala on February 21, 2019. (Tx. 22). Petitioner testified that after this IME, he continued to receive TTD benefits because his employer still could not accommodate his physical restrictions. (Tx. 23).

On February 25, 2019, Petitioner attended a consultation with pain management specialist, Dr. Sajjad Murtaza at Concentra. Petitioner was referred to Dr. Murtaza by Dr. Salehi for consideration of an injection. (Px. 4). Dr. Murtaza stated that Petitioner was "injured at work on November 12, 2018 when he was lifting a big drum and had slipped on some oil on the floor and eventually injured his lower lumbar spine." (Px. 4). Petitioner did not recall telling Dr. Murtaza he "eventually" injured his back. (Tx. 49). Petitioner confirmed that he relayed an accurate and honest description of his accident to Dr. Murtaza, which was consistent with descriptions relayed to his

other doctors that included immediate pain to his back. (Tx. 24). Regardless of the implication of the word "eventually" in his treatment note, Dr. Murtaza stated that Petitioner's slip resulted in pain in his low back and stomach. (Px. 4). Dr. Murtaza confirmed that Petitioner's hernia surgery was a result of Petitioner's November 12, 2018 injury. (Px. 4). Dr Murtaza noted Petitioner's pain complaints were right sided low back pain that radiated down his right lower extremity into his right foot. (Px. 4). Dr. Murtaza relayed that physical therapy has not been much help to Petitioner and listed a formal diagnoses of lumbar radiculopathy, right side lumbar disease at L4-L5 and foraminal stenosis, and nerve impingement at L4-L5. (Px. 4). Dr. Murtaza agreed with Dr. Salehi that Petitioner may benefit from an injection so instructed Petitioner to schedule the same and follow up him with him afterwards. (Px. 4). Dr. Murtaza kept Petitioner on the same work restrictions issued by Dr. Salehi. (Px. 4).

Petitioner followed up with Dr. Murtaza on March 25, 2019 where Petitioner complained of increased shooting pain and numbness down his lower right extremity, which had worsened over the last month. (Px. 12). Dr. Murtaza prescribed Petitioner Gabapentin to help with his neuropathic pain and instructed him to follow up two weeks after having his injection. (Px. 12).

Petitioner underwent a right epidural steroid injection at L4-L5 with Dr. Murtaza on March 28, 2019. (Px. 4).

Petitioner followed up with Dr. Murtaza on April 15, 2019, at which time he presented with increased pain after his injection, rating it at a 10/10. (Px. 12). Dr. Murtaza stated Petitioner felt worse after the injection and reported having significant shooting pain down his right leg into his right big toe. (Px. 12). Dr. Murtaza dispensed Gabapentin and referred Petitioner back to Dr. Salehi for further treatment recommendations. (Px. 12).

Petitioner presented for the last time to ATI on April 19, 2019, in which his physical therapy specialist stated that Petitioner experienced moderate regression due to the injection he received on March 28, 2019. (Px. 6). Per Dr. Murtaza, physical therapy was to be put on hold until after Petitioner follows up with Dr. Salehi. (Px 6). Petitioner was tentatively discharged from physical therapy pending additional orders from Dr. Salehi. (Px. 6).

Petitioner followed up with Dr. Salehi on April 25, 2019. Dr. Salehi noted that the injection made Petitioner's symptoms worse. (Px. 12). He stated Petitioner experienced severe burning and tingling in his low back and down both legs. (Px. 12). He stated that Petitioner continued to have low back pain during this appointment with pain shooting down his right leg into his right foot. (Px. 12). He noted that Petitioner complained of tingling in his left foot as well since the injection. (Px. 12). Dr. Salehi discussed surgical intervention in the form of a right L4-L5 transforaminal lumbar interbody fusion, but stated Petitioner would need to quit smoking prior to having this surgery. (Px. 12). Dr. Salehi prescribed Petitioner with Robaxin and Ultram; and kept him on the same light duty work-restrictions previously issued. (Px. 12).

The Respondent became able to accommodate Dr. Salehi's light duty restrictions on April 29, 2019 so Petitioner returned to work with restrictions. Petitioner was paid all TTD owed from the date accident through April 28, 2019. (Rx. 9).

Petitioner followed up with Dr. Salehi on May 24, 2019 at which time he presented with constant pain in his low back with radiation down the bilateral legs, right more so than left; that is associated with burning and tingling sensations. (Px. 12). Dr. Salehi noted that Petitioner smoked his last cigarette on May 7, 2019 and that he went for a nicotine screening. (Px. 12). Dr. Salehi stated that considering Petitioner had quit smoking, he recommended proceeding with surgical intervention in the form of a right L4-L5 transforaminal lumbar interbody fusion. (Px. 12). Dr.

Salehi kept him on the same light duty work-restrictions previously issued (Px. 12), that the Respondent continued to accommodate.

Petitioner followed up with Dr. Salehi on June 20, 2019 with continued complaints of low back pain with a tingling, numbness, and burning sensation going down his right leg. (Px. 2). Dr. Salehi stated Petitioner had been having episodes of his leg giving out and that pain medication has not been effective. (Px. 2). Dr. Salehi again recommended proceeding with the fusion surgery pending authorization from the Respondent, and kept Petitioner on the same light duty work restrictions he previously ordered. (Px. 2).

Petitioner followed up with Dr. Salehi again on September 12, 2019 with the same continued complaints of low back pain with a tingling, numbness and burning sensation going down his right leg. (Px. 2). Dr. Salehi noted that Petitioner can no longer lay flat otherwise he will get cramps in his leg. (Px. 2). Petitioner has been sleeping in a recliner chair to try to avoid leg cramps. (Px. 2). Surgical intervention is still recommended pending authorization from the Respondent. (Px. 2). Dr. Salehi kept Petitioner on the same light duty restrictions he previously ordered, that the Respondent continued to accommodate.

Petitioner testified that he attended a second IME with Dr. Robert Strugala on September 27, 2019. (Tx. 27-28). Petitioner testified that after this IME, he remained on the same work restrictions issued by Dr. Salehi and his treatment recommendation remained unchanged from the fusion surgery recommended by Dr. Salehi. (Tx. 28).

Petitioner attended follow up appointments with Dr. Salehi on October 24, 2019, November 7, 2019, November 21, 2019, December 19, 2019, January 30, 2020, March 12, 2020, July 16, 2020 and September 10, 2020. Treatment notes from each of these dates of service document Petitioner presenting with ongoing complaints of significant constant low back pain with

pain and numbness radiating into his right leg. (Px. 2). Petitioner continued to have leg cramping and continued to work under Dr. Salehi's light duty restrictions. (Px. 2). Dr. Salehi continued to recommend the same fusion surgery. (Px. 2).

Petitioner followed up with Dr. Salehi on October 8, 2020 and presented with increased pain complaints rated at a 10/10 with pain shooting down his right leg with cramps and tingling since October 4, 2020. (Px. 11). Dr. Salehi stated Petitioner had been off-work since that time and then placed Petitioner in an "off-work" status due to the increased pain he experienced at work that week, and continued to recommend the fusion surgery. (Px. 11).

Petitioner attended follow up appointments with Dr. Salehi on October 22, 2020 and November 19, 2020. During both appointments Petitioner presented with ongoing low back pain, cramping in his right leg, and a numbness and tingling sensation of the lower right extremity. (Px. 11). Dr. Salehi kept Petitioner in an "off-work" status and continued to recommend the same fusion surgery. (Px. 11).

Petitioner followed up with Dr. Salehi on December 17, 2020 and again presented with pain in his lower back radiating down his right leg with a tingling sensation extending into his right foot. (Px. 11). Dr. Salehi returned Petitioner to his prior light duty work restrictions of no lifting, pushing, or pulling more than 10 pounds, no bending or twisting more than 3 times an hour, and alternate sitting and standing every 35 minutes. (Px. 11). This was the last appointment Petitioner attended related to this date of accident prior to the hearing on February 17, 2021.

Petitioner testified that he did not receive TTD benefits for his lost time from October 8, 2020 through December 17, 2020. (Tx. 32). Petitioner testified that as of the date of the hearing, he remained in pain and described his radicular complaints as shooting pins and needles in his right leg. (Tx. 33). Petitioner stated that he can no longer comfortably lay flat, otherwise he will

develop charley horses in his right leg. (Tx. 33). As a result, Petitioner has been sleeping in a recliner chair instead of in his bed. (Tx. 33). Petitioner testified that he remains on the light duty restrictions prescribed by Dr. Salehi, that Respondent continues to accommodate. (Tx. 32). To date, Petitioner is still waiting for his fusion surgery that was ordered on May 24, 2019. (Tx. 32).

Petitioner briefly testified about back pain he experienced in early 2015 and relative treatment with Dr. Bernard Slusinksi. Petitioner expressed confusion and lack of memory at the subject, but after hearing Dr. Slusinksi's name, recalled seeing him and recalled why. (Tx. 39). Petitioner stated he was injured in 2015 while working for the same Respondent, H&M International Transport, when he was walking up the steps of a mobile trailer to enter his office when the stairs detached from the trailer, causing Petitioner to fall and land on his rear end. (Tx. 71-72). Petitioner reported the incident to at least three of his superiors and was asked to get examined by a doctor. (Tx. 72). Petitioner was advised that although it is company policy to go to Concentra for work-injuries, he could not do so because the Respondent's account at Concentra was delinquent from not paying other employees' bills. (Tx. 73). Petitioner was referred to Dr. Slusinki by a coworker. (Tx. 74). Petitioner saw Dr. Slusinksi on two occasions. (Tx. 74). Dr. Slusinksi ordered a MRI, which Petitioner had on March 10, 2015 (Rx. 2) and then instructed Petitioner to participate in home therapy exercises. (Tx. 74). Petitioner described his back as being "sore" and "bruised" after this incident. (Tx. 74). Besides the two appointments with Dr. Slusinksi, no other medical treatment was sought or ordered for this 2015 incident. No formal therapy was recommended, no injections, and no surgical recommendation was made. (Tx. 75). Petitioner did not lose any time from work related to this 2015 incident, he did not retain an attorney because he did not believe there were any problems, and he did not receive any compensation whatsoever

from the Respondent for this incident. (Tx. 75). No Application for Adjustment of Claim was filed with the Commission for this 2015 incident. (Tx. 84).

Petitioner also testified about a 2007 workers' compensation claim he had with the same Respondent, H&M International Transport. (Tx. 58). Petitioner sustained work-related injuries on November 5, 2007 ("2007 injury") to both of his shoulders. (Rx. 7). Petitioner participated in a course of treatment that included three or four shoulder surgeries; one of which involved removing a rib. (Tx. 69). Petitioner attended a functional capacity exam on May 7, 2009, the results of which placed him at a sedentary/light physical demand level. (Rx. 6). Specifically, the report stated Petitioner was capable of occasionally lifting 12 pounds from the floor and approximately 6 pounds above shoulder level. (Rx. 6). Petitioner testified that he no recollection of ever receiving permanent restrictions consistent with the May 7, 2009 FCE report. (Tx. 58). Petitioner testified that he does recall attending a FCE, that he may have attended two FCEs, but could not remember. (Tx. 57, 70). Only one FCE was entered into evidence. Petitioner testified that his only permanent physical restriction from his 2007 work-injury was that of no overhead lifting with his right arm. (Tx. 56, 57, 63, 64, 70). Petitioner further stated that since the time he returned back to work after his 2007 injury, the Respondent has successfully accommodated his no overhead lifting restriction and he worked under that restriction up until the date he was injured on November 12, 2018. (Tx. 71). Petitioner recalled being discharged from care likely at the end of 2009 or beginning of 2010. (Tx. 70). Petitioner was compensated for his lost time related to his 2007 injury and received a settlement award in the amount of $96,000.00. (Tx. 58, 60). The Respondent entered into evidence a copy of the settlement contract from the 2007 injury that was approved on May 3, 2012. (Rx. 7). Counsel asked Petitioner about a hand-written amendment made on the front of this contract, to which Petitioner admitted being unable to read, but agreed it involved his permanent physical

restrictions he was left with as a result of his 2007 injury. (Tx. 62). Petitioner testified that he was able to return to his regular job with the Respondent, as they were able to accommodate his permanent restriction of no overhead lifting with his right arm. (Tx. 61). Petitioner testified that on the face of the settlement contract, the check box that states "no" was checked off with regard to whether Petitioner returned to his regular job. (Tx. 62, 63, Rx. 7). Petitioner stated he did not know why that box was checked off, that he did not do it himself. (Tx. 62, 63). The checkmark in the box was handwritten and there is no indication as to whether it was made before or after Petitioner signed the contract. Petitioner reiterated that he was able to return to his regular job with the Respondent and that his permanent restriction of no overhead lifting with his right arm was accommodated.

Counsel for Respondent questioned Petitioner about his decision to retain Counsel on July 16, 2019. (Tx. 51, Rx. 1). Petitioner testified that he retained counsel in July of 2019 because he was waiting on surgery authorization that had yet to be issued by the Respondent. (Tx. 77). Specifically, Petitioner stated he felt as if the Respondent was "game playing" in that they had authorized all of his prior medical treatment and then after his surgical recommendation, everything "came to a stop." (Tx. 78). Petitioner testified that his decision to retain Counsel did not result in additional and more frequent medical treatment. (Tx. 54, 55). Petitioner stated that prior to retaining Counsel in July 2019, he attended appointments at Concentra approximately every two weeks to once a month. (Tx. 76). Petitioner further stated that after retaining Counsel in July 2019 he continued to treat at Concentra approximately once a month. (Tx. 76). Petitioner did not switch doctors after retaining Counsel.

ADVERSE INFERENCE ARGUMENT

The Arbitrator notes that two IME reports related to Petitioner's November 12, 2018 date of accident with the Respondent exist. Petitioner testified that he recalled attending them and attempted to have the two IME reports entered into evidence, but the Respondent's hearsay objection was sustained. Aside from the two IME reports, the Arbitrator took judicial notice that an IME addendum dated July 23, 2020 is in existence. The Arbitrator will further take notice that the Respondent was in possession of all three of these reports, as the Respondent scheduled the appointments, paid for the appointments, requested the Petitioner to attend, and then unilaterally contacted the IME physician to request an addendum. The Arbitrator finds that the Respondent's failure to admit these reports into evidence creates a rebuttable presumption that the reports are in the Petitioner's favor and support the finding of a work-related injury as well as a causal connection for his surgical necessity. A similar fact pattern is portrayed in *Wasfi Alsaraj v. Taxi Affiliation Services*, 12 IL.W.C. 41848, 14 I.W.C.C. 0217 (2014). In this case, the Petitioner attended an independent medical examination at the request of the Respondent. *Wasfi Alsaraj v. Taxi Affiliation Services*, 12 IL.W.C. 41848, 14 I.W.C.C. 0217 (2014). The IME report was in the Petitioner's favor. *Id.* Petitioner sought to have the IME report admitted into evidence, but the Respondent objected due to hearsay. *Id.* The Arbitrator found that regardless of admissibility, "the fact the Respondent had access to an IME report from their own physician and chose not to present it at trial allows for an inference that the report would not have been favorable for Respondent." *Id.* As such, in her decision, the Arbitrator assigned weight to her inference that an IME report existed that would be favorable to the Petitioner, and she found in favor of the Petitioner on all issues. *Id.* The Arbitrator's finding regarding her inference drawn from Respondent's failure to admit the report in evidence was affirmed on review before the Commission. *Id.* As such, the

Arbitrator in this case at hand will also make the inference that two IME reports and an addendum exist that are favorable to the Petitioner.

CONCLUSIONS OF LAW

The Arbitrator incorporates the above findings of fact herein by reference. The issues presented include arising out of, accident, causal connection, medical expenses, prospective medical treatment, temporary total disability, and penalties.

I. IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Petitioner has met his burden of proof by a preponderance of the credible evidence that an injury occurred on November 12, 2018 that arose out of and in the course of his employment with Respondent. In Illinois, a Petitioner must establish that their injury arose out of and in the course of their employment. *Paganelis v. Indus. Comm'n*, 132 Ill.2d 468, 480 (1989). For an injury to "arise out of" employment, it must have 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. *Caterpillar Tractor Co. v. Indus. Comm'n*, 129 Ill.2d 52, 58 (1989). Petitioner must show, through a preponderance of the evidence, that the injury was caused or aggravated by the work accident, and not simply a result of a normal daily activity. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 214 (2003). The increased risk may also be qualitative when some aspect of the employment contributes to the risk, such as the dangerous nature of navigating a stairwell multiple times per day. *Illinois Consol. Tel. Co. v. Indus. Comm'n*, 314 Ill. App. 3d 347, 353 (2000).

Petitioner testified that on the date of accident he was employed by the Respondent as a mechanic whose job duties included working, repairing, and maintaining truck engines. This position requires Petitioner to physically, lift, move, and manipulate large and heavy objects to

complete truck maintenance and repairs. Petitioner testified that he worked in this capacity on November 12, 2018 and in the process of installing an axel to a truck, he lifted a brake drum, slipped on oil with the drum in his hands, twisted his body, and fell. Petitioner testified having pain in his stomach and lower back immediately after this incident and said pain is the only reason why he presented to Concentra the same day.

The Respondent has offered no alternate means of causation for Petitioner's hernia or back pain. All of Petitioner's medical records document consistent descriptions of this accident and all records relate Petitioner's diagnoses to his described mechanism of injury that occurred at work.

The Arbitrator finds the testimony of Petitioner credible. The Respondent has offered no reliable evidence to challenge Petitioner's credibility or to cast doubt on the mechanism of his injury. The Arbitrator finds Petitioner's testimony consistent, if not identical, to statements and complaints documented in his medical records. Therefore, the Arbitrator finds that Petitioner suffered injuries to his abdomen and lower back in the course of his employment with Respondent while performing job duties within the scope of his position. The Arbitrator further finds that Petitioner was exposed to an increased risk of hazards in the workplace, since Petitioner performed his job duties for the Respondent at a railyard surrounded by trucks waiting for maintenance with the potential to leak oil, which is not something that the general public would risk exposure to.

II. IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (D), THE DATE OF THE ACCIDENT, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Petitioner has met his burden of proof by a preponderance of the evidence that his current condition of ill-being occurred on November 12, 2018. In all of Petitioner's medical records entered into evidence, Petitioner describes an identical mechanism of injury that occurred on November 12, 2018 while he was at work for the Respondent. Petitioner testified that he was hurt at work on November 12, 2018 and the Arbitrator finds Petitioner and his testimony credible as

Petitioner appeared honest and his testimony was consistent with statements from his medical records. The Arbitrator notes that Petitioner worked at a railway with many security cameras and agrees with the Petitioner's testimony that his accident was likely on camera. The Arbitrator notes that the Respondent has not offered anything into evidence to refute Petitioner's date of accident. The Arbitrator concludes that Petitioner sustained a work-related injury on November 12, 2018.

III. IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Petitioner has met his burden of proof by a preponderance of the evidence that his current condition is causally related to the accident at work. The claimant bears the burden of establishing that an alleged accident was the cause, or at least a "causative factor" in the injury. *All Steel, Inc. v. Indus. Comm'n*, 221 Ill.App.3d 501 (Ill. App. 2d Dist. 1991). Furthermore, employers take their employees as they find them. *Baggett v. Indus. Comm'n*, 201 Ill. 2d 187, 199 (2002). Recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Caterpillar Tractor Co. v. Indus. Comm'n.*, 92 Ill. 2d at 36.

When Petitioner left for work the day of the accident, he was in satisfactory health, did not have pain in any parts of his body, and was not under the care of any other doctors. In fact, Petitioner testified that the last time he had back pain was six years ago when he had a minor work injury in 2015, that did not require any medical treatment. Petitioner's work-injury that occurred on November 12, 2018 was the sole reason necessitating his initial appointment at Concentra, and the only reason that necessitated follow up appointments with Dr. Ayala, Dr. Wiesman, Dr. Salehi, and Dr. Murtaza. Petitioner's medical records are clear that the only reason a fusion surgery has been ordered is because of his abnormal findings at L4-L5 with radicular complaints that was

caused by his work injury on November 12, 2018. Prior to November 12, 2018, Petitioner did not have any surgical recommendations to his back.

The Arbitrator finds that Petitioner's testimony regarding the cause of his injury credible. The Arbitrator notes that the act of repairing and maintaining truck engines requires the lifting and moving of large and heavy engine parts and other objects. The Arbitrator further notes that in an area of trucks being repaired, it is not unlikely that oil would have been on the ground. The Arbitrator concludes that the work-related injury on November 12, 2018 "caused" Petitioner's condition of ill-being.

The Arbitrator notes that the Respondent entered into evidence a MRI Report of Petitioner's lumbar spine dated March 10, 2015, but assigns no weight to this record. (Rx. 2). While testifying, Petitioner described a work-injury occurring for the same Respondent in 2015 and stated he had an MRI done as a result. In light of the minimal MRI findings, Petitioner received no formal treatment recommendations. In fact, Petitioner only attended two doctor's appointments related to this incident and did not lose any time from work. It is evident that Petitioner's 2015 work-injury has no bearing on his current condition of ill-being. As such, the Arbitrator finds that this MRI report is irrelevant. The Arbitrator finds that this record does not disprove Petitioner's current cause of ill-being as being work-related. In the event that the Arbitrator finds this exhibit to be relevant, the Arbitrator subsequently finds that any pre-existing diagnoses the Petitioner may have had do not expel the Respondent from liability of Petitioner's November 12, 2018 date of accident. The law in this matter is clear that an employer takes the employee as they are (*Baggett*), and that a preexisting condition that may make an employee more vulnerable to injury does not bar recovery. (*Caterpillar*).

The Arbitrator assigns no weight to Respondent's Exhibits 4, 5, 6, and 7. These exhibits are records and documents from a work-injury that occurred 13 years ago in 2007 to Petitioner's shoulders. They document Petitioner receiving permanent physical restrictions as a result of his 2007 injury and him being released from Dr. Marra's care on May 21, 2009. Petitioner adamantly testified that he had never seen or heard of the restrictions outlined in Rx. 6, and that in fact, his only permanent restriction from his 2007 work-injury was that of no overhead lifting with his right arm. It is evident that the Respondent is raising the argument that on November 12, 2018, Petitioner was working outside of the permanent restrictions ordered by Dr. Marra in 2009, and that is why he was injured. Petitioner's testimony was unwavering in that his only physical restriction was that of no overhead lifting with his right arm. In fact, he stated so seven (7) times during his testimony. (Tx. 56, 57, 63, 64, 70). Furthermore, Petitioner recalled treating after May 2009 and even thought he may have attended a second FCE. The Arbitrator cannot rule out that additional records dated after May 2009 exist that may describe permanent restrictions consistent with the ones Petitioner described in his testimony. Lastly, the Arbitrator notes that between 2009 and 2018, Petitioner successfully performed his job for the Respondent without issue under the restriction of no overhead lifting with his right arm. Had Petitioner's physical restrictions been more cumbersome than simply no overhead lifting with his right arm, Petitioner likely would have encountered issues or injury as a result in this approximate nine year time span. As such, the Arbitrator finds Respondent's Exhibits 4, 5, 6, and 7 are irrelevant and finds that they do not disprove the Petitioner's current cause of ill-being as being work-related.

The Arbitrator assigns no weight to Respondent's Exhibit 8 as it is irrelevant. This exhibit is a toxicology report from an April 18, 2019 urine test. The report states Petitioner tested positive for hydrocodone, hydromorphone, norhydrocodone, tramadol, desmethyltramadol, and cotinine.

The toxicology report fails to note that Petitioner was prescribed various medications by Dr. Salehi including Tramadol, Ultram, Mobic, and Robaxin; and prescribed Gabapentin by Dr. Murtaza. In fact, the section where prescribed medications are supposed to be listed is left blank. (Rx. 8, P. 3). It appears that this test was ordered by Dr. Murtaza, and that Dr. Murtaza indicated "no drugs prescribed" on an authorization order that he electronically signed. (Rx. 8, P. 6). This is obviously incorrect, as Dr. Salehi's records clearly indicate that Petitioner had been taking various pain medications that he continued to actively prescribe. Furthermore, Petitioner admitted he smoked cigarettes prior to May 7, 2019, so the presence of cotinine in his system on April 18, 2019 is of no relevance. The Arbitrator finds that this exhibit not disprove Petitioner's current cause of ill-being as being work-related and does not tarnish his credibility.

The Arbitrator finds that the Respondent has not produced any evidence to contradict the causal connection between Petitioner's work accident, his diagnoses, and recommended treatment. The Arbitrator notes that attempts to refute causality were made by the Respondent but such attempts failed. The Arbitrator has inferred that the Dr. Strugala's two IME reports and his addendum are in Petitioner's favor due to Respondent's failure to produce them while they were in control of them; and Petitioner's testimony that his benefits from the Respondent were not terminated after either of his IMEs. The preponderance of the evidence, taken as a whole, establishes that the Petitioner has a current condition of ill-being of his back and abdomen, which is causally related to the injury on or about November 12, 2018.

IV. IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (J), WHETHER THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER WERE REASONABLE AND NECESSARY, AND WHETHER RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Petitioner has met his burden of proof by a preponderance of credible evidence that the medical services provided were reasonable and necessary. Petitioner has produced corresponding medical records to his outstanding medical bills. The corresponding medical records document Petitioner attending appointments due to pain stemming from his November 12, 2018 work-injury. Petitioner's positive lumbar MRI serves as objective evidence that Petitioner's complaints of pain were appropriate and valid. The fact that Petitioner required no additional treatment to his abdomen after his hernia repair surgery is objective evidence that the surgery was appropriate and necessary.

The Arbitrator finds that the Respondent has already paid for the majority of Petitioner's related medical expenses (Rx. 9), but that two balances remain unpaid in the following accounts:

1) Illinois Orthopedic Network: Dr. Wiesman and Dr. Murtaza — $53.84
2) Concentra — $1,892.22

Respondent has not paid all appropriate charges. As such, the Arbitrator orders the Respondent issue payment to the above providers pursuant to the Illinois fee schedule.

V. IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (K) PETITIONER'S PROSPECTIVE MEDICAL CARE, THE ARBITRATOR CONCLUDES AS FOLLOWS:

The Arbitrator finds that Dr. Salehi's surgical order for a right L4-L5 transforaminal lumbar interbody fusion and postsurgical rehabilitative care is causally necessitated by Petitioner's work-injury that occurred on November 12, 2018. Dr. Salehi is a trained neurosurgeon and spine specialist, who has referenced a causal necessity for this surgery is his medical records. He first suggested a reasonable course of conservative care that failed to relieve Petitioner of his condition of ill-being. In fact, the injection Petitioner underwent caused him more pain, which in part led to Dr. Salehi's opinion that Petitioner was a surgical candidate.

The Arbitrator finds that the Respondent has not produced any evidence indicating that Dr. Salehi's surgical recommendation is not causally necessitated by Petitioner's work injury or that it would be unreasonable; and that no evidence refuting Dr. Salehi's recommendation exists.

As such, the Arbitrator orders the Respondent to pay for Petitioner's right L4-L5 transforaminal lumbar interbody fusion, postsurgical rehabilitative care, and any other reasonable medical expenses related to Petitioner's back injury including but not limited to medications, imaging exams, and follow-up doctor's appointments.

VI. IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (L) WHAT TEMPORARY TOTAL DISABILITY BENEFITS ARE IN DISPUTE, THE ARBITRATOR CONCLUDES AS FOLLOWS:

The Arbitrator finds that the Respondent correctly issued temporary total disability (TTD) benefits to the Petitioner related to his November 12, 2018 date of accident for a period of time of November 13, 2018 through April 28, 2019 at $929.91 per week. (Rx. 9). Petitioner has proven by the preponderance of the credible evidence that he was owed temporary total disability benefits for this time period, as he was either placed in an off-work status or placed on light duty restrictions that the Respondent could not accommodate. The Arbitrator notes that TTD benefits were ceased on April 28, 2019 because the Respondent became able to accommodate Petitioner's light duty restrictions as ordered by Dr. Salehi, so Petitioner returned to work. The Arbitrator finds that Petitioner successfully worked under Dr. Salehi's light duty restrictions from April 29, 2019 through October 4, 2020. The Arbitrator finds that Petitioner presented to Dr. Salehi on October 8, 2020 and complained of worsening pain beginning on October 4, 2020. As such, Petitioner was placed in an off-work status on October 8, 2020. The Arbitrator finds that Petitioner remained in an off-work status by Dr. Salehi from October 8, 2020 through December 17, 2020. The Arbitrator finds that Petitioner's off-work status was corroborated by his complaints of increased pain he

demonstrated at each of his doctor's visits. Therefore, the Arbitrator concludes that Petitioner is entitled to temporary total disability benefits for a period of 10.143 weeks, from October 8, 2020 through December 17, 2020.

The Arbitrator notes that the parties made an error on the Request for Hearing sheet labeled as Arbitrator's Exhibit 1, in which the parties stipulated to a $990.00 average weekly wage. The correct average weekly wage should be $1,394.86, which is consistent with Respondent's Exhibit 9. The Arbitrator has the authority adopt Petitioner's $1,394.86 average weekly wage in writing his decision, as his decision on this matter is not bound by a previous contradictory stipulation. The parties' prior contradictory stipulation with regard to Petitioner's average weekly wage does not prevent Petitioner from asserting this instant argument. *Old Ben Coal v. Industrial Com'n*, 198 Ill.App.3d 485 (199). In *Old Ben Coal*, the parties' stipulated to an average weekly wage at hearing, but the Appellate Court affirmed the Commission's decision to calculate the petitioner's wages based on other evidence produced, and not the amount stipulated to. *Id. at 493*. Similarly, in this instant case, the Arbitrator should calculate Petitioner's average weekly wage pursuant to Respondent's Exhibit 9, and not the contradictory stipulation.

Furthermore, the parties' cannot bind a court by stipulating to a question of law or the legal effects of facts. (*Domagalski v. The Industrial Comm'n* (1983), 97 Ill.2d 228, 73 Ill.Dec. 435, 454 N.E.2d 295). Controverted issues are defined by the parties' conduct during trial and not a contradictory prior stipulation. *Neal v. The Industrial Comm'n* (1986), 141 Ill.App.3d 289, 95 Ill.Dec. 651, 490 N.E.2d 124.

The Arbitrator recognizes that he is not bound by the $990.00 average weekly wage that the parties' incorrectly stipulated to during hearing. The Arbitrator notes that Respondent's Exhibit 9 was entered into evidence without objection and neither party raised any issue to the TTD rate

the Respondent previously calculated and outlined in this exhibit. Respondent's Exhibit 9 shows that Petitioner's previous TTD was paid at a $929.91 TTD rate, which would amount to a $1,394.86 average weekly wage. Pursuant to *Neal,* issues at hearing should be defined by the parties' conduct and not their prior incorrect stipulations. As such, the parties' production of Respondent's Exhibit 9 and agreement of the information set forth in Exhibit 9 should speak to the conduct and intentions of the parties' that they are in agreement with a $1,394.86 average weekly wage, and not the prior accidental and contradictory stipulation of a $990.00 average weekly wage. Lastly, the Arbitrator finds that applying the $1,394.86 average weekly wage to his decision is not contrary to the manifest weight of the evidence presented, as this figure is consistent with the Respondent's Exhibit 9, which as described above, shows that Petitioner's past TTD was paid at a $929.91 TTD rate, which would amount to a $1,394.86 average weekly wage.

This instant issue can be distinguished from *Walker*, where the Commission held that the parties' are bound by facts that they stipulate to. *Walker v Industrial Commission*, 345 Ill.App.3d 1084 (4th Dist., 2004). In *Walker,* the prior contradictory stipulation was over a fact and in this instant case the prior contradictory stipulation is over a legal effect of a fact. Pursuant to *Domagalski*, the parties are not in fact bound by a prior contradictory stipulation of legal effect.

As such, the Arbitrator finds the correct average weekly wage is $1,394.86 and the correct TTD rate is $929.91. As such, TTD owed from October 8, 2020 through December 17, 2020 is equal to $9,432.08.

The Arbitrator further finds that after his surgery, Petitioner may be placed in an off-work status or a modified duty status that the Respondent may not be able to accommodate, that would make Petitioner eligible for TTD again. As such, the Arbitrator orders the Respondent to pay TTD at that time for a period that is reasonable and necessary as determined by medical professionals.

VII. IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (M), WHETHER PENALTIES OR FEES SHOULD BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Penalties under section 19(l) are in the nature of a late fee, and the assessment of a penalty is mandatory if a payment is late and the employer cannot show an adequate justification for the delay. *Mechanical Devices v. IIC*, 344 Ill. App. 3d 752, 763, 279 Ill.Dec. 531, 800 N.E.2d 819 (2003). "In determining whether an employer has 'good and just cause' in failing to pay or delaying payment of benefits, the standard is reasonableness." *Id.* (citing *McMahan v. IIC*, 183 Ill. 2d 499, 515, 234 Ill.Dec. 205, 702 N.E.2d 545 (1998). The employer has the burden for justifying the delay. *Jacobo v. IIC* , 2011 IL App (3d) 100807WC, ¶ 19, 355 Ill.Dec. 358, 959 N.E.2d 772.

Section 19(k) warrants penalties for "any unreasonable or vexatious delay of payment or intentional underpayment of compensation." Penalties under section 19(k) 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, 234 Ill.Dec. 205, 702 N.E.2d 545.

Section 16a of the Act, in turn, provides for an award of attorney fees when an award of additional compensation under section 19(k) is appropriate.

Petitioner was taken off work by Dr. Salehi on October 8, 2020. Dr. Salehi issued Petitioner a work-status note indicating the same, which Petitioner provided his supervisor. Counsel for Respondent was also made aware of Petitioner's October 8, 2020 off-work status during an October 14, 2020 pre-trial before Arbitrator Carlson, and in emails from October 26, 2020, October 28, 2020, November 2, 2020, November 4, 2020, and December 11, 2020. (Px. 9). Formal demands for TTD were made, but TTD was not issued and no explanation for the denial of TTD was offered. To date, the Respondent has not produced any explanation for the denial of TTD for this period or any reasonable explanation for their delay in issuing the same.

Furthermore, the Respondent acted in bad faith in withholding Petitioner's TTD benefits for this time period. The Respondent indicated in July of 2020 that they had requested an IME addendum from Dr. Strugala, and surgery authorization would not be issued until the addendum was received. It is evident that the Respondent intended to rely on this addendum to determine further compensability of this claim as a whole. From August 21, 2020 through January 28, 2021, the Respondent was asked repeatedly for the status of the addendum and whether it had been issued already. (Px. 9). Counsel for Respondent repeatedly ignored these requests until January 26, 2021. (Px. 9). The Arbitrator took judicial notice that an addendum authored by Dr. Strugala dated July 23, 2020 existed. (Tx. 99-100). The addendum was dated approximately 6 months earlier! Furthermore, the evidence will reflect that neither party had possession of any 2015 MRI films. Both Px. 9 and Rx. 3 reflects that neither party had possession of any of Petitioner's 2015 medical records, with the exception of one MRI report dated March 10, 2015. Pursuant to Respondent's Exhibit 3, an attempt to secure all of Petitioner's 2015 records was made but could not be fulfilled since the facility no longer had these records.

The Arbitrator finds that Respondent has ignored Petitioner's demands for both the authorization of his surgery and the issuance of his TTD benefits. The Arbitrator further finds that the Respondent has not and cannot show adequate justification for this delay and that this delay has been unreasonable and vexatious.

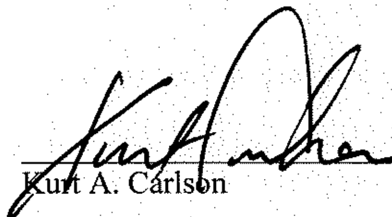
Thus, the Arbitrator finds that Respondent shall pay penalties under Section 19(l) at the rate of $30 per day not to exceed $10,000.00 for each day that Respondent failed to pay TTD from October 8, 2020 through the date of payment because the failure to pay was and is an unreasonable and vexatious delay. In addition, the Arbitrator finds that Respondent shall pay penalties under section 19(k) of 50% of the unpaid TTD of $9,432.08, or $4,716.04 as and for penalties under

19(k) as the delay in payment of benefits was and is unreasonable and vexatious. Finally, for all the forgoing reasons, Section 16(a) attorney fees are appropriate in the sum of $1,886.42 equal to 20% of the unpaid TTD accrued prior the date of the hearing.

CONCLUSION

The Arbitrator finds in favor of the Petitioner on all disputed issues including issues (C), (D), (F), (J), (K), (L), and (M) as described and stated above and awards Petitioner all of his back-owed TTD, future TTD after his surgery, his prospective fusion surgery and payment of all related past medical expenses, and penalties.

3.22.21
Date


Kurt A. Carlson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC013778
Case Name	SCHEIWEKE, VICTORIA v. SPEEDWAY
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0168
Number of Pages of Decision	14
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Jason M. Whiteside
Respondent Attorney	James Moran

DATE FILED: 5/9/2022

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS	)	☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF WILL	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VICTORIA SCHEIWEKE,

Petitioner,

vs. NO: 17 WC 013778

SPEEDWAY LLC,

Respondent.

DECISION AND OPINION ON REVIEW

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

Medical Expenses

In her Decision, the Arbitrator ordered Respondent to pay to Petitioner various medical expenses pursuant to Sections 8(a) and 8.2 including a $725.06 medical bill of Petitioner's endocrinologist. The Arbitrator also ordered Respondent to reimburse Petitioner's husband's group insurance carrier, Blue Cross/Blue Shield, for amounts it paid toward Petitioner's bills. The Commission finds that Petitioner failed to prove that the outstanding charges listed in the endocrinologist's bill are causally related to her work accident. Although Petitioner mentioned the work assault to Dr. Nadkami, nothing in the record indicates that the attack had any effect on her pre-existing condition. Moreover, some of the awarded bills were incurred prior to the assault and some were incurred four years subsequent. As there is no evidence of causal connection between Petitioner's treatment for her pre-existing Type 2 diabetes and her March 3, 2017 assault at work, the Commission vacates that part of the Arbitrator's award ordering Respondent to pay the fee schedule or contract amount of the $725.06 billed by Northeast Endocrinology.

The Commission also vacates that part of the Arbitrator's decision ordering Respondent to reimburse Blue Cross/Blue Shield for payments made on Petitioner's behalf. Pursuant to Section 8(a), Respondent is to pay said amounts to the Petitioner.

Disfigurement

The Arbitrator awarded Petitioner permanent partial disability under Section 8(d)2 "for her head injury, anxiety, post-concussion syndrome, and post-traumatic stress disorder." The Arbitrator also awarded 12 weeks of disfigurement for the lacerations above Petitioner's right eye and forehead under Section 8(c) of the Act. Section 8(c) provides in pertinent part as follows:

> No compensation is payable under this paragraph where compensation is payable under paragraphs (d), (e) or (f) of this Section.

The Commission finds that the disfigurement described by the Arbitrator as "the laceration Petitioner sustained above her right eye/forehead" is the same head injury for which the Arbitrator awarded Petitioner 10% loss of use to the person-as-a-whole under Section 8(d)2. The disfigurement award is therefore prohibited under Section 8(c) of the Act and is hereby vacated.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 15, 2021, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all outstanding medical expenses as described in Petitioner's Exhibit 9, with the exception of the $725.06 billed by Northeast Endocrinology, pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall pay to Petitioner all amounts paid by Blue Cross/Blue Shield to medical providers on her behalf for related medical care.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's order requiring Respondent to reimburse Blue Cross/Blue Shield $216.13 in charges to Dr. Wilk for related medical services is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $519.23/week for 50 weeks because the injuries to Petitioner's head as a result of the work-related assault caused 10% loss of the person-as-a-whole, as provided in Section 8(d)2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $519.23/week for an additional 25 weeks

because the injuries to Petitioner's cervical spine and right shoulder as a result of the work-related assault caused 5% loss of the person-as-a-whole, as provided in Section 8(d)2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of 12 weeks of disfigurement benefits for "the laceration Petitioner sustained above her right eye/forehead" is hereby vacated, as the Commission finds that the disfigurement award addresses the same head injury for which the Arbitrator awarded permanent disability under Section 8(d)2 and is therefore prohibited under Section 8(c) of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $39,000.00. 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.

May 9, 2022

mp/dak
r-5/5/22
068

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC013778
Case Name	SCHEIWEKE, VICTORIA v. SPEEDWAY LLC
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Jessica Hegarty, Arbitrator

Petitioner Attorney	Jason M. Whiteside
Respondent Attorney	James Moran

DATE FILED: 7/15/2021

THE INTEREST RATE FOR THE WEEK OF JULY 13, 2021 0.05%

/s/ *Jessica Hegarty, Arbitrator*
Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

VICTORIA SCHEIWEKE,
Employee/Petitioner

Case # **17 WC 13778**

v.

Consolidated cases:

SPEEDWAY LLC,
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 **JESSICA HEGARTY**, Arbitrator of the Commission, in the city of **JOLIET**, 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. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

FINDINGS

On **3/14/2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $44,999.76; the average weekly wage was $865.38.

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

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

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

ORDER

Medical benefits

The Arbitrator finds that Respondent is responsible for the following bills, totaling $23,702.66, pursuant to section 8(a) and 8.2 (medical fee schedule) of the Act:

1. Homer Township Fire Protection $1,472.00
2. Silver Cross Hospital $4,200.95
3. EM Strategies $1,229.00
4. Associated Radiologist $170.00
5. Plainfield Family Medicine $435.00
6. Elite Rehabilitation Institute $12,410.65
7. Homer Glen Open MRI & Imaging $2,600.00
8. Northeast Endocrinology $725.06
9. Health Care Center Morris Hospital $166.00
10. Premium Healthcare Solutions $2,500.00.

Respondent shall be given due credit for any previously paid bills.

In addition to the above listed bills, Respondent must reimburse the group carrier, Blue Cross Blue Shield, $216.13 in charges to Dr. Joanna Wilk for related medical services.

Permanent Partial Disability: Person as a whole

- Respondent shall pay Petitioner permanent partial disability benefits of $ **519.23**/week for **50** weeks, because the injuries sustained caused **10**% loss of the person as a whole, as provided in Section 8(d)2

of the Act for Petitioner's head injury, anxiety, post-concussion syndrome, and post-traumatic stress disorder sustained as a result of the work-related accident at issue;

- Respondent shall pay Petitioner permanent partial disability benefits of $ **519.23**/week for **25** weeks, because the injuries sustained caused **5**% loss of the person as a whole pursuant to Section 8(d)2 of the Act, due to the cervical strain and right shoulder injuries suffered by Petitioner as a result of the work-related accident at issue;

- Finally, the Arbitrator, pursuant to Section 8(c) of the Act, finds that due to the laceration Petitioner sustained above her right eye/forehead, Petitioner is entitled to **12 weeks of disfigurement benefits**.

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

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

Signature of Arbitrator

JULY 15, 2021

ICArbDec p. 2

ADDENDUM TO THE DECISION OF THE ARBITRATOR

On March 14, 2017, Petitioner was working for Respondent at a Speedway store located in Homer Glen, Illinois (on the corner of 151st and Bell Road) (T at 8). The store contained 12 gas pumps, a convenience store, a car wash, and a Dunkin Donuts (Id. at 9). Petitioner, who had been transferred to Respondent's Homer Glen location in October 2016 as the store's general manager, had been working at that location for six months prior to the undisputed work-related accident at issue (Id. at 9).

Petitioner arrived for work that morning at 4:50 a.m. and began making breakfast sandwiches back in the kitchen when she heard screaming in the front of the store (Id. at 10). She moved towards the noise and saw a male assailant with a black hoodie over his head forcibly grabbing and attempting to rob a woman of her purse. (Id.). Petitioner, who moved behind the register, yelled at the man to let the woman's purse go and then noticed cash on the ground (Id. at 10-11). A co-worker informed Petitioner that the panic button to alert police had been engaged (Id. at 11). The assailant screamed at Petitioner not to call 911 and proceeded to strike Petitioner's head with the barrel of a shotgun before fleeing the scene. (Id. at 12).

Petitioner, whose eyeglasses had fallen off during the attack, bent down to retrieve them off the floor at which time she noticed blood pouring from her head (Id. at 14). She then fell back against a tall garbage can. (Id. at 14). A fellow employee walked Petitioner to the seating area of Dunkin Donuts and another store associate applied pressure to Petitioner's head (presumably to stop the bleeding) (Id. at 15).

Petitioner testified she felt pain in her neck, right shoulder, and her head after the incident (Id. at 15).

The following day, the Daily Southtown newspaper, reported that 37-year-old Robert A. Bennett was charged with armed robbery, aggravated battery, aggravated vehicular hijacking, and felony use of a firearm (PX11). It was also noted that Bennett crashed the car he had stolen (Id.).

During the time immediately after the incident, Petitioner did not sleep well and would wake up with the scene replaying in her head (Id.).

Medical Treatment

Petitioner was transported by ambulance to the ER at Silver Cross Hospital after the incident. A 4 cm linear, bleeding, head laceration was noted. It was further documented that Petitioner had been struck in the head with a shotgun (PX1 pg. 5, 27). A CT scan showed a small right frontal scalp hematoma but no evidence of acute intracranial hemorrhage (PX2 pg. 45).

On March 14, 2017 Petitioner visited Dr. Issac Mezo, regarding her complaints of headaches and tinnitus following her trauma from March 14, 2017 (T at 19).

Petitioner returned to work on March 15, 2017 (T at 17).

On March 23, 2017 Petitioner reported anxiety following her assault to her primary doctor, Joanna Wilk (PX3 pg. 17). On June 19, 2017, Dr. Wilk noted that Petitioner was suffering from post-traumatic stress disorder (Id. pg. 9). Dr. Wilk treated Petitioner for post-concussion anxiety (Id. at 17). Dr. Wilk prescribed anxiety medications and muscle relaxers for Petitioner (Id. at 18).

On March 24, 2017 Petitioner presented to her endocrinologist, Dr. Veena Nadkarni, who noted that Petitioner had been attacked by a robber at work who struck her in the forehead with a rifle (PX3 pg.23). Dr. Nadkarni noted that Petitioner had ecchymosis of the eyes and a wound over the scalp measuring almost 6 inches (PX6 pg. 4). It was noted that Petitioner, a Type 2 diabetic, had high blood sugars (PX3 pg. 11, 23). Petitioner continued to seek treatment for her pre-existing diabetes.

On June 8, 2017 Dr. Nadkarni noted that Petitioner has been having nightmares and high blood sugars in the morning (PX2 pg. 21). Petitioner's next follow-up with Dr. Nadkarni for her diabetes was on January 25, 2019 (PX6 pg. 8).

On April 26, 2017 Petitioner presented for initial consult with Dr. Anthony Pirie at Elite Rehabilitation Institute (PX4, pg. 15). Dr. Pirie noted that Petitioner had been hit over the head with a shotgun and fell backwards into a cigarette rack, but did not hit the floor (PX4, pg. 15). The doctor noted Petitioner needed twelve (12) stitches to close the wound (PX4 pg. 15, PX13 pgs. 1, 3-4). Dr. Pirie also noted Petitioner had another lesion over her right eye, which continued to be inflamed and tender (PX4 pg. 15, PX13 pg. 2). Petitioner was also experiencing severe anxiety and nightmares, and had been prescribed anti-anxiety and muscle relaxers for pain in her neck and upper back and right shoulder by Dr. Wilk (PX4, pg. 15). Petitioner reportedly suffered headaches four times a week (PX4 pg. 15). Dr. Pirie advised Petitioner to follow-up with a neurologist for head pain, ringing in ears, and headaches (Id.). The doctor noted the following diagnoses: cervicalgia, lumbago, right shoulder pain, muscle spasms, and some right radicular pain (Id.).

On April 28, 2017 Petitioner underwent a cervical MRI that revealed multilevel spondylosis and shallow annular bulges impinging the ventral thecal sac and from C4-C7 (PX4, pg. 18-19, PX5 pg. 9). Petitioner also underwent a thoracic MRI that revealed no significant abnormality (PX4, pg. 22, PX5 pg. 12). An MRI of the brain was ordered to rule out a diffuse axonal injury (PX7 pgs. 9-10). On July 17, 2017, an MRI of Petitioner's brain noted no acute intracranial abnormality. A few nonspecific foci likely reflected minimal chronic small vessel ischemic changes without any significant abnormalities seen (PX7 pg. 11, PX8 pg. 4).

Petitioner submitted unpaid bills through her husband's Blue Cross Blue Shield insurance (T at 22, PX10 pg. 2).

Section 12 Examination by Dr. Russell H. Glantz

Petitioner attended a Section 12 examination at the request of Respondent on July 31, 2017 (RX 4, T at 21). Petitioner testified that Dr. Glantz spent thirty (30) to forty-five (45) minutes with her (T at 21). Petitioner testified that Dr. Glantz did not physically touch her but looked in her eyes and had her eyes follow the movement of his finger (T at 22).

With regard to cognitive function, Dr. Glantz opined that Petitioner had no abnormalities (RX4). Dr. Glantz opined that Petitioner had reached maximum medical improvement and could continue to work full duty (Id.). Dr. Glantz opined that Petitioner did not need further neurological treatment (Id.). Dr. Glantz opined that it would be another three (3) months before Petitioner would be at maximum medical improvement for her headaches/head pain (Id.). The doctor did not examine Petitioner for her neck or back complaints (Id.).

Petitioner's Current Condition

Petitioner testified that she continues to have headaches and a stiff neck for which she takes Tylenol (T at 23-24). After the work incident, Petitioner could not raise her right shoulder above her head, but now she can (Id. at 24). If Petitioner sleeps on her right shoulder, she will wake up and the aching will cause her to roll over (Id.).

When asked how the assault and battery affected her mentally, Petitioner testified that she used to think that everyone was good in this world, but she does not think that now (Id. at 25). Petitioner feels scared and when she hears people shouting at work, she hides (Id.).

Petitioner testified that the male assailant was caught a few hours after the incident (Id.). He is currently in a State penitentiary (Id.).

Prior to March 14, 2017, Petitioner had not been undergoing medical treatment to her neck or right shoulder (Id. at 26). Petitioner has not had any intervening injury to her neck, head or right shoulder between the work-related accident and the arbitration hearing (Id. at 26).

CONCLUSIONS OF LAW

Causal connection

The Arbitrator finds that Petitioner sustained injuries to her head, a cervical strain, a right shoulder injury, and disfigurement above her right eye/forehead. She also suffered from anxiety, post-concussion syndrome, post-traumatic stress disorder, , which are all causally related to the March 14, 2017 accident.

In support of this finding, the Arbitrator relies upon Petitioner's testimony which the Arbitrator found exceedingly credible and on the certified medical records in evidence.

On March 14, 2017, Petitioner, while employed by Respondent, was the victim of an assault and battery which caused injuries to her head, neck, right shoulder, and mental health. Petitioner was not actively treating for anything other than diabetes at the time of the assault and battery.

Dr. Joanna Wilk diagnosed Petitioner with post-traumatic stress disorder, with an onset of April 14, 2017 (PX 3, pg. 9). Dr. Wilk also treated Petitioner for post-concussion treatment and anxiety for which she prescribed anxiety medications and muscle relaxers (T at 17-18).

Petitioner's endocrinologist, Dr. Veena Nadkarni opined that the assault and battery, Petitioner's blood sugars were still running high (PX3, pg. 23). Dr. Nadkarni wrote on March 24, 2017 that Petitioner had ecchymoses of the eyes and had a wound over the scalp measuring almost 6 inches (PX6, pg. 4).

Dr. Anthony Pirie, on April 26, 2017, diagnosed Petitioner with cervicalgia, lumbago right shoulder pain, and muscle spasms, after being hit over the head with a shotgun (PX4, pg. 15). Petitioner also needed twelve (12) stitches to close her head wound (PX4 pg. 15, PX13 pgs. 1, 3-4). Dr. Pirie also noted Petitioner had another lesion over her right eye, which continued to be inflamed and tender (PX4 pg. 15, PX13 pg. 2).

Like Dr. Wilk, Dr. Pirie also noted that Petitioner was experiencing severe anxiety and nightmares (PX4, pg. 15). Medical records from Elite Rehabilitation Institute note Petitioner was experiencing headaches four times a week (PX4, pg. 15). Petitioner was to follow-up with a neurologist for head pain, ringing in ears, and headaches (PX4, pg. 15).

Dr. Mezo wrote that Petitioner most likely had post-concussion syndrome.

Respondent's expert, Dr. Russell Glantz, addressed Petitioner's complaints regarding her neurologic/head conditions (RX4). He did not address Petitioner's neck and back complaints. The doctor, in his report dated July

31, 2017, opined Petitioner had no neurological dysfunction, but her headaches/head pain would be problematic for the next three (3) months (Id.).

Medical bills

Section 8a of the Act provides that an "employer shall provide and pay the negotiated rate, if applicable, or the less of the health care provider's actual charges or according to a fee schedule, subject to 8.2 . . . for all necessary first aid, medical and surgical services, and all necessary medical, surgical, and hospital services thereafter incurred . . ." 820 ILCS 305/8(a).

The Arbitrator finds the medical care Petitioner received following her assault and battery was necessary, reasonable, and casually connected to the March 14, 2017 work-related accident.

For her head injury and anxiety, post-concussion syndrome, and post-traumatic stress disorder, Petitioner received care from her primary care physician, Dr. Joanna Wilk, who noted that Petitioner reported anxiety but no depression, following her assault (PX3 pg. 17). Dr. Wilk diagnosed Petitioner with post-traumatic stress disorder, with an onset of April 14, 2017 (PX 3 pg. 9). Dr. Wilk prescribed some anxiety medications and muscle relaxers for Petitioner, which addressed both her anxiety and neck and shoulder pain (T at 18).

The Arbitrator also finds that Petitioner's visits to her endocrinologist, Dr. Veena Nadkarni, were medically necessary. Dr. Nadkarni noted that following the assault and battery, Petitioner's blood sugars were still running high (PX3 pg. 23). Dr. Nadkarni wrote on March 24, 2017 that Petitioner had ecchymosis of the eyes and had a wound over the scalp measuring almost 6 inches (PX6 pg. 4).

Petitioner's treatment for her cervical strain and right shoulder injury was reasonable and necessary and treated by Dr. Anthony Pirie on April 26, 2017 at Elite Rehabilitation Institute (PX4 pg. 15). Dr. Pirie noted that Petitioner had been hit over the head with a shotgun and fell backwards into a cigarette rack, but did not hit the floor (PX4 pg. 15). Petitioner needed twelve (12) stitches to close the wound (PX4 pg. 15, PX13 pgs. 1, 3-4). Dr. Pirie also noted Petitioner had another lesion over her right eye, which continued to be inflamed and tender (PX4 pg. 15, PX13 pg. 2). Petitioner was also experiencing severe anxiety and nightmares, and had been prescribed anti-anxiety and muscle relaxers for pain in her neck and upper back and right shoulder by Dr. Wilk (PX4, pg. 15). Petitioner was experiencing headaches four times a week (PX4 pg. 15). She was to follow-up with a neurologist for head pain, ringing in ears, and headaches (PX4 pg. 15). Dr. Pirie assessed Petitioner as having cervicalgia, lumbago right shoulder pain and muscle spasms and some right radicular pain due to an assault type injury (PX4 pg. 15). By the time Petitioner was discharged, she could move her neck all the way to the left and the right and could reach for items opposite with her shoulder that she could not reach before therapy (T at 21). Petitioner testified the therapy improved her complaints of cervical and shoulder pain and range of motion (Id. at 24).

The Arbitrator also finds that Petitioner's visits to Dr. Issac Mezo for treatment of her headaches, tinnitus, and post-concussion syndrome were reasonable and related. On June 28, 2017, Dr. Mezo wrote that Petitioner most likely had post-concussion syndrome, but he would check an MRI of the brain to rule out a diffuse axonal injury (PX7 pgs. 9-10). An MRI of the brain was performed on July 17, 2017, but revealed no acute intracranial abnormality (PX7 pg. 11, PX8 pg. 4).

The Arbitrator finds that Respondent is responsible for the following bills, totaling $23,702.66, pursuant to section 8(a) and 8.2 (medical fee schedule) of the Act:

11. Homer Township Fire Protection in the amount of $1,472.00;

12. Silver Cross Hospital in the amount of $4,200.95;
13. EM Strategies in the amount of $1,229.00;
14. Associated Radiologist in the amount of $170.00;
15. Plainfield Family Medicine in the amount of $435.00;
16. Elite Rehabilitation Institute in the amount of $12,410.65;
17. Homer Glen Open MRI & Imaging in the amount of $2,600.00;
18. Northeast Endocrinology in the amount of $725.06;
19. Health Care Center Morris Hospital in the amount of $166.00; and
20. Premium Healthcare Solutions in the amount of $2,500.00.

Respondent shall be given due credit for any previously paid bills .

In addition to the above listed bills, Respondent must reimburse the group carrier, Blue Cross Blue Shield, $216.13 in charges to Dr. Joanna Wilk for related medical services (PX10 pg.2).

Nature & Extent of the Injury

Pursuant to Section 8.1b(b) of the Act, in determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

(i) The reported level of impairment pursuant to subsection (a);
(ii) The occupation of the injured employee;
(iii) The age of the employee at the time of the injury;
(iv) The employee's future earning capacity; and
(v) Evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of Section 8.1b(b), the Arbitrator notes that the record does not contain an impairment rating by Respondent's Section 12 examiner, Dr. Russell Glantz. The Arbitrator gives no weight to this factor.

With regard to subsection (ii) of Section 8.1b(b), the Arbitrator assigns some weight to the fact that the Petitioner is a General Manager for the Respondent. Petitioner has continued with the day to day operations of managing Respondent's Speedway gas station and convenience store, even though she testified that she is rattled by men wearing hoodies, hearing loud voices, and her has an overall distrust of members of the public.

With regard to subsection (iii) of Section 8.1b(b), the Arbitrator assigns some weight to the fact that Petitioner was 49 years of age at the time of her assault and battery. Petitioner sustained over twelve stitches above her scalp line and a permanent laceration/mark there, as well as another permanent laceration/mark above her right eye as a result of the March 14, 2017 attack.

With regard to subsection (iv) of Section 8.1b(b), the Arbitrator assigns some weight to the fourth factor, which is Petitioner's future earning capacity. Although Petitioner missed no time from work following her assault and battery, Petitioner is exposed on a daily basis to a potential repeat incident.

As a General Manger, Petitioner must interact with the public and see men in hoodies, hear loud voices, and witness potentially violent altercations, Petitioner's job duties place her on a daily basis for a repeat violent assault and battery.

Finally, with regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner had to undergo months of therapy, culminating in thirty (30) visits in order ameliorate her cervical and right shoulder complaints (PX4).

Petitioner, a forty-nine (49) year old female, also sustained a laceration on her head above her hairline which was sutured and required stitching, as well as sustaining a laceration above her right eye which remains visible.

Petitioner has also been diagnosed with anxiety, post-concussion syndrome, and post-traumatic disorder by various practitioners. In addition to these ailments, Petitioner's head injury caused her tinnitus and continued headaches. To this day, Petitioner continues to take over the counter drugs to treat her headaches.

The Arbitrator takes notice of an analogous Commission Decision. In Kristina Skeens v. State of Illinois/Pontiac Correctional Center, 19 IWCC 0073, the Commission awarded the claimant 10% loss of use, man as a whole. In Skeens, the claimant was a forty-eight (48) year old female correctional officer who was physically attacked by an inmate, who struck her twice in the head, causing her to fall back and strike her head on the concrete floor. As a result of the attack, the claimant was diagnosed with a closed head injury with concussion, symptoms of post-traumatic stress with functional impairment, and a cervical and lumbosacral strain with continuing low back and neck pain Id. at 8. The claimant in Skeens remained employed by the Respondent following the conclusion of her medical care Id at 7. In addition, only a few months prior to the trial before the arbitrator, the claimant in Skeens was promoted to Major and received a $700 a month increase in pay Id. at 7.

Subsection (v) carries the most significant weight in the permanency determination.

Based upon the above factors, the record taken as a whole, and prior analogous Commission Decision, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of:

- **10% loss of use to the person as a whole**, pursuant to Section 8(d)2 of the Act for her head injury, anxiety, post-concussion syndrome, and post-traumatic stress disorder;

- **5% loss of use to the person as a whole**, pursuant to Section 8(d)2 of the Act, due to her cervical strain and right shoulder injuries;

- Pursuant to Section 8(c) of the Act, finds that due to the laceration Petitioner sustained above her right eye/forehead, Petitioner is entitled to **12 weeks of disfigurement benefits.**

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC027021
Case Name	LANG, STUART A v. MIDSTATE TANK
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0169
Number of Pages of Decision	23
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Bruce Bonds

DATE FILED: 5/10/2022

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF URBANA)

☒ 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

STUART LANG,

Petitioner,

vs. NO: 17 WC 27021

MIDSTATE TANK,

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 maintenance benefits and permanent partial disability (PPD) benefits, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $64,900.00. 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.

May 10, 2022

CAH/tdm
O: 5/5/22
052

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

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

/s/*Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC027021
Case Name	LANG, STUART v. MIDSTATE TANK
Consolidated Cases	No Consolidated Cases
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Maureen Pulia, Arbitrator

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Bruce Bonds

DATE FILED: 9/29/2021

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 28, 2021 0.05%

/s/Maureen Pulia, Arbitrator
Signature

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

- [ ] 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

STUART LANG,
Employee/Petitioner
v.
MIDSTATE TANK,
Employer/Respondent

Case # **17** WC **27021**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **9/10/21**. 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. [x] What temporary benefits are in dispute?
[ ] TPD [x] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other________________

FINDINGS

On **5/4/17**, 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 $**38,888.62**; the average weekly wage was $**864.45**.

On the date of accident, Petitioner was **46** 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 $**38,928.38** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**38,928.38**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner maintenance benefits of $00.00/week for 00.00 weeks, as provided in Section 8(a) of the Act. The petitioner's claim for maintenance benefits is denied based on the fact that petitioner has failed to prove by a preponderance of the credible evidence that he is entitled to maintenance benefits pursuant to Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $518.67/week for 200 weeks, because the injuries sustained caused the 40% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

The parties stipulate that the respondent is entitled to a credit for a TTD overpayment in the amount of $6,161.02

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

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

Signature of Arbitrator

SEPTEMBER 29, 2021

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 46 year old welder/builder, sustained an accidental injury to his left shoulder, that arose out of and in the course of his employment by respondent on 5/4/17. On the date of accident, petitioner had worked for respondent for 10 years. His duties as a welder/builder included building large vacuum and semi trailer tanks made from aluminum, that hold between 800 and 9000 gallons. He described the job as very manual. He would weld shelves to the bottom of the oil tanks. Petitioner has a high school education. He also received a welding certificate from Parkland College. Petitioner is left hand dominant.

On 5/4/17 petitioner was installing baffles in the tank. This required standing in the radius of the bottom of the tank with his feet spread while he placed the baffle against the shelf. The baffle was 100 inches long. As he was swinging the sledge hammer with his left hand to install the baffle petitioner felt a sharp, burning, pain in his left shoulder. He testified that he felt like he was being stabbed with a needle in the shoulder. Petitioner reported the injury to respondent. Prior to this date, petitioner denied any problems with his left shoulder. He further stated that he never took any medication for his left shoulder, or sought any medical treatment for his left shoulder.

On 5/30/17 petitioner presented to Central Illinois Orthopedic Surgery and was examined by Dr. Brett Keller, DO. He complained of left shoulder pain. He reported that he injured his left shoulder at work performing strenuous work. He indicated that the pain was at the anterior aspect of his left shoulder, radiating into the left bicep region. He also reported some weakness in the left shoulder, with full range of motion, and left elbow epicondylitis for which he takes Norco 5-325mg for pain, as needed. Dr. Keller examined petitioner and assessed left shoulder rotator cuff tendinitis/bursitis. He was told to avoid heavy pushing, pulling, or lifting. Dr. Keller prescribed Meloxicam. On 6/29/17 petitioner reported that his left shoulder continued to be very painful, and that had made it difficult for him to work throughout the day. He also noted right shoulder pain due to overcompensation, since he injured his left arm. Dr. Keller examined petitioner and assessed left shoulder impingement, and rotator cuff tendinitis/bursitis, with little relief with Meloxicam. He also diagnosed right elbow distal biceps tendinitis. He ordered an MRI of the left shoulder. He also prescribed Tramadol.

On 7/6/17 petitioner underwent an MRI of the left shoulder. The impression was rotator cuff impingement syndrome; downward sloping of the lateral aspect of the distal acromion; and, type II acromion. It was noted that the rotator cuff tendinosis was most marked at the supraspinatus tendon without tear or muscle atrophy. On 7/14/17 petitioner followed-up with Dr. Keller. He reported that his left shoulder was still quite painful. Dr. Keller performed an examination and reviewed the results of the MRI. He recommended surgical intervention. On 7/31/17 Dr. Keller placed petitioner on restricted work with no use of the left upper extremity.

On 8/9/17 petitioner underwent a left shoulder arthroscopy, arthroscopic extensive debridement, partial undersurface supraspinatus tear, anterior labral tear, subacromial bursa, and AC joint; left shoulder arthroscopy, arthroscopic distal clavicle excision; and, left shoulder arthroscopy, arthroscopic subacromial decompression. His post-operative diagnosis was left shoulder impingement syndrome, left shoulder acromioclavicular joint osteoarthritis, and left shoulder anterior labral tear and partial thickness supraspinatus tear. This procedure was performed by Dr. Keller. Petitioner followed up post-operatively with Dr. Keller.

On 8/10/17 petitioner began a course of physical therapy at Central Illinois Orthopedic Surgery. On 8/22/17 petitioner followed-up with Dr. Keller. He complained of post-operative pain. His sutures were removed. On 9/8/17 petitioner underwent a physical therapy reevaluation. It was noted that while deficits remained, the petitioner was making consistent progress with therapy.

On 9/26/17 petitioner followed-up with Dr. Keller. He reported some popping in the shoulder that he did not have before surgery. He rated his pain at a 5/10. He reported difficulty with activities of daily living. He reported the most pain when he is abducting his shoulder and raising it above his head. He reported that the Tramadol was not really helping the pain. Dr. Keller continued petitioner in physical therapy, and released him to work with a 10 pound lifting restriction.

Petitioner returned to Dr. Keller on 10/31/17, and reported that he returned to work on 10/30/17. He rated his pain at 5/10, but said on Sunday his pain was a 3-4/10. He again noted that the Tramadol was not working, and he wanted Oxycodone because he was only sleeping two hours at night. He reported increased popping, and more pain with lateral movement. He stated that he had completed therapy. He was concerned that the pain was almost as bad as before surgery. Dr. Keller ordered additional physical therapy and took petitioner off work. He restricted petitioner from doing any heavy lifting, pushing or pulling with the left upper extremity.

On 11/28/17 petitioner returned to Dr. Keller. He reported that since he returned to work for a day a month ago, his shoulder has been bothering him more. He rated his pain at 5/10, worse with any activity, or when trying to sleep. Following an examination, Dr. Keller injected petitioner's left shoulder subacromial space. Petitioner was placed on restricted work with a 10 pound weight restriction with the left upper extremity. On 12/19/17 petitioner followed up with Dr. Keller and told him that the injection seemed to help a lot. He rated his pain at a 2-3/10. He still reported popping. He requested additional physical therapy. Dr. Keller continued petitioner's restrictions and ordered additional therapy. On 1/16/18 petitioner reported that his shoulder pain was worse. He stated that most activities at work made his shoulder worse. He reported a new sharp pain along the superior aspect of the shoulder. He also reported limited active range of motion in the shoulder with abduction.

He stated that he was apprehensive to return to full duty work because of the physical demands of his job. Dr. Keller ordered an MRI of the left shoulder. Restrictions remained the same and physical therapy was continued.

On 1/26/18 petitioner underwent an MRI of his left shoulder. The impression was interval postsurgical changes at the acromioclavicular joint with some residual hypertrophy abutting the supraspinatus tendon accompanied by mild supraspinatus bursal surface degeneration/tendinitis and minor peritendinous bursitis; no labral tear; mild inferior glenohumeral joint space chondromalacia; and, the humeral head subcortical pseudocysts accompanying mild marrow edema, more prominent than seen previously.

On 2/6/18 petitioner followed-up with Dr. Keller. He rated his pain level at 3/10. He stated that the pain started feeling like a burning sensation going up and down his arm recently. He reported pain on the front of the shoulder, as well as the side. He also reported that his range of motion had decreased since his last visit. He noted that he could not complete daily activities without pain. Dr. Keller recommended a Functional Capacity Evaluation (FCE), because petitioner was convinced, he was unable to perform his job duties. He told petitioner to follow-up as needed. Dr. Keller indicated that he would not recommend any additional surgical intervention. Dr. Keller placed petitioner at maximum medical improvement.

On 4/24/18 petitioner underwent a Functional Capacity Evaluation. Petitioner's effort was found to be valid. Petitioner was found to meet the material handling demands for the Medium Physical Demand Level, per the Dictionary of Occupational Titles.

On 4/30/18 petitioner's attorney, John Boshardy, sent a letter to respondent's attorney, Bruce Bonds, including an updated work slip with permanent restrictions, and requested that respondent accommodate petitioner's restrictions, or continue to pay benefits until petitioner is able to obtain employment within his restrictions. He further stated that his letter was a request for vocational rehabilitation assistance for petitioner.

On 6/14/18 petitioner returned to Dr. Keller. He reported constant pain in his shoulder. He stated that he had been working with restrictions and even with these limitations he still had increased pain while at work. He stated that he had not been lifting any heavy objects, but had pain moving things around. He also complained of decreased range of motion. Dr. Keller was of the opinion that since petitioner was not better and had failed all conservative treatment, he was recommending a left shoulder arthroscopy, excision of clavicle and bicep tenotomy. Petitioner indicated that he wanted to proceed with surgery. His restrictions were continued.

On 7/2/18 petitioner returned to Dr. Keller and told him he was not doing well. He did not feel that the FCE went well. He rated his pain at a 7/10. He stated that he was not taking any medication, and was still doing his home exercise program. He also stated that he was still working light duty, but that with his

restrictions he was unable to do anything with his left upper extremity, and because of this, felt that he was overusing his right upper extremity which had caused him some discomfort. Dr. Keller reviewed the FCE and noted that petitioner met the criteria for medium demand vocation due to the weakness in his left upper extremity. Dr. Keller again reiterated that petitioner was at maximum medical improvement. He released petitioner to work with restrictions of lifting 9 pounds overhead, no use of a hammer, and 30 pounds from floor to waist. He released petitioner on an as needed basis.

On 7/24/18 petitioner presented to Dr. David Fletcher at SafeWorks Illinois, for a second opinion consultation. He gave a history of swinging a sledge hammer and tore muscles in his shoulder. He rated his pain at a 6/10, and stated that he had very limited range of motion. He also reported that his pain was constant; he had difficulty sleeping and doing regular activities; and, he was unable to use his arm for long periods of time. Following an examination, Dr. Fletcher assessed a classic suprascapular nerve entrapment. He wanted to hold off on any additional surgery until an EMG was completed. He referred petitioner to Dr. Seidl, and restricted him from lifting over 10 pounds, and any above shoulder level work. On 8/3/18 petitioner reported severe pain. Dr. Fletcher restricted petitioner from lifting over 5 pounds, and no use of the left arm or above the shoulder work. He also limited pushing and pulling to 5 pounds or less. He reiterated his request for an EMG and referral to Dr. Seidl.

On 8/7/18 petitioner presented to Dr. Robert Seidl for an evaluation of his left shoulder. Petitioner provided a history of the accident and his treatment to date. He reported muscle aches, muscle weaknesses, and neck pain. He noted that he still had very limited range of motion, scapular winging, and a positive impingement. Following a physical examination, Dr. Seidl assessed pain of the left shoulder joint, and impingement syndrome of the left shoulder region. On 8/9/18 petitioner's condition and Dr. Fletcher's opinions remained the same.

On 8/18/18 petitioner returned to Dr. Fletcher. He noted that petitioner's left shoulder condition had continued to worsen, based on his self reported QuickDash score. Dr. Fletcher noted that petitioner's atrophy and weakness was also getting progressively worse. He referred petitioner to Dr. Trudeau for the EMG and Dr. Greatting for a surgical evaluation. He continued petitioner's work restrictions.

On 8/27/18 petitioner underwent an EMG/NCS. The impression was left suprascapular neuropathy, moderately severe to severe, and ulnar neuropathy at left elbow, moderately severe. There was no current evidence of other entrapment neuropathy, cervical radiculopathy, or brachial plexopathy.

On 9/6/18 petitioner followed-up with Dr. Fletcher. Dr. Fletcher was of the opinion that the EMG/NCS confirmed his diagnosis of classic suprascapular nerve entrapment. He noted that petitioner was off work because respondent could not accommodate his restrictions. He gave him a shot of Toradol. He was of the opinion that petitioner needed a left suprascapular nerve entrapment decompression. Dr. Fletcher was of the opinion that this problem was work related. He again referred petitioner to Dr. Greatting and continued his restrictions. On 9/26/18 and 10/5/18 Dr. Fletcher reported that petitioner's shoulder condition continued to worsen. He continued his restrictions, and noted that petitioner would be seeing Dr. Greatting on 10/10/18.

On 10/10/18 petitioner presented to Dr. Mark Greatting, an orthopedic surgeon, for his left shoulder pain and decreased motion of his left shoulder. He also reported numbness and tingling involving the ring and small fingers of his left hand. Petitioner gave a history of his treatment to date. Following a physical examination, Dr. Greatting noted findings consistent with suprascapular neuropathy, that correlated with the findings on the EMG/NCS. He also noted findings consistent with left cubital tunnel, significant ongoing shoulder pain and stiffness, and possible adhesive capsulitis/postoperative stiffness. He recommended an MRI arthrogram of the left shoulder.

On 12/5/18 petitioner underwent an MRI arthrogram of the left shoulder. The impression was mild infraspinatus tendinopathy with no evidence of a rotator cuff tendon tear or retraction; moderate acromioclavicular joint osteoarthritis; glenohumeral joint synovitis; and, mild degenerative blunting of the glenoid labrum inferiorly.

On 12/5/18 petitioner followed-up with Dr. Greatting after his MRI arthrogram. Following his review of the MRI arthrogram, and physical examination, Dr. Greatting recommended that petitioner undergo a release of the left suprascapular nerve, a shoulder arthroscopy with revision of his subacromial decompression and distal clavicle excision, and, an anterior submuscular transposition of his ulnar nerve.

Petitioner continued to follow-up with Dr. Fletcher. Dr. Fletcher handled medication management of petitioner. During this period petitioner's condition remained essentially unchanged. He continued petitioner's restrictions during this time.

On 2/22/19 petitioner underwent a decompression of the left suprascapular nerve; left shoulder arthroscopy with subacromial decompression and distal clavicle excision; and anterior submuscular transposition of left ulnar nerve. The post-operative diagnosis was left suprascapular nerve entrapment; left shoulder rotator cuff syndrome and painful acromioclavicular joint arthritis; and, left cubital tunnel syndrome

with subluxation ulnar nerve. This procedure was performed by Dr. Greatting. Petitioner followed-up post-operatively with Dr. Greatting.

On 3/5/19 petitioner followed-up with Dr. Greatting and reported that the numbness in his ring and small fingers was improved. His sutures were removed. Dr. Greatting took petitioner off work. He was told to begin using his arm for light activities as tolerated. He told petitioner to start therapy in 2 weeks.

On 3/6/19 petitioner returned to Dr. Fletcher post-operatively. Dr. Fletcher reviewed petitioner's Job Description for a Production-Tank Builder. He rated his pain level at a 6/10, but also reported that some of the pain he had before, he did not have anymore. He described the pain he had as aching, sharp, and shooting, and was constant. He also noted loss of range of motion and weakness. Dr. Fletcher examined petitioner and was of the opinion that petitioner was doing surprisingly well, and his pain was markedly improved. He also noted that petitioner was sleeping through the night and gaining muscle mass in his left shoulder girdle.

On 3/13/19, 3/21/19, 3/29/19, and 4/12/19, Dr. Fletcher examined petitioner, and handled medication management for petitioner. During this period petitioner continued in physical therapy and off work.

On 4/10/19 petitioner returned to Dr. Greatting. He noted that he was improving, but had some popping in his shoulder with range of motion. Dr. Greatting examined petitioner and continued him in physical therapy.

On 5/10/19 Dr. Fletcher noted petitioner was making improvement and released him to transitional duty on 5/10/19, with no lifting over 5 pounds, and limited overhead activity. He also noted that petitioner was in Work Hardening 4 hours a day for 4 weeks.

On 5/15/19 petitioner followed-up with Dr. Greatting. He noted that he was in work hardening, and was having some pain with that, and difficulty with his strength. He reported some recurrent numbness and tingling in his ring and small fingers. He also reported some pain in his shoulder, but felt the pain had improved from where it was before surgery. Following an examination, Dr. Greatting instructed petitioner to continue in work hardening.

On 5/28/19 petitioner presented to Dr. Fletcher for an unscheduled visit. He complained of a constant aching pain in his left shoulder with intermittent sharp shooting pains. He also complained of numbness and tingling in his left hand and fingers that began around 3 weeks prior. He also complained of burning pain in his left elbow. Dr. Fletcher did not believe petitioner would benefit from any further rehab. He restricted petitioner to limited overhead activity with no overhead lifts more than 10 pounds, no lifting more than 30 pounds occasionally, and 15 pounds frequently floor to waist, and waist to chest.

On 6/5/19 petitioner returned to Dr. Greatting. He reported that the work hardening made his pain worse. Dr. Greatting noted that Dr. Fletcher stopped work hardening and wanted to put him on permanent restrictions. Dr. Greatting, after examining petitioner, agreed with putting petitioner on permanent restrictions. He gave petitioner permanent restrictions of limited overhead activity with no lifting overhead greater than 10 pounds, and no lifting more than 30 pounds occasionally, or 15 pounds frequently floor to waist and waist to chest. Dr. Greatting released petitioner from his care at maximum medical improvement.

Petitioner testified that after he got his permanent restrictions from Dr. Greatting on 6/5/19 he took those restrictions to respondent that same day, and met with John Highland. They discussed jobs he could and could not do, and there was no job that he could do.

On 6/5/19 petitioner's attorney, John Boshardy, sent a letter to respondent's attorney, Bruce Bonds, including an updated work slip with permanent restrictions, and requested that respondent accommodate petitioner's restrictions, or continue to pay benefits. He further stated that his letter was a request for vocational rehabilitation assistance for petitioner.

Petitioner testified that on 6/14/19 John Highland called him and told him that they had created a job for him in Arthur, IL, where he worked. He testified that it was the job of a floater.

On 6/14/19 John Highland, Management Systems Analyst for respondent, sent a letter to petitioner. He noted that 'After reviewing your job capability information provided by Dr. Mark Greatting and Dr. David Fletcher, your treating physicians, we are pleased to be able to offer you a full time position as a Production Support-Floater at Mid-State Tank in Arthur." It further stated that "We believe the physical requirements of this position are within your restricted activity capabilities as described by your treating physicians on the enclosed documents. You will only be assigned tasks consistent with your physical abilities, skills and knowledge. If any training is needed for additional assignments, it will be provided. Your wages and benefits for this position will be consistent with your pre-injury levels." Petitioner was then informed who his supervising manager was going to be, and that they would like him to report for introduction and orientation on 6/20/19. He was provided with his new supervisor's number and instructed to call if he had any questions. Highland went on to inform petitioner that even though the position was different, his knowledge and experience as a welder and tank builder would certainly be of great value in the new job.

Petitioner testified that a couple days after his phone call with Highland, Highland called him and left a voice mail indicating that he was sending an overnight letter that included the job description for the floater position.

On 6/20/19 Highland drafted an email to Kathy Trevino. He informed Trevino that they had planned to offer petitioner the new position at the Arthur plant that would accommodate his MMI restrictions. He noted that he had informed petitioner of this plan by phone on 6/14/19. He wrote that he had explained to petitioner that it was planned that he would start back to work on 6/20/19, and meet with the new supervising manager for instructions. He noted that they then completed the return to work job offer letter and job description for petitioner on 6/18/19 and overnight mailed it to petitioner with petitioner receiving it by noon on 6/19/19. He also noted that petitioner received the letter and called his attorney about the situation. His attorney then advised petitioner not to go to work until he reviewed the letter and job description. He added that petitioner then called him on 6/19/19 to inform him that he would not be at work on 6/20/19, per the advice of his attorney, John Boshardy.

On 6/20/19, petitioner's attorney John Boshardy, drafted a letter to respondent's attorney Bruce Bonds. In the letter he noted that petitioner told him that respondent created a permanent full job for him, and also told him that there had never been a non-working floater in the production area, and the job they offered him did not exist before 6/14/19. Boshardy wrote that it was his position that the job offered did not exist in the open labor market, and that respondent artificially inflated the wages to avoid a wage differential. He further noted that petitioner would not be accepting the job offer. He then requested continued maintenance benefits and vocational rehabilitation, and told Mr. Bonds that petitioner would begin a self-directed job search.

On 6/26/19 respondent's attorney Bruce Bonds drafted a letter to petitioner's attorney, John Boshardy. Bonds noted that petitioner had been offered a regular job within his restrictions at or near his prior pay level. He further wrote that petitioner's benefits would be suspended after 6/19/19 for failure to cooperate. He went on to state they would give petitioner a chance to reconsider, by presenting himself to work on 7/8/19. He wrote that if petitioner failed to do so, he would assume the issue would have to be litigated.

On 7/2/19 petitioner presented to Dr. Michael Kuhlenschmidt for a narcotic refill. Dr. Kuhlenschmidt did not want to refill petitioner's narcotics, and referred him to pain management.

Petitioner offered into evidence job search logs that he made via the internet from 6/24/19 through 8/21/21. (PX16). Although petitioner testified that he only applied for positions within his restrictions, he also testified that he applied for a variety of jobs outside of his permanent restrictions, including a welder, construction, and mover/laborer. Petitioner testified that some of the jobs he applied for turned out to be more physical than he thought, but he never purposely applied for jobs outside his restrictions. Petitioner testified that he was not offered any job as a result of the more than 1000 jobs he applied for only via the internet. Petitioner testified that he used the Indeed job search website to look for jobs within a 50 mile radius of his home in

Bloomington, IL. He did not look for any jobs in Arthur, IL, which is where he was working on the date of injury. He testified that he applied for one job in Sullivan, IL. He also posted a cover letter and resume on Indeed, but had no direct contract with any prospective employer. He then testified that he had a couple of phone calls, but no interviews. He did not keep a record of those phone calls. Petitioner testified that his job search records only included the receipt he got from the posting. He did not post any of the responses he got from any prospective employers. Despite the big demand for employees currently, petitioner testified that he has had no in-person interviews or job offers. Petitioner testified that he did not go to any job fairs. He also testified that he never found a floater position with anyone else when he was looking for jobs.

On 6/3/20 Dennis Gustafson, M.S. CRC, drafted a Vocational Assessment Report, after interviewing petitioner on 2/18/20, and performing a record review, regarding petitioner's injury on 5/4/17. Following his record review and in-person interview, Gustafson's report included a summary of petitioner's education and work history, and a summary of petitioner's medical information, after which he provided employment alternatives and conclusions. Based upon the work-related restrictions set by Dr. Fletcher and Dr. Greatting, Gustafson was of the opinion that petitioner was unable to return to his welder-fitter type employment, and was limited to the performance of almost the full range of Light work, with some jobs falling within the Medium level of physical demand. He also noted that he was concerned that petitioner's pain increased with shoulder movement. Gustafson was of the opinion that some welding positions may exist, in the production type welding.

Petitioner reported that he submitted approximately 12-15 applications per week since August of 2019, and these internet-submitted applications resulted in a few unsuccessful phone interviews, but none in person. He stated that these phone interviews were related to welding and forklift operating jobs. Gustafson provided petitioner with some suggestions relative to a job search and interviewing. Based on petitioner's education, work history, and job-related physical limitations, Gustafson provided examples of entry-level jobs within which there may be some employment opportunities for petitioner. The jobs he identified included security guard, amusement/recreation attendant, cashier, retail salesperson, parts salesperson, hotel desk clerk, order clerk, courier/messenger, general office clerk, production occupations, inspector/tester, packaging machine operator, industrial truck operator, and hand packager. The wages for these jobs ranged from $9.25 to $13.47 an hour. After identifying all these positions, Gustafson was of the opinion, that it was more likely than not, that the majority of such available jobs would exceed petitioner's physical limitations, but they were worth pursuing for the limited number of which he may be capable of performing. Gustafson opined that a reasonable starting range would be between $11.00-$12.00 an hour.

On 8/20/20 the evidence deposition of Dennis Gustafson, a vocational rehabilitation counselor consultant, was taken on behalf of the petitioner. Gustafson testified that petitioner's job for respondent as a welder/fitter was a medium to heavy level, but commonly was heavy. He was of the opinion that given his permanent restrictions, petitioner could not perform his regular job for respondent. Dr. Gustafson opined that based on petitioner's educational background, work history and residual physical limitations, petitioner was employable at a range of $11.00-$12.00 an hour. Gustafson was of the opinion that petitioner's restrictions fall within all the jobs he listed in his report. Gustafson testified that he told petitioner to diversify his job search since he was primarily using Indeed.

On cross examination, Gustafson testified that when he met with petitioner he appeared lucid, and did not appear to be in any pain. He also testified that he did not review any of petitioner's job search logs up to that point, or since that point. Gustafson testified that he did not review petitioner's resume or give him any hints, since it was already on Indeed. Gustafson stated that he was aware that respondent drew up an alternative position for petitioner. Gustafson testified that he did not do a labor market survey, and did not review petitioner's job application for employment with respondent to see what prior jobs he had.

Respondent offered into evidence a job description for the new job that petitioner was offered on 6/14/19, that of a Production Support-Floater. The revision date on the job description was 6/14/19. Petitioner testified that before this date this position did not exist. He testified that he never heard of it.

Respondent also offered into evidence a printout of temporary total disability benefits paid from 8/24/17 through 6/20/19 totaling $38,928.38.

Petitioner testified that after his accident he continued to have interaction with Highland. He testified that he would come into work every 1-2 weeks, and Highland would try and pressure him into saying that his injury was not a work injury, but instead an ongoing preexisting issue in his left shoulder. Petitioner further testified Highland would call him at home regarding the same. He also testified that Highland would ask about the shoulder and said that Dr. Fletcher and Dr. Trudeau were wrong about their diagnosis. Highland denied that he ever tried to get petitioner to say that he did not get hurt at work, or that his injury predated the date of accident.

Petitioner testified that currently he sleeps on the right side of his body, because he cannot sleep for more than 5 minutes at a time because his hand goes numb, and he has a lot of aches and pains. He also reported sharp shooting pains down the back of his shoulder to the side through the elbow to the hand. He testified that his hand goes numb, and he now has neck issues. He testified that he cannot turn his head to the left side, and that his symptoms are constant. Petitioner stated that his pain affects everything he does from tying his shoes to

folding laundry. He also stated that he can't help vacuum, or push a lawn mower. He noted that even taking a shower is harder to do. Petitioner testified that he cannot pick up his 4 year old son, play ball with him, or climb a tree with him. He also noted that this injury has caused a lot of issues with his wife because some things are real hard to do and she has to do them by herself.

Petitioner testified that after he sent the Floater job description to Boshardy, they never requested that the respondent make any changes or modifications to the job description. He further testified that he never tried the Floater position. He stated that the job duties in the Production Support-Floater job description were taken from job duties of the production support employees. He noted that the duties in the job description were previously done by various production workers.

Petitioner testified that in May of 2017 he lived in Champaign, IL and would commute about 40 minutes to work in Arthur, IL each day. In June of 2019 petitioner was living in Bloomington, IL, which is about 1 ½ hours from Arthur, IL. Despite this distance he was still willing to work in Arthur, IL.

Kevin Conlin, General Manager for respondent, was called as a witness on behalf of respondent. His job included overseeing production, office and sales in both of respondent's locations. He testified that he was involved in determining if respondent had a job for petitioner. Based on petitioner's light duty restrictions it was determined that respondent could offer petitioner a full time job.

Conlin testified that since 1997 respondent has had a light duty program, and that petitioner worked in that program when on light duty following the injury. He testified that the functions of the builders would be given to those on light duty, depending on their skills. These would include testing tanks, small parts assembly, and warehouse duties. Respondent would match light duty restrictions to job duties.

Colin testified that they took Dr. Greatting's restrictions, and used them to find a full duty job for petitioner. He testified that when the position for petitioner was created they did not have someone doing that job full time in Arthur, IL, but other employees would fill the role for a short time. When petitioner was on light duty, respondent had one person dedicated to doing the Floater job for better throughput. Colin testified that in Arthur, IL no one person was specifically designated to be the Floater in June of 2019, but they had someone full time in this position in Sullivan, IL, at that time. He testified that the Production Support-Floater position created for petitioner in Arthur, IL, was the same as the existing Production Support-Floater position that existed in Sullivan, IL, at that time.

Colin testified that there are currently 2 employees who perform the job of a Production Support-Floater in Arthur, IL, and, 3 employees who perform the job of a Production Support-Floater company wide. He also

testified that in Sullivan, IL one person has been performing this job for the past 3 years. Colin testified that this job was created as a real job for Production Support. He noted for the past twenty years they have had Floater jobs for both the Head and Baffling job. Colin testified that the Production Support Floater position is a real job that does exist, and is within the restrictions Dr. Greatting gave petitioner.

Colin testified that respondent's shop is a non-union shop, and all production, welder, and builder positions start at $18.25/hr and get raises on their anniversary date, and possibly based on merit. Based on this, he noted that if petitioner had returned to work as a Production Support-Floater his wages and benefits would be consistent with his pre-injury level. He noted that no employee is paid union rates.

John Highland, Management Systems Analyst for respondent, was called as a witness on behalf of respondent. Highland's duties include insurance coordination for workers' compensation. Highland testified that he was familiar with petitioner and his injury. He testified that when petitioner was on light duty he would match petitioner with the right job based on his restrictions. Highland testified that he was aware that petitioner was released to work with permanent restrictions in June of 2019, and he was involved in determining if a job existed or could be created to meet petitioner's restrictions, but that Conlin would ultimately have the final say. Highland also testified that respondent is a non-union shop and the pay is merit based or seniority pay scale, He testified that petitioner would currently be making $24.63 an hour, which is $2.00 more than the rate he would have gotten back in June of 2019, just based on regular raises, and not merit raises.

Highland testified that when he offered the job to petitioner, he did not express any concerns about any of the job duties. Highland also testified the job that was offered to petitioner in June of 2019, the Production Support-Floater position, is currently filled by other full time employees. Highland was of the opinion that petitioner was an experienced tank builder and welder who brought a lot of knowledge to the table, and because they had invested a lot in petitioner, and he had a lot of qualifications. Highland agreed that "but for" petitioner's restrictions, the Production Support-Floater position would not have been created in Arthur, IL at that time. However, since then the position has remained, and it is a full time position that anyone can apply for, it is not a position unique to petitioner and his restrictions. He testified that any employee who comes to work for respondent could be hired into this position if their qualifications meet the requirements of this position, or an existing employee can work towards qualifying for this position.

K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?
L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Petitioner claims he is entitled to maintenance benefits from 6/20/19 through 6/2/20, a period of 49-5/7 weeks. Respondent claims petitioner is not entitled to any maintenance benefits since petitioner was offered a

job within his restrictions on 6/14/19, that his attorney, John Boshardy, told him not accept, claiming it was a "sham job" because it did not exist before this date.

On 6/5/19, Dr. Greatting placed petitioner at maximum medical improvement, and placed him on permanent restrictions of limited overhead activity with no lifting overhead greater than 10 pounds, and no lifting more than 30 pounds occasionally, or 15 pounds frequently floor to waist and waist to chest. Petitioner testified that he then took these restrictions to respondent and discussed them with Highland. There was a discussion as to what jobs petitioner could and could not do, and there was no existing job in the Arthur, IL location that met the petitioner's restrictions.

After this meeting, petitioner's attorney, John Boshardy, sent a letter to respondent's attorney, Bruce Bonds, requesting respondent accommodate petitioner's restrictions, or continue to pay benefits. He further stated that his letter was a request for vocational rehabilitation assistance for petitioner.

After the meeting with petitioner, Highland and Colin were involved in trying to find a position that would meet petitioner's restrictions. Respondent was of the opinion that petitioner was an experienced tank builder and welder who brought a lot of knowledge and qualifications to the table, and they had invested a lot in him. For these reasons, they wanted to find a position for him within his restrictions, that would play to his strengths and benefit the business. Highland did admit, that "but for" petitioner's restrictions, the Production Support-Floater position would not have been created in the Arthur, IL location. However, what the arbitrator finds very significant is that this position had existed in the Sullivan, IL location prior to this date.

Colin testified that in Arthur, IL prior to this date, respondent had a light duty program, where the builders job duties would be given to those on light duty, depending on their skill set. These duties included testing tanks, small parts assembly, and warehouse duties. Colin testified that the employee's light duty restrictions would be matched to the job duties. Colin testified that when people were on light duty these job duties were performed by that light duty employee, and this would result in better throughput, because all the duties were being done by one person, as opposed to many different employees.

Colin and Highland then looked at petitioner's permanent restrictions and determined that if they put all these light duty job duties into one position, it would meet petitioner's restriction; would provide a more consistent throughput; and, would match the same position they had in the Sullivan, IL location. The arbitrator finds it very significant that the job description they came up with for the Production Support-Floater position in Arthur, IL, noted that it was revised of 6/14/19. The arbitrator notes that if this had been a totally new position, it would not have had a "revised" creation date, but rather, would have just had a creation date of 6/14/19. The

arbitrator finds that since this job description was "revised" on 6/14/19, that a prior job description for the Production Support-Floater position existed prior to this date. The arbitrator found the testimony of Colin very persuasive, and finds that although this Production Support-Floater job description was created for the Arthur, IL location on 6/14/19, it already existed in the Sullivan location prior to this date.

Additionally, the arbitrator finds it significant that all the job duties in this job description were existing job duties, and not job duties created just for petitioner. Also, the arbitrator finds it very significant, that the Production Support-Floater position for the Arthur, IL location, that was revised on 6/14/19, still exists as a full time job in Arthur, IL today, and there are currently 2 employees that are performing this job. The arbitrator also notes that there is a full time employee performing this position in respondent's Sullivan, IL location. The arbitrator finds it significant that since this job description was revised on 6/14/19, it still exists in the Arthur, IL location, and is a full time position that anyone can apply for and be hired into, and is a full time position that an existing employee can work towards qualifying for.

Petitioner claims that the job of Production Support-Floater was a "sham job" created just to prevent respondent from having to pay petitioner maintenance benefits. The arbitrator finds this argument is not supported by the credible evidence. The arbitrator notes that throughout petitioner's treatment following his injury, respondent always accommodated petitioner's restrictions when they could. However, when petitioner was ultimately given permanent restrictions, it was determined that an existing position did not exist in Arthur, IL that would meet his restrictions. Therefore, the respondent immediately starting looking to see if they could create a job in Arthur, IL that would meet petitioner's permanent restrictions, and benefit the business. The arbitrator finds that the respondent then took an existing job description for the Production Support-Floater position that existed in Sullivan, IL, and tweak it for the Arthur, IL location. The end result was a new Production Support-Floater position in Arthur, IL, that was modeled on the existing Production Support-Floater position in Sullivan, that met petitioner's restrictions. This position was then offered to petitioner. Just because the job description was "revised on 6/14/19", and did not exist in the Arthur, IL location prior to 6/14/19, the petitioner and his attorney, summarily dismissed the job as a valid job, and labeled it as a "sham job. The arbitrator finds it significant that the petitioner did not even attempt to try the new job, or in the alternative, request modifications to the job duties. Petitioner did none of this, and just refused to accept the job offer.

The petitioner also tried to claim that he would be overpaid in this new job, in an attempt by respondent to avoid paying him an 8(d)1 wage differential. In response to this claim, the arbitrator finds it significant that respondent operates a non-union shop; that all production, welder and builder positions start at the same rate of $18.25 an hour, and get raises on their anniversary, as well as merit raises; that had petitioner accepted the job

his wages and benefits would have been consistent with his pre-injury level; that this position was created with petitioner's welding experience and knowledge of the production operation; and, that anyone else vying for this position would have to have the same experience and knowledge of the production operation.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner's claim that the job respondent offered him was a "sham job" is without merit. The arbitrator finds it significant that although the job respondent offered petitioner was new to the Arthur, IL location on 6/14/19, it already existed in the Sullivan, IL location; that the job duties for the Production Support-Floater position were not new duties created just for petitioner, but rather, were job duties that already existed and were spread across various employees in the Production department in Arthur, IL, and were being put together under one job description for better throughput; that after petitioner declined this position, respondent did not do away with it, but rather continued it as a regular position in Arthur, IL that 2 employees are currently working in Arthur, IL, and one person is working this position in Sullivan, IL; and, that the pay for the new Production Support-Floater job in Arthur, IL was commensurate with petitioner's pre-injury wages.

For these reasons, the arbitrator finds the Production Support-Floater Job respondent offered petitioner on 6/14/19 was not a "sham job", but rather a valid job that met respondent's needs, petitioner's permanent restrictions, and still exist today in respondent's Arthur, IL location for new hires, or existing employees that meet the qualifications. The arbitrator finds the creation of a new job in and of itself does not make a job a "sham job'.

Given that petitioner has failed to prove by a preponderance of the credible evidence that the Production Support-Floater position respondent offered him on 6/14/19 was a "sham job", the arbitrator finds the petitioner is not entitled to maintenance benefits for the period 6/20/19 through 6/2/20.

Now with respect the issue of the nature and extent of the injury, the arbitrator finds the petitioner is not entitled to a wage differential pursuant to Section 8(d)1 of the Act, because the petitioner was offered a valid job on 6/14/19 by respondent commensurate with his current salary, but declined to accept it. Therefore, the arbitrator will determine the petitioner's permanent partial disability pursuant to Section 8(d)2 of the Act.

The nature and extent of petitioner's injury, consistent with 820 ILCS 305/8.1b, permanent partial disability, shall be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of Section 8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability

corroborated by the treating medical records. 820 ILCS 305/8.1b. No single enumerated factor shall be the sole determinant of disability. Id.

Neither party submitted an AMA rating pursuant to Section 8.1b of the Act into evidence. For this reason, the arbitrator gives no weight to this factor.

With respect to factor (ii), the occupation of the injured employee, the petitioner was a welder/builder for respondent, who was unable to return to his regular duty job due to his permanent restrictions that placed petitioner at the Medium Physical Demand Level. Although respondent offered petitioner the position of Production Support-Floater, which was within his permanent restrictions, petitioner declined the offer claiming it was a "sham job", which the arbitrator determined it was not. Petitioner has a high school education, and welding certificate from Parkland College. Petitioner also had experience in construction and auto repair prior to working for respondent. He also worked for 10 years for ADM before he worked for respondent. For these reason, the arbitrator gives greater weight to this factor.

With respect to factor (iii), the age of the employee. Petitioner was 47 years old at the time of the injury. When he was released from care on 6/5/19, he was released with permanent restrictions, that prevented him from returning to his regular duty position. Respondent offered petitioner the position of Production Support-Floater, which was within his restrictions, and commensurate with his current wages. However, petitioner declined this position. Instead, petitioner sought vocational rehabilitation assistance from Gustafson, who opined that petitioner could find alternate work within his restrictions. Based on his age of 47, the arbitrator finds the petitioner may remain in the workforce for up to 2 decades, and during that time could continue to experience pain and limitations as they relate to his left shoulder. For these reasons, the Arbitrator gives greater weight to this factor.

With respect to factor (iv), the future earnings of the petitioner, the petitioner was released from care on 6/5/19 with permanent restrictions in the Medium Physical Demand Level. On 6/14/19 petitioner was offered the full time position of Production Support-Floater, the pay of which was commensurate with his current wages. Petitioner declined this position claiming that it was a "sham job", which the arbitrator found it was not. After declining the position, petitioner performed a self-directed job search, and then worked with Gustafson, who determined petitioner was capable of earning $11.00-$12.00 an hour. However, the job petitioner declined was not a "sham job", and he would have been paid a salary commensurate with the job he currently had, and he would have received additional raises based on his merit and seniority. Highland testified that had petitioner accepted the job his would have been making at least $24.63 an hour, which was $2.00 more than the rate he would have gotten back in June of 2019 based on just regular raises. Highland noted that this rate did not

include any merit raises petitioner may have earned. For these reasons, the arbitrator gives no weight to this factor.

With respect to factor (v), evidence of disability corroborated by the treating medical records, the Arbitrator finds that as a result of the accident on 5/4/17 petitioner underwent two surgical procedures, and ultimately, on 6/5/19 was released by Dr. Greatting at maximum medical improvement with permanent restrictions of limited overhead activity with no lifting overhead greater than 10 pounds, and no lifting more than 30 pounds occasionally, or 15 pounds frequently from floor to waist and waist to chest. Around that time, petitioner had complaints of a constant aching pain in his left shoulder with intermittent shooting pains; numbness and tingling in his left hand and fingers that began about three weeks ago; and burning pain in his left elbow. At trial, petitioner testified that he has to sleep on his right side, because he cannot sleep on his left side for more than 5 minutes without his hand going numb. He also testified that he has a lot of aches and pain, and sharp shooting pains down the back of the shoulder, to the side, and through the elbow to the hand. He testified that his symptoms are constant. He reported difficulty tying his shoes, folding laundry, vacuuming, taking a shower, pushing a lawnmower, lifting his son, playing ball with his son, and climbing a tree with his son who is 4 years old.

For these reasons, the Arbitrator gives greater weight to this factor.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner sustained a 40% loss of use to his person as a whole pursuant to Section 8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC028426
Case Name	DASCOTTE, PATTY v. STATE OF ILLINOIS/SOUTHERN ILLINOIS UNIVERSITY CARBONDALE
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0170
Number of Pages of Decision	11
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Natalie Shasteen

DATE FILED: 5/10/2022

/s/Carolyn Doherty, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PATTY DASCOTTE,

Petitioner,

vs. NO: 20 WC 28426

STATE OF ILLINOIS/
SOUTHERN ILLINOIS UNIVERSITY CARBONDALE,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 22, 2021, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired

without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

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

May 10, 2022

o: 05/05/22

CMD/ma

045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC028426
Case Name	DASCOTTE, PATTY v. STATE OF ILLINOIS/SIU CARBONDALE
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Natalie Shasteen

DATE FILED: 11/22/2021

/s/*William Gallagher, Arbitrator*

Signature

INTEREST RATE WEEK OF NOVEMBER 16, 2021 0.06%

CERTIFIED as a true and correct copy

pursuant to 820 ILCS 305/14

November 22, 2021

/s/ *Brendon O'Rourke*

Brendan O'Rourke, Assistant Secretary

Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Patty Dasotte
Employee/Petitioner

Case # 20 WC 28426

v.

Consolidated cases: n/a

S.O.I./SIU Carbondale
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on October 8, 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

K. [x] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

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

N. [ ] Is Respondent due any credit?

O. [ ] Other

FINDINGS

On the date of accident, May 28, 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 $42,568.44; the average weekly wage was $818.62.

On the date of accident, Petitioner was 49 years of age, single with 0 dependent child(ren).

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

Respondent shall be given a credit of $1,402.57 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $1,402.57.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit for amounts paid for medical benefits 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.

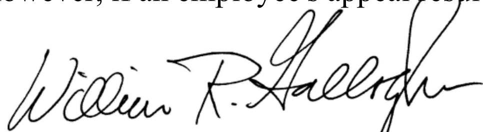
Respondent shall pay Petitioner temporary total disability benefits of $545.75 per week for 61 4/7 weeks, commencing May 29, 2020, through August 5, 2020, and October 6, 2020, through October 8, 2021, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for prospective medical treatment as recommended by Dr. Robert Golz and Dr. Amanda Brazis.

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.



November 22, 2021

William R. Gallagher, Arbitrator
ICArbDec19(b)

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment by Respondent on May 28, 2020. According to the Application, Petitioner "Got bug powder in eye and fell off curb" and sustained an injury to her "Left eye/left ankle" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. Respondent stipulated Petitioner sustained a work-related injury to her left eye, but disputed Petitioner sustained a work-related injury to her left ankle (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a building service worker. On May 28, 2020, Petitioner was cleaning a cabinet located underneath a sink. As Petitioner was in the process of performing this task, she experienced a burning sensation in her left eye. At that time, Petitioner attempted to flush her eye with water, but it did not help. Petitioner subsequently determined the source of the irritation to her left eye was bug powder which had been placed under every sink.

Petitioner reported the accident to her supervisor, an individual named "Jamie", who directed her to flush her eye out again. Petitioner did so, but this did not help. Petitioner testified Jamie took her supervisor, Randy Moore, who informed her she would need to go to the office to complete a report, but to defer going to the office until after lunch.

Petitioner had her lunch while seated in the passenger seat of a car with another employee. When she finished lunch, Petitioner walked to Lentz Hall, where the office was located. Petitioner testified her left eye was still red, irritated and watering which caused her vision to be impaired. When Petitioner stepped off of the curb while walking to Lentz Hall, she fell and sustained an injury to her left ankle. Petitioner said she had no vision issues or left ankle injuries prior to the accident.

On May 28, 2020, Petitioner completed two Injury Reports, one for the left eye and one for the left ankle. In regard to the report in respect to the left eye, Petitioner indicated she was below a sink cleaning it when she felt a burning sensation in her left eye which she attempted to flush with water (Petitioner's Exhibit 10). In regard to the report in respect to the left ankle, Petitioner indicated she was going to the office to fill out a report, rubbing her eye and step off of a sidewalk and twisted her ankle and fell (Respondent's Exhibit 1).

There were also two Notification of Injury Reports completed, one for the left eye and one for the left ankle. The information contained in these reports was consistent with the information contained in the Injury Reports (Respondent's Exhibit 1).

Additionally, there were two Supervisor's Reports of Injury or Illness completed, one for the left eye and one for the left ankle. The information contained in these reports was also consistent with the information contained in the Injury Reports (Respondent's Exhibit 1).

Petitioner testified that prior to the accident, she had walked in the area she sustained the fall on numerous occasions. Petitioner said she would not have sustained the fall if she had not been experiencing vision difficulties.

Following the accident, Petitioner sought treatment at SIH Workcare on May 29, 2020, where she was evaluated by Mindy Dudenbostel, a Nurse Practitioner. According to the medical record of that date, on May 28, Petitioner was cleaning underneath a sink and got bug powder in her left eye which she attempted to flush out. When Petitioner went to fill out a report, she stepped off of a curb and turned her ankle. Petitioner was diagnosed as having a foreign body in her left eye and a left ankle sprain. X-rays of the left ankle were taken which were negative for fracture. Petitioner was directed to use crutches and work/activity restrictions were imposed (Petitioner's Exhibit 3).

Petitioner was again seen by PA Dudenbostel on June 3, 2020. At that time, Petitioner's vision issues had resolved, but she continued to have left ankle symptoms. Petitioner was directed to apply ice to the ankle and to elevate it to reduce pain/swelling. When Petitioner was seen on June 10, and June 16, 2020, her left ankle condition had not improved and physical therapy was ordered (Petitioner's Exhibit 3).

Petitioner received physical therapy at Herrin Hospital from June 18, 2020, through July 31, 2020. Petitioner's left ankle condition did not improve to any significant degree (Petitioner's Exhibit 5).

On July 31, 2020, Petitioner sought treatment with her family physician, Dr. Jeffrey Parks. At that time, Petitioner was evaluated by Austin Stalling, a Physician Assistant associated with Dr. Parks. PA Stalling diagnosed Petitioner with an inversion injury to the left ankle (Petitioner's Exhibit 4).

On August 14, 2020, Petitioner was evaluated by Dr. Parks. His medical record of that date contained a history of Petitioner having powder in her left eye, attempting to flush it out and, while walking to her employer's office, turning her left ankle. Petitioner continued to complain of left ankle pain and, on examination, Dr. Parks observed swelling around the lateral malleolus. He ordered an MRI of Petitioner's left ankle (Petitioner's Exhibit 4).

The MRI was performed on September 10, 2020. According to the radiologist, the MRI revealed mild osteoarthrosis, Achilles paratendinitis, peroneal tenosynovitis and a split peroneus brevis (Petitioner's Exhibit 5). Dr. Parks reviewed the MRI and referred Petitioner to Dr. James Murphy, an orthopedic surgeon (Petitioner's Exhibit 4).

Petitioner was initially seen by Dr. Murphy on September 17, 2020. At that time, Petitioner continued to complain of left ankle pain/instability. Dr. Murphy examined Petitioner and reviewed the MRI. He opined Petitioner had sustained a tear of the peroneal tendon. He recommended Petitioner undergo surgery consisting of an open repair of the peroneus brevis and exploration of the peroneus longus tendon (Petitioner's Exhibit 6).

Dr. Murphy performed surgery on October 9, 2020. The procedure consisted of open debridement of the left peroneal tendon sheath and an open repair of the left peroneus brevis tendon (Petitioner's Exhibit 8).

Following surgery, Petitioner continued to be treated by Dr. Murphy. He ordered physical therapy, but Petitioner's condition only improved slightly. Petitioner continued to have difficulties walking and experienced pain, especially while in physical therapy (Petitioner's Exhibit 6).

On January 12, 2021, Petitioner was evaluated by Dr. Robert Golz, an orthopedic surgeon associated with Dr. Murphy. He noted Petitioner was wearing a brace, was still in therapy and continued to have left ankle symptoms. When he again saw Petitioner on April 6, 2021, Petitioner complained of constant left ankle pain which was worse with activity. Dr. Golz ordered an MRI scan (Petitioner's Exhibit 6).

The MRI was performed on May 25, 2021. According to the radiologist, the MRI revealed degenerative changes and a chronic sprain/partial thickness tear of the anterior talofibular ligament (Petitioner's Exhibit 6).

Dr. Golz saw Petitioner on June 1, 2021, and reviewed the MRI scan. His interpretation of the MRI was consistent with that of the radiologist. He continued to impose work/activity restrictions (Petitioner's Exhibit 6).

Petitioner was referred to Dr. Amanda Brazis, a podiatrist associated with Dr. Murphy and Dr. Golz. Dr. Brazis performed surgery on August 6, 2021. The procedure consisted of left lateral ankle stabilization with internal brace augmentation and left ankle peroneal tendon repair (Petitioner's Exhibit 8).

When Dr. Brazis saw Petitioner on September 2, 2021, she noted Petitioner had been weight bearing while wearing a CAM boot. At that time, Dr. Brazis ordered physical therapy (Petitioner's Exhibit 6).

Petitioner testified she has been receiving physical therapy following the most recent surgery and it has been helping. Petitioner was wearing an ankle brace at the time of trial and said she has not been able to return to work.

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 her employment by Respondent on May 28, 2020, to her left eye and left ankle.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related injury to her left eye.
Petitioner's testimony regarding the circumstances of how she sustained the injury to her left ankle was unrebutted.

The information regarding the circumstances of how Petitioner sustained the injury to her left ankle was contained in various reports prepared afterward.

Petitioner provided a consistent history of how she sustained the injury to her left ankle to the medical providers who treated her.

At the time Petitioner sustained the injury to her left ankle, her vision was impaired because of having the bug powder in her left eye. Petitioner testified she would not have sustained the fall if she had not been experiencing vision difficulties.

In this case, the chain of causation between Petitioner having bug powder in her left eye which caused her vision to be impaired and her sustaining the left ankle injury has not been broken. Where a work injury causes a subsequent injury, the chain of causation is not broken. *Fermi National Accelerator Laboratory v. Industrial Commission*, 586 N.E.2d 750, 756 (Ill. App. 2nd Dist. 1992).

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

Based upon the Arbitrator's conclusion of law in disputed issue (C) the Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of May 28, 2020.

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

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

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

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

The Arbitrator concludes Petitioner is entitled to prospective medical treatment including treatment as recommended by Dr. Golz and Dr. Brazis.

In support of this conclusion the Arbitrator notes following:

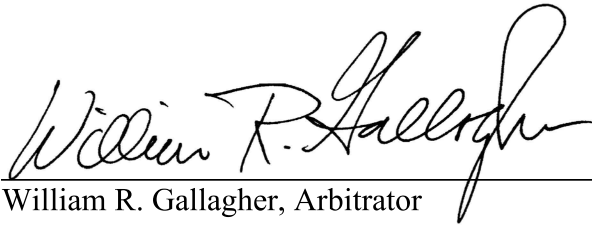
Petitioner was still receiving treatment at the time of trial.

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

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 61 4/7 weeks, commencing May 29, 2020, through August 5, 2020, and October 6, 2020, through October 8, 2021.

In support of this conclusion the Arbitrator notes the following:

Petitioner has been under active medical treatment and was unable to work during the aforestated periods of time.



William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC035814
Case Name	RAFAEL, C DELIA v. MAGNA INTERNATIONAL INC
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0171
Number of Pages of Decision	34
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Eduardo Salgado
Respondent Attorney	John Fassola

DATE FILED: 5/10/2022

/s/Carolyn Doherty, 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 WINNEBAGO	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
	)		☐ PTD/Fatal denied
		☒ Modify: TTD, Prospective Care	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CELIA RAFAEL,

Petitioner,

vs. NO: 17 WC 35814

MAGNA INTERNATIONAL, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under Section 19(b) of the Act having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability, temporary partial disability, and prospective care, and being advised of the facts of law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof. The Commission further remands this case to the Arbitrator for further proceedings including a determination of permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327 (1980).

The Commission modifies the Decision of the Arbitrator with respect to the award of temporary total disability (TTD) benefits, and prospective care.

Regarding TTD benefits, the Arbitrator ordered that Respondent shall pay Petitioner $450.08/week for 157 and 5/7ths weeks, commencing December 28, 2017 through March 25, 2018 and from May 18, 2018 through the hearing date of February 26, 2021, and "[t]hereafter, TTD to be based on Petitioner's condition stabilizing and determined by Dr. Thomas Poepping." The Decision of the Arbitrator also characterized the latter part of the award as "from May 18, 2018 through the date of trial on February 26, 2021, and ongoing." However, "'[e]ach section 19(b) proceeding is a separate proceeding, *limited to a determination of temporary total disability up to the date of the hearing*, and each 19(b) decision is a separate and appealable order.'" (Emphasis added.) *Weyer v. Illinois Workers' Compensation Comm'n*, 387 Ill. App. 3d 297, 307 (2008) (quoting *R.D. Masonry, Inc. v. Industrial Comm'n*, 215 Ill. 2d 397, 407 (2005)). Accordingly, the

Commission strikes the Arbitrator's reference to ongoing benefits and awards TTD benefits for the periods commencing December 28, 2017 through March 25, 2018 and from May 18, 2018 through the hearing date of February 26, 2021. The Commission affirms the Arbitrator's award of a credit to Respondent for TTD benefits already paid.

Regarding prospective care, the Decision of the Arbitrator found that Dr. Thomas Poepping's proposed left shoulder surgery was reasonable and necessary to treat Petitioner, but this finding was not expressly included in the "Order" section of the Decision. The Commission affirms and adopts the Arbitrator's finding and awards the left shoulder surgery recommended by Dr. Poepping.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated November 3, 2021 is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $450.08 per week commencing December 28, 2017 through March 25, 2018 and from May 18, 2018 through February 26, 2021, a period of 157 and 5/7ths weeks, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent is entitled to a full credit for any temporary total disability benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for the left shoulder surgery recommended by Dr. Poepping and any necessary and reasonable associated care.

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

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

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

Bond for the removal of this cause to the Circuit Court is hereby fixed at the sum of $36,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

May 10, 2022

o: 5/5/22
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

DECISION SIGNATURE PAGE

Case Number	17WC035814
Case Name	RAFAEL, CELIA v. MAGNA INTERNATIONAL, INC
Consolidated Cases	No Consolidated Cases
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	30
Decision Issued By	Paul Seal, Arbitrator

Petitioner Attorney	Eduardo Salgado
Respondent Attorney	John Fassola

DATE FILED: 11/3/2021

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 2, 2021 0.06%

/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

Celia Rafael
Employee/Petitioner

v.

Magna International, Inc.
Employer/Respondent

Case # **17** WC **35814**

Consolidated cases: ____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Eric Seal**, Arbitrator of the Commission, in the city of **Rockford, Illinois**, on **February 26, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **09/25/2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**6,751.20**; the average weekly wage was $**675.12**.

On the date of accident, Petitioner was **51** years of age, ***married*** with **1** dependent child.

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

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

Respondent shall be given a credit of $**42,693.32** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**42,693.32**. Respondent is entitled to a credit of $**42,639.32** under Section 8(j) of the Act.

ORDER:

MEDICAL BENEFITS:
Respondent shall pay reasonable and necessary medical services of $154.32 to Rockford Orthopedic / Ortho Illinois, $2,070.00 to G&T Orthopaedics, $264.29 to Midwest Specialty Pharmacy, directly to Petitioner for further distribution as provided in Sections 8(a) and 8.2 of the Act.

Temporary Partial Disability
Respondent shall pay Petitioner temporary partial disability benefits of $759.15 from March 26, 2018 through May 17, 2018 representing 7 4/7 weeks, as provided in Section 8(a) of the Act.

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $450.08/week for 157 5/7 weeks, commencing 12/28/2017 through 03/25/2018 and from 05/18/2018 through 02/26/2021, as provided in Section 8(b) of the Act. Thereafter, TTD to be based on Petitioner's condition stabilizing and determined by Dr. Thomas Poepping.

Credits
Respondent shall be given a credit of $42,693.32 for TTD, $0.00 for TPD, and $0.00 for maintenance benefits, for a total 8(j) credit of $42,693.32.

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.

______________________________ **NOVEMBER 3, 2021**

Signature of Arbitrator

I. FINDINGS OF FACTS:

The Arbitrator observed the Petitioner's behavior and demeanor in the courtroom, including her behavior while testifying and having reviewed all of the evidence admitted, the Arbitrator finds the Petitioner to be credible and her testimony credibly corroborated by all the other evidence.

The Arbitrator finds that on February 26, 2021, the petitioner, Ms. Celia Rafael, testified and the parties stipulated that on September 25, 2017, she was 51 years old, married with one dependent child, and was employed by the Respondent, Magna International, Inc. The parties further stipulated that Petitioner worked in the assembly department and was paid at an average weekly rate of $675.12.

According to Petitioner's testimony, she was responsible for operating a machine involved the manufacturing of automotive parts. While working in this capacity Petitioner suffered an injury to her right shoulder occurring on September 25, 2017, which was timely reported to the employer. With respect to the accident, Petitioner testified to feeling a pinch to her neck while attempting to remove a bumper off the machine she was operating (Transcript Pg. 13).

Petitioner commenced treating for her injuries with Physician's Immediate Care on October 4, 2017, at which time she provided a consistent history of being injured at work on September 25, 2017. Petitioner clarified that she was injured while operating a machine that manufactured car bumpers before being diagnosed with sustaining a strain of her muscles, fascia and tendons of the right shoulder and upper arm along with a sprain of the cervical spine (Petitioner's Exhibit 1, Pg. 4). Petitioner was also provided with light duty work restrictions and prescribed medication for her symptoms (Id.).

Thereafter, Petitioner continued to treat with Physicians Immediate Care and followed up after an initial appointment on October 8, 2017. At her scheduled appointment, the treating physician recommended Petitioner undergo a course of physical therapy. Petitioner commenced therapy with Physicians Immediate Care on October 11, 2017, with additional therapy appointments occurring on October 13, 2017, and again on October 16, 2017. At the next follow up appointment with Physicians Immediate Care on October 25, 2017, Petitioner was discharged from further care. (Petitioner's Exhibit 1, Pg. 61 – 63).

Despite being discharged Petitioner continued to seek medical attention. On October 27, 2017, Petitioner was seen at Ortho Illinois for an initial consultation with Dr. Robin Borchard. (Petitioner's Exhibit 2, Pg. 29). According to the history provided, the Petitioner was injured on September 25, 2017, while trying to lift a bumper at work when the machine did not lift (Id.). Dr. Borchardt performed a physical examination and diagnosed Petitioner with pain in the right shoulder and recommended an MRI to assess for long head biceps tendon rupture (Id., Pg. 29, 30). Furthermore, Dr. Borchardt provided Petitioner with restrictions to return to work under the condition that she be limited to only performing work with her left hand. (Id., Pg. 33).

Per the medical records, Petitioner had an MRI of the right shoulder at Summit Radiology on November 10, 2017. On the same date Petitioner had the results interpreted by Dr. Borchardt, who indicated the imaging was positive for a full thickness tear of the anterior fibers of the supraspinatus tendon and for fraying of the superior labrum (Petitioner's Exhibit 2, Pg. 38). Furthermore, Dr. Borchardt indicated that the imaging further showed signs of acromial impingement and bicep tendinitis. Based on the MRI

findings, Dr. Borchardt provided Petitioner with a referral for an orthopedic consultation with Dr. Scott W. Trenhaile, also of Ortho Illinois (Id., Pg. 38).

Petitioner followed up with Dr. Trenhaile on November 21, 2017, and she provided him with a consistent history of an injury to the right shoulder after attempting to remove an auto-part from a machine at work on September 25, 2017 (Petitioner's Exhibit 2, Pg. 40). According to Dr. Trenhaile, Petitioner's clinical exam results and her diagnostic findings, were sufficient to recommend a right shoulder arthroscopy, rotator cuff repair, sub-acromial decompression, distal clavicle excision, joint debridement and possible biceps tenodesis (Id.). Dr. Trenhaile also prescribed Petitioner with light duty restrictions of no lifting greater than 5lbs and no over shoulder level work. Lastly, on November 21, 2017, Dr. Trenhaile further recommended an EMG in order to assess Petitioner's cervical complaints and to rule out cubital tunnel versus any possible cervical involvement (Id., Pg. 43).

Petitioner's EMG examination took place at Mercy Sports Medicine & Rehabilitation Center on December 7, 2017. Petitioner's exam was consistent with mild ulnar neuropathy in the right wrist (Petitioner's Exhibit 2, Pg. 48).

After obtaining the results of the EMG, Petitioner had a second surgical opinion with Dr. Benjamin Goldberg of Illinois Orthopedic Network on December 14, 2017 (Petitioner's Exhibit 3, Pg. 1). Petitioner provided a consistent history of mechanism of injury occurring on September 25, 2017, while operating a machine at work (Id.). After performing a physical examination and reviewing Petitioner's right shoulder MRI, Dr. Goldberg diagnosed Petitioner with a full thickness rotator cuff tear of the right shoulder resulting from her work injury. Dr. Goldberg further diagnosed Petitioner with significant bicep

tenosynovitis as well as a symptomatic AC joint with bursitis (Petitioner's Exhibit 3, Pg. 1). Based on the aforementioned, Dr. Goldberg recommended arthroscopic surgery.

Petitioner underwent surgery on December 28, 2017 with Dr. Goldberg, which consisted of a right shoulder arthroscopy with extensive debridement of the labral tear, biceps tenotomy, subacromial decompression, distal clavicle excision with mini open tenodesis and rotator cuff repair (Petitioner's Exhibit 3, Pg. 3). According to the treating records from the date of surgery, Petitioner was also taken off work (Id., Pg. 5).

Petitioner followed up after surgery with Dr. Goldberg on January 4, 2018. As part of her recovery process Dr. Goldberg prescribed Petitioner a sling as of the date of surgery. On January 4, 2018, Dr. Goldberg advised Petitioner to discontinue the use of her sling and encouraged Petitioner to start working on passive range of motion exercises. Dr. Goldberg also prescribed physical therapy for two to three times a week in order to work on her passive range of motion (Petitioner's Exhibit 3, Pg. 6). Petitioner was also provided with an off-work note.

Per the recommendations for Dr. Goldberg, physical therapy commenced at Athletico on January 11, 2018 (Petitioner's Exhibit 4). After starting therapy Petitioner followed up with Dr. Goldberg on January 25, 2018. Dr. Goldberg recommended Petitioner continue to take pain medications as tolerated and to continue with physical therapy with a focus on passive range of motion exercises (Petitioner's Exhibit 3, Pg. 8). Petitioner continued to treat with Athletico undergoing 20 visits from January 25, 2018 through March 14, 2018 (Petitioner's Exhibit 4.).

On March 14, 2018, per the instructions of the Respondent, Petitioner was evaluated for an independent medical evaluation by Dr. Joshua Alpert of Midwest Bone &

Joint Institute (Respondent's Exhibit 2). According to Dr. Alpert's report, Petitioner suffered a work-related injury on September 25, 2017, resulting in a right shoulder rotator cuff tear. Per Dr. Alpert, Petitioner was three months removed from surgery and is currently in the post-surgery recovery phase of her treatment. Dr. Alpert recommended additional physical therapy to focus on strengthening and potentially work conditioning. Whether to undergo work condition would be based on the outcome of therapy itself. With respect to Petitioner's work status, Dr. Alpert opined that Petitioner was able to work with restrictions of no lifting with the right upper extremity (Respondent's Exhibit 2, Pg. 4).

After her appointment with Dr. Alpert, Petitioner followed up with her treating physician, Dr. Goldberg on March 22, 2018 (Petitioner's Exhibit 3, Pg. 10). Dr. Goldberg agreed with the work status recommendations made by Dr. Alpert and also recommended Petitioner return to work with restrictions of no lifting more than one pound and no lifting at or above shoulder level (Petitioner's Exhibit 3, Pg. 10). Dr. Goldberg also recommended additional physical therapy. The Petitioner testified that she returned to work for the employer in a light duty capacity on Mach 26, 2018.

Petitioner continued to perform therapy at Athletico Physical Therapy from March 23, 2018 until her next follow up appointment with Dr. Goldberg on May 3, 2018. During that time Petitioner had 13 physical therapy appointments. Of note, during her appointment on May 2, 2018 with Athletico, Petitioner reported gains with strength, but also reported range of motion deficits that were limiting her capacity to perform tasks of daily living as well as work related activities (Petitioner's Exhibit 4, Pg. 170 – 173).

On May 3, 2018, Petitioner followed up for a pre-scheduled appointment with Dr. Goldberg. Dr. Goldberg indicated that Petitioner was 4 months post-surgery and that

Petitioner's rotator cuff appeared to be clinically healed, despite ongoing concerns about a clicking and clunk sensation reported by the Petitioner (Petitioner's Exhibit 3, Pg. 12). Acting out of precaution and to determine whether Petitioner was experiencing hardware failure, Dr. Goldberg requested an MRI of the right shoulder. Petitioner was also instructed to continue with physical therapy as well as restrictions of no lifting, carrying, pushing or pulling in excess of one pound with no lifting above shoulder level (Id.).

Petitioner continued with therapy and also obtained a new right shoulder MRI. Petitioner had therapy appointments on May 4th, May 7th, May 9th and again May 11th of 2018 (Petitioner's Exhibit 4). Thereafter, Petitioner obtained the prescribed MRI at Niles Medical Imaging on May 12, 2018. According to the radiologist that interpreted the imaging results, Petitioner's study was remarkable for a partial tear of the supraspinatus tendon (Petitioner's Exhibit 8).

After the completion of the May 12, 2018, right shoulder MRI, Petitioner followed up with Dr. Goldberg on May 17, 2018. Dr. Goldberg concurred with the partial tear findings in Petitioner's right shoulder and recommended a possible injection. According to the treating notes, Petitioner was hesitant to start with injection therapy and requested to hold off (Petitioner's Exhibit 3, Pg. 14). Instead, Petitioner was provided with an off work note pending additional evaluation and treatment recommendations by Dr. Goldberg.

Petitioner continued along with her treatment and had additional physical therapy appointments with Athletico. According to the treatment records Petitioner continued to perform her therapy exercises from May 22, 2018, through June 13, 2018, consisting of 11 additional appointments (Petitioner's Exhibit 4).

Next, Petitioner was seen by Dr. Goldberg on June 14, 2018, at which point he confirmed Petitioner's hardware had been compromised. In particular, Dr. Goldberg indicated that the MRI showed evidence that one of the anchors was positive for resting prominently in the anchor site. Dr. Goldberg further noted the rotator cuff was mostly healed, but still had evidence of partial tearing. (Petitioner's Exhibit 3, Pg. 16). Given the aforementioned results Dr. Goldberg recommended a second right shoulder arthroscopy with repeat decompression and possible anchor or suture versus scar removal, to prevent Petitioner's ongoing clicking symptoms (Id.). Petitioner was also recommended she remain off work and to follow up with her primary physician to be cleared for surgery.

Thereafter, Petitioner continued to treat with Athletico performing an additional eight visits of physical therapy. The aforementioned therapy appointments occurred from June 15, 2018, through July 12, 2018 (Petitioner's Exhibit 4).

On July 16, 2018, acting on the request of the Respondent, Petitioner attended a second independent medical evaluation with Dr. Joshua Alpert (Respondent's Exhibit 1). Dr. Alpert opined Petitioner suffered a work-related full thickness tear that was operated and is now experiencing post-operative inflammation. Dr. Alpert also indicated that Petitioner suffers from pain coming from a distal clavicle bone spur that is still rubbing on Petitioner's rotator cuff (Id.). Unlike Dr. Goldberg, Dr. Alpert did not believe that Petitioner was suffering from issues resulting from her hardware backing out, but rather the partial tearing of the rotator cuff and Petitioner's bone spur. Based on his findings, Dr. Alpert recommended Petitioner try a sub-acromial cortisone injection along with a trial of work conditioning. According to Dr. Alpert, this would be done in an attempt to avoid a second surgery. However, Dr. Alpert further concluded that if the aforementioned treatment failed

to provide Petitioner with relief, then surgery would be appropriate (Id.). With regards to Petitioner's work status, Dr. Alpert indicated that Petitioner would be capable of working with restrictions of no lifting more than 5lbs with her right arm. Additionally, Dr. Alpert commentated that during his examination he did not appreciate any symptom magnification or positive Waddells signs.

After the conclusion of Respondent's IME appointment, Petitioner continued to perform physical therapy with Athletico. From July 17, 2018, through August 1, 2018, Petitioner attended seven additional appointments. On July 30, 2018, while attending therapy, Petitioner reported to her therapist that in an effort to relieve her symptoms Petitioner did not use her right shoulder for much of the weekend (Petitioner's Exhibit 4, Pg. 254, 255).

Thereafter, Petitioner followed up with Dr. Thomas Poepping, also of Illinois Orthopedic Network, on August 7, 2018. According to the treating report from Dr. Peopping's visit, Petitioner provided him with a consistent history of her mechanism of accident occurring on September 25, 2017. Dr. Poepping also reviewed Petitioner's prior MRI imaging as well as a copy of Dr. Alpert's July 16, 2018 IME report. Based on the information available to him at the time, Dr. Poepping agreed with the recommendation for arthroscopic surgery and provided Petitioner with restrictions to return to work with no use of the right arm, no lifting, pulling, pushing greater than 5lbs, and no over shoulder work (Petitioner's Exhibit 3, Pg. 18, 19).

Petitioner returned to see Dr. Poepping on September 24, 2018. At that time Dr. Poepping administered a right shoulder injection in an attempt to alleviate Petitioner's symptoms. At this time Dr. Poepping once again recommended surgery of the right

shoulder (Petitioner's Exhibit 3, Pg. 21). Petitioner returned to see Dr. Poepping on October 30, 2018, to check on her progress since she had received her injection during her previous appointment. Dr. Poepping indicated that he did not feel work conditioning would provide any additional benefits to Petitioner at this time given her current pseudo paralytic right shoulder (Id., Pg. 22). Based on his findings Dr. Poepping recommended surgery for the right shoulder as well as provided light duty work restrictions of no use of the right arm, no carrying, lifting, pulling, or pushing greater than 5lbs, no above shoulder work and no operating machinery (Id., Pg. 23)

Petitioner underwent her second right shoulder surgery November 27, 2018, with Dr. Poepping. On said date Petitioner was placed off work while she recovered from surgery (Petitioner's Exhibit 3, Pg. 24 – 26). Per Dr. Poepping's records, Petitioner had her first post-surgery follow up on December 4, 2018. Dr. Poepping recommended Petitioner commence physical therapy with a focus on passive range of motion, continue to use a sling to immobilize the right arm, and to refrain from the use of her right arm for any kind of lifting (Petitioner's Exhibit 3, Pg. 27). Dr. Poepping also prescribed Petitioner to remain off work.

The following appointment with Dr. Poepping occurred December 21, 2018. Petitioner reported feeling better than prior to undergoing her second surgery. Dr. Poepping recommended Petitioner continue use of her sling until six weeks after the surgery. According to the records Petitioner was also recommended to remain off work as well as to commence physical therapy. Petitioner's first post-operative physical therapy appointment occurred on January 7, 2019, at Ortho Illinois. Per the treating notes Petitioner was to undergo a course of two to three therapy sessions a week for ten to

twelve weeks. After attending her initial appointment Petitioner followed up with Ortho Illinois on January 9, 2019, and again on January 16, 2019.

The Petitioner was next seen on January 18, 2019, by Dr. Poepping. The treating record indicates that Petitioner was instructed to discontinue the use of her sling at such time that she feels comfortable (Petitioner's Exhibit 3, Pg. 30). Petitioner was also told to continue attending her physical therapy appointments while she remains off work (Id., Pg. 31).

Per the instructions of Dr. Poeppoing Petitioner continued to attend her scheduled therapy appointments with Orhto Illinois. The record shows Petitioner attended seven sessions from January 25, 2019 through February 14, 2019 (Petitioner's Exhibit 2, Pg. 63 – 83). Review of the therapy notes from the aforementioned time frame shows Petitioner complained of right shoulder pain and soreness occurring after or during each of her therapy sessions (Id.).

Petitioner returned to see Dr. Poepping on February 15, 2019, with complaints ongoing pain, despite also reporting overall improvement with her right shoulder. During his physical examination, Dr. Poepping reported continued deficits in Petitioner's range of motion, particularly with active elevating and external rotation exercises (Petitioner's Exhibit 3, Pg. 34). With regards to Petitioner's work status, Dr. Poepping concluded Petitioner could return to work with restrictions of no use of Petitioner's right arm and no lifting, carrying, pulling, pushing or above shoulder work (Id., Pg. 34, 35).

On February 19, 2019, Petitioner returned to Ortho Illinois to continue with the prescribed course of therapy. From February 19, 2019, through March 14, 2019, Petitioner attended eight total therapy sessions. In particular, on February 21, 2019, Petitioner was

seen at Ortho Illinois for a routine therapy appointment. According to the treating notes, Petitioner made complaints of having pain in her left arm now too (Petitioner's Exhibit 2, Pg. 88) Specifically Petitioner reported pain bilaterally in her elbows and wrists, which she rated to be a seven out of a possible ten. Similarly, on March 14, 2019, while at a therapy appointment at Ortho Illinois, Petitioner reported feeling soreness in both arms after progressing to pushups in therapy (Id., Pg. 106).

The next appointment with Dr. Poepping occurred on March 15, 2019. Petitioner reported improvements to her right shoulder condition, but with ongoing complaints of pain. Dr. Poepping recommended Petitioner continue with therapy, but also stated that if pain in the right shoulder continued, consideration for a subacromial injection and advanced imaging would be made (Petitioner's Exhibit 3, Pg. 38). Petitioner was also provided with ongoing restrictions of no use of the right arm, no carrying, lifting, pushing, pulling greater than 5lbs, and no over shoulder work (Id., Pg. 39).

Petitioner continued to follow up with Ortho Illinois for physical therapy and attended seven appointments from March 18, 2019, through April 11, 2019. During a therapy session on March 20, 2019 the Petitioner reported her right shoulder was feeling better and that she was trying to use her right arm more to do her home activities (Petitioner's Exhibit 2, Pg. 113).

According to the records, Petitioner had a follow up appointment with Dr. Poepping on April 12, 2019. During this particular appointment the treating physician performed a physical examination that included a review of Petitioner's left shoulder (Petitioner's Exhibit 3, Pg. 43). Dr. Poepping recommended Petitioner continue with physical therapy before potentially transitioning to work conditioning. According to the treating notes Dr.

Poepping also prescribed additional work restrictions of no carrying, lifting, pushing and pulling in excess of 5lbs along with no above shoulder work (Id., Pg. 44).

Thereafter, Petitioner continued with physical therapy at Ortho Illinois and underwent an additional seven appointments from April 18, 2019, through May 9, 2019. The therapy notes from April 18, 2019 ,indicate Petitioner reported she was starting to use her right arm more to do household activities such as putting plates in cupboards. However, on April 29, 2019, during another therapy session Petitioner further stated that despite feeling better with her right shoulder, she still has numbness in the left arm and neck area (Petitioner's Exhibit 2, Pg. 132 – 136). Additionally, the therapy note from May 9, 2019, states that despite overall gains in Petitioner's condition, she remains unable to lift a gallon of milk with just the use of the right arm (Petitioner's Exhibit 2, Pg. 150).

On May 10, 2019, Petitioner followed up with Dr. Poepping and reported feeling well enough to commence transitioning to a work conditioning program. Dr. Poepping once again performed a physical examination of both the right and left shoulders. Upon completing his examination Dr. Poepping recommended Petitioner start transitioning into a work conditioning program. In addition, Dr. Poepping stated that if Petitioner's right shoulder pain persisted, they would consider performing a subacromial injection (Petitioner's Exhibit 3, Pg. 47). With respect to work status, Petitioner was provided with an off-work note.

Thereafter, the records reflect that Petitioner followed up with Dr. Peopping just one week later on May 17, 2019. Per Dr. Poepping's report Petitioner had complaints of left shoulder pain that she indicated had been progressing since the second surgery because of her use of the left arm for essentially all tasks of daily life and work (Petitioner's Exhibit 3,

Pg. 51). Dr. Poepping noted that Petitioner's left shoulder pain was located laterally on the left shoulder with radiating pain down the lateral upper arm. Petitioner was diagnosed with being status post right shoulder arthroscopic rotator cuff repair, subacromial decompression and debridement along with left shoulder pain (Id.). According to the notes Dr. Poepping indicated that Petitioner suffered from left shoulder subacromial bursitis and rotator cuff tendinitis. At this time, he recommended Petitioner continue to perform work conditioning and see if the shoulders hold up to the proposed treatment. Dr. Poepping further suggested that advanced imaging would be necessary should Petitioner's shoulder pain continue (Id.).

Petitioner had an additional therapy session with Ortho Illinois on May 20, 2019, before commencing a three-week work conditioning program scheduled to start on May 23, 2019. The records reflect that Petitioner indeed started work conditioning on May 23, 2019, and performed six additional sessions through June 13, 2019 (Petitioner's Exhibit 2, Pg. 158 - 173).

Dr. Poepping saw the Petitioner on June 14, 2019, as a follow up to Petitioner's post-surgical right shoulder condition and ongoing left shoulder complaints (Petitioner's Exhibit 3, Pg. 52). According to Petitioner she was unable to continue with work conditioning due to an increase of pain in her right shoulder. As a result, the Petitioner was prescribed a right shoulder MRI due to persistent pain and limitations to Petitioner's function and strength. Dr. Poepping also, continued Petitioner's off work status at this time (Id.).

Based on the recommendations from the treating physician, Petitioner obtained a right shoulder MRI on June 21, 2019, at Chicago Medical Imaging (Petitioner's Exhibit 7). The results of the MRI were interpreted by Dr. Poepping during his next appointment on

June 28, 2019. Per the treating notes, Dr. Poepping confirmed Petitioner suffered from bilateral shoulder pain, with the right being worse than the left (Petitioner's Exhibit 3, Pg. 55). Dr. Poepping opined that the right shoulder MRI from June 21, 2019, was remarkable for a healing right rotator cuff with some subacromial bursitis. Given his findings Dr. Poepping performed a right shoulder subacromial injection with the goal of providing Petitioner sufficient relief to allow her to resume work conditioning (Id.). With regards to the left shoulder, Dr. Poepping indicated that Petitioner's complaints were increasing and as a result he would continue to monitor the situation. Additionally, Dr. Poepping stated that if Petitioner's left shoulder complaints continued, he would consider getting advanced imaging (Id.). At the conclusion of the appointment Petitioner was again provided with an off-work note.

Physical therapy resumed once again with Ortho Illinois on July 3, 2019. Per the July 3, 2019, report Petitioner reported no relief from the subacromial injection and expressed concerns with her ability to return to full duty employment with Respondent (Petitioner's Exhibit 2, Pg. 178, 179). Thereafter, Petitioner attended eleven additional sessions of work conditioning from July 8, 2019 until her discharge date of July 30, 2019 (Id., Pg. 180 – 204).

Shortly after completing work conditioning, Petitioner testified that the employer advised her that her employment had been terminated effective August 1, 2019 (Transcript Pg. 27). Despite having lost her employment with Respondent, Petitioner continued to treat for her claimed injuries. The record shows Petitioner returned to Dr. Poepping on August 2, 2019. Per Dr. Poepping's report Petitioner expressed minimal improvement after the injection. Based on Petitioner's complaints and his physical exam findings, Dr. Poepping

prescribed a left shoulder MRI. According to the records Dr. Poepping wanted to evaluate the integrity of the rotator cuff (Petitioner's Exhibit 3, Pg. 59). While they waited for the MRI results to come in, Dr. Poepping provided Petitioner with an off work note and advised her to continue to perform an at home exercise regimen (Petitioner's Exhibit 3, Pg. 60).

On August 12, 2019, Petitioner obtained an MRI of the left shoulder from Preferred Open MRI (Petitioner's Exhibit 6). Thereafter, Petitioner proceeded to follow up with Dr. Poepping on August 30, 2019, in order to have the results interpreted. According to the treating notes from August 30, 2019 Dr. Poepping diagnosed Petitioner with a partial thickness tear of the left rotator cuff with acromioclavicular arthritis (Petitioner's Exhibit 3, Pg. 61). Dr. Poepping advised Petitioner that her options at that time would be to consider permanent restrictions or undergo surgery of the left shoulder. Petitioner advised Dr. Poepping that she would like to think about her options before making a decision. At the conclusion of the appointment Dr. Poepping prescribed Petitioner with restrictions of no carrying, lifting, pushing or pulling in excess of 5lbs with no above shoulder work (Id., Pg. 61, 62).

Thereafter, at the direction of the respondent, Petitioner was asked to attend a third independent medical examination. However, this time the evaluation was not conducted by Dr. Joshua Alpert. Rather, the Respondent obtained an independent medical evaluation with Dr. Prasant Atluri of Hand to Shoulder Associates (Respondent's Exhibit 1). According to Dr. Atluri's report, Petitioner complained of pain and weakness in the right shoulder that interfered with her ability to not only sleep but made accomplishing tasks of daily living difficult. In additional Petitioner complained of radiating pain down her left arm that was not present prior to her accident. Dr. Atluri diagnosed Petitioner with post right shoulder

arthroscopic rotator cuff repair, left shoulder pain and possible left shoulder impingement syndrome. With regards to Petitioner's right shoulder, Dr. Atluri concluded that Petitioner's condition was related to the alleged accident but did not necessitate additional care and should be able to return to work in a full duty capacity. As to the left shoulder, Dr. Atluri determined Petitioner's condition was not related to Petitioner's work accident as it developed gradually and long after the initial work injury. Dr. Atluri indicated that Petitioner's condition could be a result of chronic impingement syndrome. Despite not finding Petitioner's condition to be causally related to her employment, Dr. Atluri indicated that treatment to date had been reasonable, necessary and appropriate. Despite the reasonableness and appropriateness of care, Dr. Atluri did not agree surgery was necessary. Specifically, Dr. Atluri identified Petitioner's lack of relief to the subacromial injection as evidence that surgery would also fail to provide relief to Petitioner's condition.

After attending Dr. Atluri's independent medical exam, Petitioner followed up with Dr. Poepping on September 27, 2019, and again on November 8, 2019. At the conclusion of both appointments the record reflects that Dr. Poepping requested authorization for left shoulder surgery and also provided Petitioner with work restrictions of no lifting, pushing, carrying or pulling in excess of 5lbs with no above shoulder work (Petitioner's Exhibit 3, Pg. 63 – 65).

On December 20, 2019, Petitioner followed up with Dr. Poepping who diagnosed Petitioner with a right shoulder post arthroscopic rotator cuff repair, subacromial decompression and debridement, with a left shoulder partial thickness tear with acromioclavicular arthrosis (Petitioner's Exhibit 3, Pg. 66). Dr. Poepping also took the time during his evaluation to clarify his opinions with regards to the cause of Petitioner's

ongoing left shoulder complaints. According to Dr. Poepping, Petitioner's left shoulder symptoms are a direct result of the chronic right shoulder issues she has had since the accident at work. Dr. Poepping indicates that Petitioner's accident resulted in two right shoulder surgeries which forced Petitioner to use her left arm for most of her daily activities. This overuse of the left arm may or may not have caused the partial tearing for Petitioner's left shoulder rotator cuff, but per Dr. Poepping, it certainly made it symptomatic (Petitioner's Exhibit 32, PG. 66). With regards to surgery, Dr. Poepping agreed with Dr. Atluri that Petitioner did not responded well to her previous subacromial injection but disagreed that there was a one-to-one correlation between the response from the injection and that from surgery itself (Id.). Dr. Poepping stressed that given there is not a direct one to one correlation and the fact that Petitioner has failed conservative care, the only real option for Petitioner to get better from her left shoulder is to proceed to surgery (Id.). In the meantime, Dr. Peopping provided Petitioner with ongoing work restrictions of no lifting, carrying, pushing, or pulling in excess of 5lbs (Id. Pg. 66, 67).

Thereafter, Petitioner continued to follow up with Dr. Peopping while awaiting authorization of the prescribed left shoulder surgery. From February 14, 2020, through January 8, 2021, Petitioner had an additional seven appointments with Dr. Poepping. During her appointments the records confirm Petitioner has remained on light duty restrictions while she awaits authorization for Dr. Poepping's recommended left shoulder surgery. With regards to the right shoulder, on February 28, 2020, Dr. Poepping indicated that Petitioner was likely at MMI for the right shoulder and that an FCE would be appropriate (Petitioner's Exhibit 3, Pg. 69). At the time Dr. Poepping articulated his concerns for Petitioner's overall performance in an FCE given her ongoing left shoulder

issues would likely limit her ability. Dr. Poepping further states that Petitioner's restrictions relate to both shoulders and in the absence of even the left shoulder being at issue, Petitioner would still be on work restrictions currently (Id., Pg. 69).

When asked on direct examination whether she would like to proceed with surgery the Petitioner respondent affirmatively (Transcript Pg. 26). Petitioner also confirmed on direct examination that she is right-handed and was not currently working (Transcript Pg. 21, 27).

II. CONCLUSIONS OF LAW

The Arbitrator adopts the above findings of fact in support of the following conclusions of law:

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

The Arbitrator incorporates the foregoing findings of fact and conclusion of law as though fully set forth herein. Having already established that the parties agree the Petitioner sustained accidental injuries arising out of and in the course of her employment with Respondent on September 25, 2017, the Arbitrator now finds Petitioner's current condition of ill-being with respect to her right shoulder and left shoulder are causally related to her work accident.

In Illinois, a workers' compensation claimant bears the burden of showing by a preponderance of credible evidence that their current condition of ill-being is causally related to a workplace injury. *Elgin Board of Education School District U-46 v. Illinois Workers' Compensation Commission*, 409 Ill. App. 3d 943 (2011). With regards to casual connection and cases with preexisting conditions, recovery depends on the employee's ability to show that a work-related accidental injury aggravated or accelerated the preexisting disease such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition. *Caterpillar*

Tractor Co. v. Industrial Comm'n, 92 Ill. 2d 30, 36-37 (1982). Moreover, the courts have long established that an accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *Rock Road Construction Co. v. Industrial Comm'n*, 37 Ill. 2d 123, 127 (1967).

In the case at hand, the Petitioner testified to being in generally good health with no health problems with either her left or right shoulder on the morning of September 25, 2017 (Transcript Pg. 11, 12). Per Petitioner's testimony the pain in her right shoulder first manifested while operating a machine at work on September 25, 2017. Medical records from Physicians' Immediate Care as well as from all other treating physicians corroborate Petitioner's consistent account of a workplace accident resulting in injury to Petitioner's right shoulder. Although, Petitioner was initially diagnosed with a simple right shoulder strain at Physicians Immediate Care, subsequent records and MRI imaging identified Petitioner was actually suffering from a full thickness tear of her right rotator cuff. The Arbitrator notes, that all medical providers including both of Respondent's IME examiner's agree Petitioner suffered a right shoulder injury on September 25, 2017 that was directly attributed to her work activities.

Given Petitioner's medical providers and Respondent's own independent examiners directly related the mechanism of injury to Petitioner's ongoing right shoulder complaints, the Arbitrator finds Petitioner's current right shoulder condition of ill-being causally related to her September 25, 2017, workplace accident.

With regards to Petitioner's left shoulder, the medical records clearly establish that Petitioner did not report any complaints related to the left shoulder immediately after the September 25, 2017, accident. According to Petitioner's statements to Dr. Atluri during her independent medical examination, Petitioner did not experience left shoulder symptoms until after her second surgery on November 28, 2018. The Petitioner indicated to Dr. Atuluri that she

began to feel left shoulder symptoms early in 2019. Petitioner's statements to Dr. Atluri are easily corroborated by the record. Specifically, the physical therapy notes from Ortho Illinois. The Ortho Illinois records show the Petitioner made several complaints concerning her left shoulder as early as February 21, 2019. By said date, Petitioner had been under treatment requiring her to at times completely immobilize the right arm and favor exclusively the left arm for almost one and a half years. The Arbitrator notes that after both surgeries occurred Petitioner was asked to immobilize the right arm by using a sling or to refrain from its use altogether. According to the Petitioner the result of the aforementioned treatment was that Petitioner continuously relied on the use of the left arm to accomplish all functional tasks of daily life and work. In particular, when asked on direct examination how wearing a sling affected her daily routine the Petitioner advised the court that she had to use her left hand all the time, including but not limited to bathing and eating. In Petitioner's own words, "she had to do everything else with my left arm" (Transcript Pg. 17, 18).

Although the Respondent argues Dr. Atluri's findings of no causation for the left shoulder should be adopted, because of the amount of time between the mechanism of injury and the date Petitioner's left shoulder symptoms first manifested, this argument is not persuasive. In the case at hand the treating physician as well as the Petitioner herself acknowledged that Petitioner's complaints did not manifest immediately after the accident. In fact, Dr. Poepping accepts that there is even a question as to whether the partial thickness tear was actually caused by Petitioner's employment or if it was simply a pre-existing condition. However, Dr. Poepping's is clear in his remarks that Petitioner's current left shoulder condition is at least in part a result of her work-related accidental injuries. Dr. Peopping persuasively argues that Petitioner's overuse of her left arm to achieve all task of daily living, while under treatment for

the right shoulder has been a causative factor and contributed to Petitioner's ongoing left shoulder condition of ill-being. Per Dr. Peopping, Petitioner's symptoms in the left shoulder are a direct result of the chronic right shoulder issues she has had since the accident at work, which resulted in two shoulder surgeries and forced Petitioner to use her left hand for most of her day to day activities (Petitioner's Exhibit 3, Pg. 66).

Based upon the entirety of the record including Petitioner's credible testimony, the Arbitrator finds Petitioner's account of the mechanism of injury to be well founded by a preponderance of the evidence. Given the medical treatment directly relates to the mechanism of injury and given the treating physician's persuasive causal opinion, the Arbitrator finds Petitioner's left shoulder complaints and current condition of ill-being to be causally related to her September 25, 2017, workplace accident.

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

Based on the entirety of the evidence presented, the Arbitrator finds the Respondent liable for medical treatment rendered to Petitioner as a result of her workplace accident occurring on September 25, 2017, and further finds the medical care and associated bills to be reasonable and necessary to treat Petitioner's injuries.

The admitted medical records are consistent in showing the care and treatment provided to Petitioner was both reasonable, necessary and related. Not only do the medical records adequately document the mechanism of injury, but they also provide a clear causal connection between Petitioner's right and left shoulder complaints and the described mechanism of injury. Specifically, the history portion of every medical provider that has examined the Petitioner,

including the Respondent's own Section 12 examiners, indicate the Petitioner was seen as a result of right and left shoulder complaints.

Petitioner claimed the following medical bills as unpaid and part of Respondent's liability to pay:

- Rockford Orthopedic Associates / Ortho Illinois: $154.32
- G&T Orthopaedics: $2,070.00
- Midwest Specialty Pharmacy: $264.29

The Arbitrator notes that the medical care provided by the aforementioned providers properly addressed the Petitioner's bilateral shoulder injuries and given Respondent's failure to present persuasive evidence to the contrary by way of a valid utilization review or IME, the Arbitrator finds as follows:

Rockford Orthopaedic / Ortho Illinois: The Arbitrator has reviewed the records admitted as Petitioner's Exhibit 2. These records reflect treatment provided to Petitioner in attempts to resolve her work-related bilateral shoulder complaints. Based on the Arbitrator's prior findings in favor of Dr. Poepping's credibility with respect to causal connection, Petitioner is entitled to payment of the reasonable and necessary medical treatment provided by Rockford Orthopaedic / Ortho Illinois. The bill of $154.32 is hereby awarded and Respondent shall pay Petitioner directly in accordance with the Workers' Compensation Act and the Illinois Fee Schedule.

G&T Orthopaedics: The Arbitrator has reviewed the records admitted as Petitioner's Exhibit 10. These records reflect treatment provided to Petitioner by her treating physician Dr. Thomas G. Poepping. According to Dr. Poepping's records he has been providing medical treatment to Petitioner as result of a work-place injury occurring on September 25, 2017. Based on the Arbitrator's prior findings in favor of Dr. Poepping's credibility with respect to causal connection, Petitioner is entitled to payment of the reasonable and necessary medical treatment

provided by G&T Orthopaedics. The bill of $2,070.00 is hereby awarded and Respondent shall pay Petitioner directly in accordance with the Workers' Compensation Act and the Illinois Fee Schedule.

Midwest Specialty Pharmacy: The Arbitrator has reviewed the records admitted as Petitioner's Exhibit 5. These records reflect medications prescribed to Petitioner by Dr. Poepping to resolve her work-related bilateral shoulder pain. Based on the Arbitrator's prior findings in favor of Dr. Poepping's credibility with respect to causal connection, Petitioner is entitled to payment for reasonable and necessary medications prescribed by Dr. Poepping and dispensed by Midwest Specialty Pharmacy. The bill of $264.29 is hereby awarded and Respondent shall pay Petitioner directly in accordance with the Workers' Compensation Act and the Illinois Fee Schedule.

ISSUE (K): What temporary benefits are in dispute?

In Illinois when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized or in other words, whether the claimant has reached maximum medical improvement. With regards to this issue, section 8(b) of the Worker's Compensation Act states that weekly compensation shall be paid as long as the total temporary incapacity lasts. The Illinois Appellate court has interpreted this to mean that an employee is temporary totally incapacitated from the time of a workplace injury incapacitates the Petitioner from work until such a time as the Petitioner has reached maximum recovery, as the nature of the injury will permit.

In the case at hand the parties have stipulated that Respondent paid TTD benefits from December 28, 2017, through March 25, 2018 at a TTD rate of $450.08. Thereafter, Petitioner returned to work for Respondent from March 26, 2018 through May 17, 2018, representing 7 4/7

weeks. Per the medical records, during this time period Petitioner was provided with light duty restrictions that were accommodated by the Respondent (Petitioner's Exhibit 3, Pg. 10 -13). However, despite returning to work in a light duty capacity the Petitioner failed to earn at least her average weekly wage of $675.12. Petitioner's Exhibit 11 demonstrates that from pay period ending on April 1, 2018 through pay period ending on May 20, 2018 the Petitioner was paid the following:

- For Pay Period: 04/01/2018 the Petitioner was paid $628.63;
- For pay period: 04/08/2018 the Petitioner was paid $483.36;
- For pay period: 04/15/2018 the Petitioner was paid $358.32;
- For pay period: 04/22/2018 the Petitioner was paid $614.00;
- For pay period: 04/29/2018 the Petitioner was paid $597.20;
- For pay period: 05/06/2018 the Petitioner was paid $537.48;
- For pay period: 05/13/2018 the Petitioner was paid $602.80;
- For pay period: 05/20/2018 the Petitioner was paid $440.44.

After being able to return to work in a light duty capacity, the Petitioner was placed on off work duty by Dr. Poepping on May 17, 2019 (Petitioner's Exhibit 3, Pg. 51). The parties agree that Petitioner was paid TTD benefits commencing on May 18, 2019 through October 25, 2019. After, October 25, 2019, no further TTD benefits have been paid. Furthermore, the Arbitrator notes Petitioner's uncontested testimony that she was terminated by the employer on August 1, 2019 (Transcript Pg. 27).

In the case at hand, the records reflect that Petitioner has been under continued treatment for her bilateral shoulder condition with Dr. Poepping since she was taken off of work on May 17, 2019. From that point forward through the present time Dr. Poepping has provided Petitioner with either an off work note or with light duty restrictions. According to the records Dr. Poepping placed Petitioner on off work status from May 17, 2018 until August 30, 2019 (Petitioner's Exhibit 3, PG. 51 – 62). On August 30, Petitioner was provided with light duty

restrictions of no carrying, lifting, pushing, pulling or lifting above shoulder level. On January 8, 2021, Dr. Poepping again reaffirmed Petitioner's need for restrictions by prescribing ongoing work restrictions that remain in place today.

With regards to whether Petitioner's restrictions are permanent, Dr. Poepping has previously stated that Petitioner was likely at MMI for the right shoulder and that an FCE would be appropriate (Petitioner's Exhibit 3, Pg. 69). Dr. Poepping further articulated his concerns for Petitioner's overall performance in an FCE given her left shoulder would likely limit her ability. Per Dr. Dr. Poepping, Petitioner's restrictions relate to both shoulders and in the absence of even the left shoulder being at issue, Petitioner would still be on work restrictions currently (Id., Pg. 69).

The Arbitrator finds the treating medical providers' work status recommendations to be reasonable for the type of injuries sustained and given the totality of all the evidence, finds the Petitioner has proved by a preponderance of the evidence that she is entitled to TPD benefits in the amount of $759.15, from March 26, 2018, through May 17, 2018, as provided for in the Act. The Arbitrator further finds Petitioner has proved by a preponderance of the evidence to be entitled to TTD from December 28, 2017, through March 25, 2018 and from May 18, 2018 through the date of trial on February 26, 2021, and ongoing. After Respondent's 8(j) credit is taken into consideration, Petitioner is entitled to an additional 157 5/7 weeks of TTD or $70,984.05.

ISSUE (N): Is Respondent due any credit?

The Arbitrator incorporates the foregoing findings of facts and conclusions of law as though fully set forth herein. The Arbitrator notes that the Respondent has alleged an 8(j) credit for previously paid TTD in the amount of $42,693.32.

In reviewing this issue, the Arbitrator takes into consideration Respondent's Exhibit 4. According to Respondent's TTD payment ledger the Respondent paid TTD benefits from

December 28, 2017, through March 25, 2018, and from May 18, 2018, through October 25, 2019. Based on this finding the Arbitrator awards the Respondent a credit towards the payment of TTD in the amount of $42,693.32.

ISSUE (O): Prospective medical care and payment of ongoing TTD.

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having already established the Petitioner sustained accidental injuries arising out of and in the course of her employment on September 25, 2017 and that Petitioner's current right shoulder and left shoulder conditions are causally related to her work accident, the Arbitrator now finds Dr. Thomas Poepping's proposed left shoulder surgery reasonable and necessary to treat Petitioner. Similarly, with respect to future payments of TTD, Petitioner's is entitled to ongoing TTD benefits until her condition stabilizes. Until then the Arbitrator recognizes Dr. Poepping's current bilateral shoulder light duty restrictions of no carrying, lifting, pushing or pulling in excess of 5lbs with no above shoulder lifting.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC007486
Case Name	STEWART, ANGELA v. JOHN DEERE HARVESTER
Consolidated Cases	17WC007487 17WC007500
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0172
Number of Pages of Decision	13
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	David Hunt
Respondent Attorney	Austin Schoeck

DATE FILED: 5/10/2022

/s/Carolyn Doherty, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANGELA STEWART,

Petitioner,

vs. NO: 17 WC 7486

JOHN DEERE HARVESTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by Petitioner and 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, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 8, 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.

Bond for the removal of this cause to the Circuit Court is hereby fixed at the sum of $26,000.00. 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.

May 10, 2022
o: 5/5/22
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

DECISION SIGNATURE PAGE

Case Number	17WC007486
Case Name	STEWART, ANGELA v. JOHN DEERE HARVESTER
Consolidated Cases	No Consolidated Cases
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Adam Hinrichs, Arbitrator

Petitioner Attorney	David Hunt
Respondent Attorney	John Harris

DATE FILED: 10/8/2021

/s/Adam Hinrichs, Arbitrator

Signature

INTEREST RATE WEEK OF OCTOBER 5, 2021 0.05%

STATE OF ILLINOIS)
)**SS.**
COUNTY OF Rock Island)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ANGELA STEWART Case # **17 WC 007486**
Employee/Petitioner
v.
JOHN DEERE HARVESTER
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 **Adam Hinrichs**, Arbitrator of the Commission, in the city of **Rock Island**, on **August 10, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner earned $**9,780.66**; the average weekly wage was $**698.62**.

On the date of accident, Petitioner was **34** 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 up to $**46,528.00** for other benefits, for a total credit up to $**46,528.00** for other benefits paid during the awarded TTD period.

Respondent is entitled to a credit of $**22,583.36** under Section 8(j) of the Act.

ORDER

Respondent is ordered to pay the outstanding $90.00 bill at Orthopedic Specialists, pursuant to the medical fee schedule, for Petitioner's reasonable, necessary and related medical care. Respondent is ordered to reimburse the Petitioner directly for her $1,570.00 in out-of-pocket payments for her reasonable and necessary medical expenses related to this work injury.

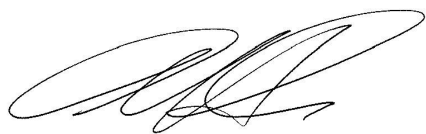
As provided in Section 8(j) of the Act, Respondent shall be given a full credit of $22,583.36 for other medical benefits which have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

Respondent is ordered to pay the Petitioner temporary total disability benefits of $465.74 a week for 53 4/7 weeks from January 7, 2017 to January 17, 2018, as provided in Section 8(b) of the Act. Respondent is entitled to a credit for all non-occupational weekly benefits paid during this period pursuant to Section 8(j).

Respondent shall pay the Petitioner permanent partial disability benefits of $419.17 per week for 50 weeks, as provided in Section 8(d)2, as Petitioner sustained a 10% loss of use to her person as a whole from the work-related injury to her left shoulder.

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

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



October 8, 2021

Signature of Arbitrator

FINDINGS OF FACT

The Petitioner filed three Applications for Adjustment of Claim with the IWCC alleging repetitive trauma injuries to her left shoulder while driving a fork truck. Petitioner alleged three accident dates: May 2, 2014, June 1, 2016, and January 6, 2017. The parties proceeded to hearing with the following issues in dispute in all three matters: Accident, Causal Connection, Medical Bills, TTD, and the Nature and Extent of the injury.

Angela Stewart (hereinafter "Petitioner") testified that she was employed at John Deere Harvester (hereinafter "Respondent") as a fork truck driver starting around 2008 or 2009. The Petitioner testified that operating the fork truck required her to make anywhere from 300-500 rotations on the steering wheel on a daily basis. There was a quick turn knob equipped on the steering wheel to make these turns.

At hearing, the Petitioner demonstrated that the operation of this fork truck required her to be in a sitting position with her left arm on the steering wheel, straight in front of her, at shoulder level. The Petitioner testified that she is right-hand dominant and would use her right arm to adjust the forks on the fork truck. She testified that her left arm was used exclusively for steering the fork truck. The Petitioner testified that as long as the fork truck was being given gas, the steering wheel easily moved. However, if the fork truck was at a stop, a great deal more effort had to be put into turning the steering the wheel with her left arm.

The Petitioner testified that in the months leading up to May 2, 2014, her job was busier due to personnel changes. She testified that in May of 2014 her left shoulder began bothering her and that on May 5, 2014 she sought treatment with the John Deere Medical Clinic ("JDMC"). Petitioner reported pain and fatigue in her left shoulder from driving the fork truck arm over arm. On May 9, 2014, the JDMC gave Petitioner permanent work restrictions. The Petitioner was subsequently referred out for an MRI and EMG/NCV. (Px. 1)

On July 30, 2014, the Petitioner underwent an MRI Arthrogram that was interpreted as normal. (Px. 3). On September 17, 2014, Petitioner underwent an EMG/NCV that was also interpreted as normal. (Px 5). The Petitioner was referred for an orthopedic consult with Dr. Suleman Hussain at ORA Orthopedics.

On August 22, 2014, Petitioner presented to Dr. Hussain complaining of sensitivity, numbness, and tingling in her left shoulder down to her left elbow since March. Dr. Hussain performed a physical exam and reviewed the MRI. Dr. Hussain noted that he was concerned with Parsonage Turners post infection versus brachial plexus. Dr. Hussain found no significant shoulder dysfunction, stated that this was not a shoulder condition, and released Petitioner back to work full duty. (Px. 4)

On September 22, 2014, Petitioner returned to Dr. Hussain noting that all of her symptoms in her left shoulder went away when she was off work. Dr. Hussain reviewed the EMG/NCV and examined the Petitioner. Dr. Hussain released the Petitioner at MMI, full duty work, and related her complaints in her left shoulder to an infection. (Px 4)

The Petitioner testified that after her release from Dr. Hussain, she initially returned to work as a fork truck driver. However, shortly thereafter, the Petitioner became pregnant. Her pregnancy was deemed to be high risk, so Respondent transferred her to an office job where she worked until she gave birth in May 2015.

The Petitioner testified that after the birth of her child, she returned to work as a fork truck driver in August 2015. She testified that the job continued to be very busy, and shortly after her return to her fork truck duties, she began to again have the same pain in her left shoulder.

The Petitioner returned to the JDMC on June 1, 2016 with similar pain complaints in her left shoulder as she had made in 2014. Petitioner testified that it hurt in the exact same area of her left shoulder. She treated with the JDMC using ice therapy for approximately one week. (Px. 2)

On January 6, 2017, the Petitioner returned to the JDMC to inform them that her symptoms had increased in her left shoulder. On January 17, 2017 the JDMC placed a permanent restriction on the Petitioner's left shoulder of "rare use of left upper extremity," and that the JDMC "will have her see her provider as a personal medical condition as her symptoms cannot be explained based on her work exposure of driving a fork truck." (Px 2). Petitioner testified that Respondent did not have an accommodated position available for her at that time.

On February 1, 2017, the Petitioner returned to see Dr. Hussain. She informed Dr. Hussain that beginning in 2016 she constantly drove a fork truck at work which caused her to rotate her left arm 300-500 times per day. She informed Dr. Hussain that by the end of the week, she was barely able to lift her left arm due to the pain. Dr. Hussain diagnosed a left shoulder contusion from overuse at work, gave the Petitioner an injection in her left shoulder, and prescribed an MRI. (Px. 4) Petitioner testified she was taken off work by Dr. Hussain at this visit. Dr. Hussain continued the off-work restriction through June 29, 2017. (Px. 4)

On March 27, 2017, Petitioner returned to Dr. Hussain who reviewed the MRI, Px. 7, which revealed degenerative changes in the AC joint along with mild edema. Dr. Hussain's records indicate another injection was performed in the left shoulder, however, there is a typo indicating it occurred in the right shoulder. (Px. 4)

On May 1, 2017, Petitioner followed up with Dr. Hussain reporting one week of relief from the injection. Dr. Hussain diagnosed impingement syndrome, and AC Joint arthrosis. As conservative measures had failed to cure and relieve the Petitioner's complaints of pain in her left shoulder, Dr. Hussain recommended an arthroscopic procedure. (Px 4)

On June 29, 2017, Dr. Hussain released Petitioner to return to work with the following restrictions: "no pushing, pulling, or lift more than 5 lbs. floor to chest high, no overhead lifting." (Px. 4) Respondent did not accommodate Petitioner's restrictions.

On July 14, 2017, the Petitioner met with Dr. Tuvi Mendel at Orthopedic Specialists for a second opinion regarding the need for surgery. Petitioner gave Dr. Mendel a consistent history, and Dr. Mendel examined her. After his examination of the Petitioner, and his review of the objective tests, Dr. Mendel found that given her failure to respond to conservative care, surgery was indicated. Dr. Mendel further opined that the Petitioner's condition "does appear to be correlated with work activities specifically turning the speed dial on the fork truck." (Px 6)

On August 15, 2017, Dr. Mendel performed a glenohumeral joint labral debridement and synovectomy, subacromial decompression, and acromioclavicular joint resection and biceps tendon tenodesis on Petitioner's left shoulder. Dr. Mendel's post-operative diagnosis was left shoulder impingement, acromioclavicular joint degenerative arthritis, and biceps tendinopathy. Dr. Mendel found no rotator cuff tear during the procedure, but performed an aggressive glenohumeral joint labral debridement and synovectomy. Significant biceps tendinopathy was noted and tenodesed. There was significant degeneration of the AC joint that was then resected. (Px. 8). Petitioner was taken off work following surgery.

Petitioner testified that she participated in post-operative physical therapy at Rock Valley Physical Therapy. (Px. 9)

Dr. Mendel released Petitioner to return to work "anticipated final" full duty on December 15, 2017. During that office visit, Dr. Mendel noted Petitioner continued to complain of throbbing anterior left shoulder pain between

3-7 out of 10. Petitioner reported she was ready to try to return to full work duties, and agreed with Dr. Mendel's plan to aggressively strengthen the shoulder. (Px. 6).

However, the JDMC continued to place a permanent restriction on the Petitioner, and Respondent did not bring her back to work until January 17, 2018. At that time, the Petitioner returned to work in the paint department. The Petitioner testified that she continued to work in this department until January 30, 2019.

On March 16, 2018, Petitioner returned to Dr. Mendel reporting no symptoms of pain and doing very well. She reported doing her HEP and having generalized muscle soreness in the shoulder. On exam, Dr. Mendel found smooth ROM in the left shoulder and 5/5 strength. Dr. Mendel released Petitioner at MMI and full duty.

The Petitioner testified that on January 30, 2019, the Respondent determined that her job duties in the paint department were outside the permanent restrictions that the JDMC had placed on her, and disqualified her from that position. The Respondent began paying the Petitioner non-occupational benefits from January 30, 2019 through January 30, 2020. The Petitioner testified that Respondent brought her back to work on February 18, 2020. At that time, the Respondent found a permanent job as an inspector in the paint department.

The Petitioner testified that her job as a paint inspector is quality control and does not require her to do any activities at or above shoulder level with her left arm. The Petitioner testified that she has continued working as an inspector in the paint department since February 19, 2020, and her hourly pay has increased from $17.52 per hour as fork truck driver to $26.72 per hour as an inspector.

The parties deposed Dr. Tuvi Mendel on April 29, 2019. Dr. Mendel testified that he is a board-certified orthopedic surgeon. Dr. Mendel was given a hypothetical consistent with the Petitioner's testimony of her job duties. Dr. Mendel testified that based on that job description it "definitely would lead to the type of symptoms that she described which necessitated" the medical care provided. (Px 10, pp. 18-19). Dr. Mendel testified that Petitioner's work activities as a fork truck driver "significantly aggravated her underlying problem." (Id, at 21). Dr. Mendel testified that Petitioner was capable of returning to her prior position as a fork truck driver, and he would not place a permanent restriction on a 36-year-old with an intact rotator cuff. (Id, at 23). On cross-exam, Dr. Mendel testified that he likely reviewed Dr. Hussain's notes regarding Petitioner's use of her left arm at work, however, he no longer dictates his notes so they do not include all the information he reviews during his office visits. (Id, at 29)

At the Respondent's request, pursuant to Section 12, the Petitioner was examined by Dr. Camilla Frederick on October 29, 2018. The parties deposed Dr. Frederick on July 25, 2019. Dr. Frederick testified that she is board certified in family practice, but 100% of her practice is dedicated to occupational medicine. Occupational medicine has a board certification. Dr. Frederick testified that she is not board certified in occupational medicine. (Rx. B, pp. 17-18).

Dr. Frederick testified that during her physical exam of the Petitioner, she found positive impingement signs in the left shoulder, and bicipital tendinitis. (Id. at 13). Dr. Frederick opined that there was no causal connection between the Petitioner's job duties and the shoulder condition for which she had surgery. Dr. Frederick opined that the Petitioner's job was neither repetitive, according to OHSA guidelines, nor was the work above shoulder level, which were both necessary components for Petitioner to sustain her shoulder injury. (Id, pp. 22 -24).

Dr. Frederick testified that the findings made by Dr. Mendel during his surgery could be causally related to repetitive trauma if the activities were repetitive and above shoulder height. (Id. at 24). Dr. Frederick noted the Petitioner had a Type 2 acromion, which is curved or hooked, unlike a normal Type 1 acromion. (Id. at 26). Dr. Frederick testified that with a Type 2 acromion, one would become symptomatic with activity, and asymptomatic without activity**,** which Dr. Frederick noted is what happened in this case. (Id.). Dr. Frederick testified that a person with a Type 2 acromion is more likely to develop symptoms with activity than a person

with a normal Type 1 acromion. Dr. Frederick confirmed that Dr. Mendel shaved off the curve on the Petitioner's acromion during his surgery. (Id. at 24).

The Petitioner testified that she continues to experience pain and discomfort in her left shoulder when performing activities at or above shoulder height with her left arm. She stated that this could be putting dishes away on a top shelf or folding laundry in front of her at chest level. She testified that these activities can cause her left shoulder to ache for several hours and can range in pain, sometimes going up to 7 out of 10. She testified that she takes ibuprofen for the pain. The Petitioner testified that prior to 2014 she never had any of these problems with her left shoulder. She further testified that subsequent to 2014, she had never had any other accidents or injuries involving her left shoulder.

The Arbitrator observed the Petitioner and found her to be sincere, consistent and credible. Petitioner provided an account at hearing that matched her reports to her treating physicians, the company clinic, and the Respondent's examiner.

CONCLUSIONS OF LAW

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

Petitioner was working as fork truck driver for Respondent when she noticed pain in her left shoulder on multiple occasions after steering the wheel 300-500 times per day with her left arm straight out in front of her. The Petitioner testified that as long as the fork truck was being given gas, the steering wheel was easily moved. However, if the fork truck was at a stop, a great deal more effort had to be put in to steering the wheel.

In the months leading up to May 2014, Petitioner's job duties as a fork truck driver had significantly increased. On May 5, 2014 she sought treatment with the John Deere Clinic reporting pain and fatigue in her left shoulder beginning on May 2, 2014 from driving the fork truck arm over arm. Petitioner continued to have pain in her left shoulder until August 2014, when she went off work. During this off-work period her pain complaints resolved. In September 2014 she was released to return to work full duty after Dr. Hussain told her she did not have a left shoulder issue, but instead had an infection which caused her complaints.

Shortly after Petitioner returned to work, due to a high-risk pregnancy, Respondent placed Petitioner in a light duty office position. Petitioner returned to driving the fork truck sometime in August 2015, a few months after the birth of her child. Her job continued to be very busy, and after her return to the fork truck, she began to have the same pain in her left shoulder.

Petitioner returned to the JDMC on June 1, 2016 with similar pain complaints, in the same place on her left shoulder as she had made to the JDMC in 2014. Petitioner worked through the pain until January 6, 2017, when Petitioner returned to the JDMC, informing them that her symptoms had increased in her left shoulder. The JDMC advised the Petitioner that her complaints could not be related to driving the fork truck and she should consult with her personal physician.

On February 1, 2017, Petitioner returned to Dr. Hussain. Petitioner reminded Dr. Hussain of her left shoulder complaints arising only after driving a fork truck at work, which required her to rotate her left arm 300-500 times per day. She reported to Dr. Hussain that by the end of the week, she was barely able to lift her left arm due to the pain. Dr. Hussain placed Petitioner on restrictions due to her left shoulder complaints from overuse at work. Respondent did not accommodate Petitioner's restrictions.

On July 14, 2017, the Petitioner met with Dr. Mendel for a second opinion. Petitioner again provided a history of pain in her left shoulder aggravated by her job duties as a fork truck driver. Dr. Mendel, a board-certified orthopedic surgeon testified that Petitioner's work activities as a fork truck driver "significantly aggravated her underlying problem."

Respondent's Section 12 examiner. Dr. Frederick, dedicates 100% of her practice to occupational medicine. Occupational medicine has a board certification. Dr. Frederick is not board certified in occupational medicine. Dr. Frederick opined that the Petitioner's job was neither repetitive, according to OHSA guidelines, nor was the work above shoulder height, which were necessary components for Petitioner to sustain a shoulder injury.

However, Dr. Frederick also noted the Petitioner had a Type 2 acromion, which is curved or hooked, unlike a normal Type 1 acromion. Dr. Frederick testified that a person with a Type 2 acromion is more likely to develop symptoms with activity than a person with a normal Type 1 acromion.

Petitioner's testimony that her job aggravated her left shoulder is credible, unrebutted and supported by the medical record. Dr. Frederick's opinion is not supported by the record, and is not persuasive. Dr. Mendel's opinion is supported by the record and is persuasive.

The record is clear, the Petitioner became symptomatic in her left shoulder only when performing her repetitive job duties steering the fork truck, making 300-500 rotations per day, with her left arm extended at shoulder level in front of her body. Petitioner made a good faith effort to work through her pain in the hopes that it would abate, however, the pain did not resolve on its own, and she reasonably sought medical attention rather than working to collapse.

Given the chain of events, the totality of the evidence, the Petitioner's treatment records and the persuasive opinion of Dr. Mendel, the Arbitrator finds that the Petitioner sustained a repetitive trauma accident arising out of and in the course of her employment by the Respondent.

The initial two accident dates, May 2, 2014 and June 1, 2016, alleged by the Petitioner are not the most appropriate manifestation dates, as the Petitioner did not have a medical doctor relate her left shoulder pain to her work activities until February 1, 2017. Therefore, the Arbitrator finds that the third alleged accident date, January 6, 2017, is when the relation of the Petitioner's left shoulder condition to her work activities become plainly apparent, leading her to follow up on February 1, 2017 with an orthopedic surgeon.

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

Incorporating the above, the Petitioner must show that some act or phase of employment was a causative factor in her resulting condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 205 (2003). In repetitive trauma cases, the Petitioner generally relies on medical testimony to establish the causal connection between work activities performed and subsequent disablement. *Nunn v. Industrial Commission*, 157 Ill. App. 3d 470, 477 (1987). When a Petitioner alleges a repetitive trauma accident, it is for the Commission to determine whether the disability is solely the consequence of the degenerative process, or an aggravation of a pre-existing condition due to repetitive trauma. *Cassens Transport Co. v. Industrial Commission*, 262 Ill. App. 3d 324, 331 (1994).

Petitioner needed to make anywhere from 300-500 rotations on the steering wheel of the fork truck on a daily basis with her left arm. The Petitioner testified that as long as the fork truck was being given gas, the steering wheel was easily moved. However, if the fork truck was at a stop, a great deal more effort had to be put in to steering the wheel with her left arm extended in front of her body at shoulder level.

Petitioner provided clear, consistent, credible and unrebutted testimony that the repetitive use of the steering equipment with her left arm while operating a fork truck for the Respondent, caused her pain in her left shoulder leading her to seek medical attention, and be given restrictions or taken off of work by her providers. The medical record supports Petitioner's testimony that she only sought medical attention for pain in her left shoulder as a consequence of performing her job duties operating the fork truck.

Respondent offered the opinion of its examiner, Dr. Frederick, who opined that Petitioner's current condition of ill-being in her left shoulder was not caused by her work activities as a fork truck driver. Dr. Frederick ignored the chain of events in this matter, as well as her own finding that Petitioner's Type 2 acromion would cause the Petitioner to be more likely develop a symptomatic left shoulder. The Arbitrator is not persuaded by the opinions of Dr. Frederick.

Petitioner's treating physician, Dr. Mendel, a board-certified orthopedic surgeon, examined the Petitioner regularly, performed surgery on her left shoulder, and had an accurate understanding of her job duties, and was in the best position to judge the cause of Petitioner's complaints. Dr. Mendel testified that Petitioner's work activities significantly aggravated her underlying left shoulder problem, and caused her need for subsequent medical care.

The Arbitrator is persuaded by the chain of events, the totality of the evidence, and the opinion of Dr. Mendel. The Arbitrator finds that Petitioner's current condition of ill-being in her left shoulder is causally related to her repetitive trauma work injury.

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

Incorporating the above, the Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary. The Arbitrator finds that Respondent has not paid all appropriate charges for all reasonable and necessary medical services. Respondent is ordered to pay the outstanding $90.00 bill at Orthopedic Specialists, pursuant to the fee schedule. Additionally, the Respondent is ordered to reimburse the Petitioner directly for her $1,570.00 in out-of-pocket payments for her reasonable and necessary medical expenses related to this work injury.

Respondent shall be given a credit of $22,583.36 for other medical benefits which have been paid. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

Incorporating the above, the Petitioner testified that she was off work from January 7, 2018 as Respondent placed a restriction on her left shoulder that was not accommodated. Petitioner testified that she was taken off work by Dr. Hussain on February 1, 2017. On June 29, 2017, Dr. Hussain released Petitioner to return to work with restrictions. The Respondent again was unable to accommodate these restrictions and Petitioner remained off of work at that time. The Petitioner testified that she underwent her surgical procedure on August 15, 2017. At that point she was taken off work by Dr. Mendel.

Dr. Mendel released Petitioner to return to an "anticipated final" full duty release on December 15, 2017, despite Petitioner's ongoing left shoulder complaints, complementing his aggressive strengthening plan for her recovery. The Respondent would not allow Petitioner to return to work at that time due to the JDMC's permanent restrictions placed on the Petitioner. The Respondent brought the Petitioner back to light duty on January 17, 2018. Dr. Mendel released Petitioner to final full duty and MMI on March 16, 2018.

The Arbitrator finds Dr. Mendel's March 18, 2018 final full duty release for the Petitioner to be persuasive as to Petitioner's work capacity. Dr. Mendel credibly testified that permanent restrictions for a 36-year-old with an intact rotator cuff is not indicated. The JDMC's permanent restriction for the Petitioner, placed there by an individual or individuals of unknown medical qualifications, is not supported by the record.

Petitioner is entitled to TTD at the rate of $465.74 from January 7, 2017 to January 17, 2018, or 53 4/7 weeks of TTD. Respondent is entitled to a full credit for any non-occupational disability benefits paid during this period.

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

An analysis applying the five statutory factors set forth in ILCS 305/8.1(b)(b) is as follows:

(i) Reported level of impairment: Dr. Camilla Frederick, Respondent's Section 12 examiner, found the level of impairment to be 3% upper extremity or 2% person-as-whole pursuant to the AMA impairment guides, 6th Edition. The Arbitrator has considered and gives some weight to this factor.

(ii) Occupation of the injured employee: Petitioner is no longer a fork truck driver, but is still employed by Respondent, working as a paint inspector. Petitioner's treating surgeon released Petitioner to full duty as a fork truck driver. The Arbitrator has considered and gives some weight to this factor as Petitioner was able to return to her prior occupation, however, Respondent elected to provide a less strenuous job for the Petitioner.

(iii) Age: Petitioner was 34 years old at the time of injury. The Arbitrator has considered and gives moderate weight to this factor as Petitioner has many years left in the labor force.

(iv) Employee's future earning capacity: No evidence was presented reflecting a diminution of Petitioner's future earning capacity as a result of the injury. However, the record indicates that in Petitioner's inspector position with Respondent, she now earns $26.72/hour, whereas she was earning $17.52/hour in her fork truck driver position. The Arbitrator has considered and gives some weight to this factor.

(v) Disability corroborated by the treating medical records: The Petitioner testified at Arbitration that she continues to experience pain and discomfort in her left shoulder. She testified that this is particularly true with any activities that cause her left arm to be at or above shoulder height. The Petitioner testified that when she does have problems with her left shoulder it can cause pain and discomfort between a 2 to 7 out of 10. The Petitioner testified that she takes over-the-counter ibuprofen to alleviate the pain. Petitioner has not received medical treatment for her left shoulder subsequent to her final March 16, 2018 office visit with Dr. Mendel. At that final visit Petitioner reported no symptoms of pain, and that her left shoulder was doing very well, though she did have some generalized muscle soreness. At that final office visit, Dr. Mendel found smooth ROM in the left shoulder, 5/5 strength, and released Petitioner at MMI and full duty.

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 10% permanent partial disability to Petitioner's person as a whole pursuant to §8(d)(2) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC007487
Case Name	STEWART, ANGELA v. JOHN DEERE HARVESTER
Consolidated Cases	17WC007486 17WC007500
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0173
Number of Pages of Decision	13
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	David Hunt
Respondent Attorney	John Harris

DATE FILED: 5/10/2022

/s/Carolyn Doherty, 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 ROCK ISLAND)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANGELA STEWART,

Petitioner,

vs. NO: 17 WC 7487

JOHN DEERE HARVESTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by Petitioner and 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, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof.

The Commission also affirms and adopts the Decision of the Arbitrator as stated by the Commission in its Decision and Opinion in the companion case of No. 17 WC 7486. As a result, in this matter 17 WC 7487, the Commission concludes that all benefits resulting from the causally related conditions of ill-being to be awarded Petitioner, including medical expenses, temporary total disability, and permanent partial disability, are awarded by the Commission in its Decision and Opinion in the companion case of No. 17 WC 7486. No award of additional benefits is made herein.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 8, 2021 is hereby affirmed and adopted.

IT IS FURTHER FOUND BY THE COMMISSION that medical expenses, temporary total disability, and permanent partial disability at issue in this matter 17 WC 7487 are awarded by the Commission in its Decision and Opinion in the companion case of No. 17 WC 7486. No award of additional benefits is made herein.

No additional bond beyond that required for removal of this cause to the Circuit Court by Respondent in case No. 17 WC 7486 is required. 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.

May 10, 2022

o: 5/5/22
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

DECISION SIGNATURE PAGE

Case Number	17WC007487
Case Name	STEWART, ANGELA v. JOHN DEERE HARVESTER
Consolidated Cases	No Consolidated Cases
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Adam Hinrichs, Arbitrator

Petitioner Attorney	David Hunt
Respondent Attorney	John Harris

DATE FILED: 10/8/2021

/s/ *Adam Hinrichs, Arbitrator*
Signature

INTEREST RATE WEEK OF OCTOBER 5, 2021 0.05%

STATE OF ILLINOIS)
)**SS.**
COUNTY OF Rock Island)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ANGELA STEWART
Employee/Petitioner

Case # **17 WC 007487**

v.

JOHN DEERE HARVESTER
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 **Adam Hinrichs**, Arbitrator of the Commission, in the city of **Rock Island**, on **August 10, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **June 1, 2016**, Respondent **was** operating under and subject to the provisions of the Act.

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

On **January 6, 2017**, Petitioner **did** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned $**9,780.66**; the average weekly wage was $**698.32**.

On the date of accident, Petitioner was **34** years of age, **married** with **2** dependent children.

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

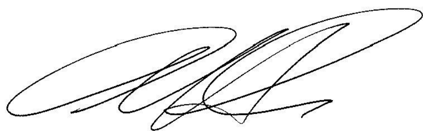
Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

ORDER

Based upon the decision in the consolidated case, 17WC 7486, no further award or credit shall issue in this matter.

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

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



Signature of Arbitrator

October 8, 2021

FINDINGS OF FACT

The Petitioner filed three Applications for Adjustment of Claim with the IWCC alleging repetitive trauma injuries to her left shoulder while driving a fork truck. Petitioner alleged three accident dates: May 2, 2014, June 1, 2016, and January 6, 2017. The parties proceeded to hearing with the following issues in dispute in all three matters: Accident, Causal Connection, Medical Bills, TTD, and the Nature and Extent of the injury.

Angela Stewart (hereinafter "Petitioner") testified that she was employed at John Deere Harvester (hereinafter "Respondent") as a fork truck driver starting around 2008 or 2009. The Petitioner testified that operating the fork truck required her to make anywhere from 300-500 rotations on the steering wheel on a daily basis. There was a quick turn knob equipped on the steering wheel to make these turns.

At hearing, the Petitioner demonstrated that the operation of this fork truck required her to be in a sitting position with her left arm on the steering wheel, straight in front of her, at shoulder level. The Petitioner testified that she is right-hand dominant and would use her right arm to adjust the forks on the fork truck. She testified that her left arm was used exclusively for steering the fork truck. The Petitioner testified that as long as the fork truck was being given gas, the steering wheel easily moved. However, if the fork truck was at a stop, a great deal more effort had to be put into turning the steering the wheel with her left arm.

The Petitioner testified that in the months leading up to May 2, 2014, her job was busier due to personnel changes. She testified that in May of 2014 her left shoulder began bothering her and that on May 5, 2014 she sought treatment with the John Deere Medical Clinic ("JDMC"). Petitioner reported pain and fatigue in her left shoulder from driving the fork truck arm over arm. On May 9, 2014, the JDMC gave Petitioner permanent work restrictions. The Petitioner was subsequently referred out for an MRI and EMG/NCV. (Px. 1)

On July 30, 2014, the Petitioner underwent an MRI Arthrogram that was interpreted as normal. (Px. 3). On September 17, 2014, Petitioner underwent an EMG/NCV that was also interpreted as normal. (Px 5). The Petitioner was referred for an orthopedic consult with Dr. Suleman Hussain at ORA Orthopedics.

On August 22, 2014, Petitioner presented to Dr. Hussain complaining of sensitivity, numbness, and tingling in her left shoulder down to her left elbow since March. Dr. Hussain performed a physical exam and reviewed the MRI. Dr. Hussain noted that he was concerned with Parsonage Turners post infection versus brachial plexus. Dr. Hussain found no significant shoulder dysfunction, stated that this was not a shoulder condition, and released Petitioner back to work full duty. (Px. 4)

On September 22, 2014, Petitioner returned to Dr. Hussain noting that all of her symptoms in her left shoulder went away when she was off work. Dr. Hussain reviewed the EMG/NCV and examined the Petitioner. Dr. Hussain released the Petitioner at MMI, full duty work, and related her complaints in her left shoulder to an infection. (Px 4)

The Petitioner testified that after her release from Dr. Hussain, she initially returned to work as a fork truck driver. However, shortly thereafter, the Petitioner became pregnant. Her pregnancy was deemed to be high risk, so Respondent transferred her to an office job where she worked until she gave birth in May 2015.

The Petitioner testified that after the birth of her child, she returned to work as a fork truck driver in August 2015. She testified that the job continued to be very busy, and shortly after her return to her fork truck duties, she began to again have the same pain in her left shoulder.

The Petitioner returned to the JDMC on June 1, 2016 with similar pain complaints in her left shoulder as she had made in 2014. Petitioner testified that it hurt in the exact same area of her left shoulder. She treated with the JDMC using ice therapy for approximately one week. (Px. 2)

On January 6, 2017, the Petitioner returned to the JDMC to inform them that her symptoms had increased in her left shoulder. On January 17, 2017 the JDMC placed a permanent restriction on the Petitioner's left shoulder of "rare use of left upper extremity," and that the JDMC "will have her see her provider as a personal medical condition as her symptoms cannot be explained based on her work exposure of driving a fork truck." (Px 2). Petitioner testified that Respondent did not have an accommodated position available for her at that time.

On February 1, 2017, the Petitioner returned to see Dr. Hussain. She informed Dr. Hussain that beginning in 2016 she constantly drove a fork truck at work which caused her to rotate her left arm 300-500 times per day. She informed Dr. Hussain that by the end of the week, she was barely able to lift her left arm due to the pain. Dr. Hussain diagnosed a left shoulder contusion from overuse at work, gave the Petitioner an injection in her left shoulder, and prescribed an MRI. (Px. 4) Petitioner testified she was taken off work by Dr. Hussain at this visit. Dr. Hussain continued the off-work restriction through June 29, 2017. (Px. 4)

On March 27, 2017, Petitioner returned to Dr. Hussain who reviewed the MRI, Px. 7, which revealed degenerative changes in the AC joint along with mild edema. Dr. Hussain's records indicate another injection was performed in the left shoulder, however, there is a typo indicating it occurred in the right shoulder. (Px. 4)

On May 1, 2017, Petitioner followed up with Dr. Hussain reporting one week of relief from the injection. Dr. Hussain diagnosed impingement syndrome, and AC Joint arthrosis. As conservative measures had failed to cure and relieve the Petitioner's complaints of pain in her left shoulder, Dr. Hussain recommended an arthroscopic procedure. (Px 4)

On June 29, 2017, Dr. Hussain released Petitioner to return to work with the following restrictions: "no pushing, pulling, or lift more than 5 lbs. floor to chest high, no overhead lifting." (Px. 4) Respondent did not accommodate Petitioner's restrictions.

On July 14, 2017, the Petitioner met with Dr. Tuvi Mendel at Orthopedic Specialists for a second opinion regarding the need for surgery. Petitioner gave Dr. Mendel a consistent history, and Dr. Mendel examined her. After his examination of the Petitioner, and his review of the objective tests, Dr. Mendel found that given her failure to respond to conservative care, surgery was indicated. Dr. Mendel further opined that the Petitioner's condition "does appear to be correlated with work activities specifically turning the speed dial on the fork truck." (Px 6)

On August 15, 2017, Dr. Mendel performed a glenohumeral joint labral debridement and synovectomy, subacromial decompression, and acromioclavicular joint resection and biceps tendon tenodesis on Petitioner's left shoulder. Dr. Mendel's post-operative diagnosis was left shoulder impingement, acromioclavicular joint degenerative arthritis, and biceps tendinopathy. Dr. Mendel found no rotator cuff tear during the procedure, but performed an aggressive glenohumeral joint labral debridement and synovectomy. Significant biceps tendinopathy was noted and tenodesed. There was significant degeneration of the AC joint that was then resected. (Px. 8). Petitioner was taken off work following surgery.

Petitioner testified that she participated in post-operative physical therapy at Rock Valley Physical Therapy. (Px. 9)

Dr. Mendel released Petitioner to return to work "anticipated final" full duty on December 15, 2017. During that office visit, Dr. Mendel noted Petitioner continued to complain of throbbing anterior left shoulder pain between

3-7 out of 10. Petitioner reported she was ready to try to return to full work duties, and agreed with Dr. Mendel's plan to aggressively strengthen the shoulder. (Px. 6).

However, the JDMC continued to place a permanent restriction on the Petitioner, and Respondent did not bring her back to work until January 17, 2018. At that time, the Petitioner returned to work in the paint department. The Petitioner testified that she continued to work in this department until January 30, 2019.

On March 16, 2018, Petitioner returned to Dr. Mendel reporting no symptoms of pain and doing very well. She reported doing her HEP and having generalized muscle soreness in the shoulder. On exam, Dr. Mendel found smooth ROM in the left shoulder and 5/5 strength. Dr. Mendel released Petitioner at MMI and full duty.

The Petitioner testified that on January 30, 2019, the Respondent determined that her job duties in the paint department were outside the permanent restrictions that the JDMC had placed on her, and disqualified her from that position. The Respondent began paying the Petitioner non-occupational benefits from January 30, 2019 through January 30, 2020. The Petitioner testified that Respondent brought her back to work on February 18, 2020. At that time, the Respondent found a permanent job as an inspector in the paint department.

The Petitioner testified that her job as a paint inspector is quality control and does not require her to do any activities at or above shoulder level with her left arm. The Petitioner testified that she has continued working as an inspector in the paint department since February 19, 2020, and her hourly pay has increased from $17.52 per hour as fork truck driver to $26.72 per hour as an inspector.

The parties deposed Dr. Tuvi Mendel on April 29, 2019. Dr. Mendel testified that he is a board-certified orthopedic surgeon. Dr. Mendel was given a hypothetical consistent with the Petitioner's testimony of her job duties. Dr. Mendel testified that based on that job description it "definitely would lead to the type of symptoms that she described which necessitated" the medical care provided. (Px 10, pp. 18-19). Dr. Mendel testified that Petitioner's work activities as a fork truck driver "significantly aggravated her underlying problem." (Id, at 21). Dr. Mendel testified that Petitioner was capable of returning to her prior position as a fork truck driver, and he would not place a permanent restriction on a 36-year-old with an intact rotator cuff. (Id, at 23). On cross-exam, Dr. Mendel testified that he likely reviewed Dr. Hussain's notes regarding Petitioner's use of her left arm at work, however, he no longer dictates his notes so they do not include all the information he reviews during his office visits. (Id, at 29)

At the Respondent's request, pursuant to Section 12, the Petitioner was examined by Dr. Camilla Frederick on October 29, 2018. The parties deposed Dr. Frederick on July 25, 2019. Dr. Frederick testified that she is board certified in family practice, but 100% of her practice is dedicated to occupational medicine. Occupational medicine has a board certification. Dr. Frederick testified that she is not board certified in occupational medicine. (Rx. B, pp. 17-18).

Dr. Frederick testified that during her physical exam of the Petitioner, she found positive impingement signs in the left shoulder, and bicipital tendinitis. (Id. at 13). Dr. Frederick opined that there was no causal connection between the Petitioner's job duties and the shoulder condition for which she had surgery. Dr. Frederick opined that the Petitioner's job was neither repetitive, according to OHSA guidelines, nor was the work above shoulder level, which were both necessary components for Petitioner to sustain her shoulder injury. (Id, pp. 22 -24).

Dr. Frederick testified that the findings made by Dr. Mendel during his surgery could be causally related to repetitive trauma if the activities were repetitive and above shoulder height. (Id. at 24). Dr. Frederick noted the Petitioner had a Type 2 acromion, which is curved or hooked, unlike a normal Type 1 acromion. (Id. at 26). Dr. Frederick testified that with a Type 2 acromion, one would become symptomatic with activity, and asymptomatic without activity, which Dr. Frederick noted is what happened in this case. (Id.). Dr. Frederick testified that a person with a Type 2 acromion is more likely to develop symptoms with activity than a person

with a normal Type 1 acromion. Dr. Frederick confirmed that Dr. Mendel shaved off the curve on the Petitioner's acromion during his surgery. (Id. at 24).

The Petitioner testified that she continues to experience pain and discomfort in her left shoulder when performing activities at or above shoulder height with her left arm. She stated that this could be putting dishes away on a top shelf or folding laundry in front of her at chest level. She testified that these activities can cause her left shoulder to ache for several hours and can range in pain, sometimes going up to 7 out of 10. She testified that she takes ibuprofen for the pain. The Petitioner testified that prior to 2014 she never had any of these problems with her left shoulder. She further testified that subsequent to 2014, she had never had any other accidents or injuries involving her left shoulder.

The Arbitrator observed the Petitioner and found her to be sincere, consistent and credible. Petitioner provided an account at hearing that matched her reports to her treating physicians, the company clinic, and the Respondent's examiner.

CONCLUSIONS OF LAW

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

Petitioner was working as fork truck driver for Respondent when she noticed pain in her left shoulder on multiple occasions after steering the wheel 300-500 times per day with her left arm straight out in front of her. The Petitioner testified that as long as the fork truck was being given gas, the steering wheel was easily moved. However, if the fork truck was at a stop, a great deal more effort had to be put in to steering the wheel.

In the months leading up to May 2014, Petitioner's job duties as a fork truck driver had significantly increased. On May 5, 2014 she sought treatment with the John Deere Clinic reporting pain and fatigue in her left shoulder beginning on May 2, 2014 from driving the fork truck arm over arm. Petitioner continued to have pain in her left shoulder until August 2014, when she went off work. During this off-work period her pain complaints resolved. In September 2014 she was released to return to work full duty after Dr. Hussain told her she did not have a left shoulder issue, but instead had an infection which caused her complaints.

Shortly after Petitioner returned to work, due to a high-risk pregnancy, Respondent placed Petitioner in a light duty office position. Petitioner returned to driving the fork truck sometime in August 2015, a few months after the birth of her child. Her job continued to be very busy, and after her return to the fork truck, she began to have the same pain in her left shoulder.

Petitioner returned to the JDMC on June 1, 2016 with similar pain complaints, in the same place on her left shoulder as she had made to the JDMC in 2014. Petitioner worked through the pain until January 6, 2017, when Petitioner returned to the JDMC, informing them that her symptoms had increased in her left shoulder. The JDMC advised the Petitioner that her complaints could not be related to driving the fork truck and she should consult with her personal physician.

On February 1, 2017, Petitioner returned to Dr. Hussain. Petitioner reminded Dr. Hussain of her left shoulder complaints arising only after driving a fork truck at work, which required her to rotate her left arm 300-500 times per day. She reported to Dr. Hussain that by the end of the week, she was barely able to lift her left arm due to the pain. Dr. Hussain placed Petitioner on restrictions due to her left shoulder complaints from overuse at work. Respondent did not accommodate Petitioner's restrictions.

On July 14, 2017, the Petitioner met with Dr. Mendel for a second opinion. Petitioner again provided a history of pain in her left shoulder aggravated by her job duties as a fork truck driver. Dr. Mendel, a board-certified orthopedic surgeon testified that Petitioner's work activities as a fork truck driver "significantly aggravated her underlying problem."

Respondent's Section 12 examiner. Dr. Frederick, dedicates 100% of her practice to occupational medicine. Occupational medicine has a board certification. Dr. Frederick is not board certified in occupational medicine. Dr. Frederick opined that the Petitioner's job was neither repetitive, according to OHSA guidelines, nor was the work above shoulder height, which were necessary components for Petitioner to sustain a shoulder injury.

However, Dr. Frederick also noted the Petitioner had a Type 2 acromion, which is curved or hooked, unlike a normal Type 1 acromion. Dr. Frederick testified that a person with a Type 2 acromion is more likely to develop symptoms with activity than a person with a normal Type 1 acromion.

Petitioner's testimony that her job aggravated her left shoulder is credible, unrebutted and supported by the medical record. Dr. Frederick's opinion is not supported by the record, and is not persuasive. Dr. Mendel's opinion is supported by the record and is persuasive.

The record is clear, the Petitioner became symptomatic in her left shoulder only when performing her repetitive job duties steering the fork truck, making 300-500 rotations per day, with her left arm extended at shoulder level in front of her body. Petitioner made a good faith effort to work through her pain in the hopes that it would abate, however, the pain did not resolve on its own, and she reasonably sought medical attention rather than working to collapse.

Given the chain of events, the totality of the evidence, the Petitioner's treatment records and the persuasive opinion of Dr. Mendel, the Arbitrator finds that the Petitioner sustained a repetitive trauma accident arising out of and in the course of her employment by the Respondent.

The initial two accident dates, May 2, 2014 and June 1, 2016, alleged by the Petitioner are not the most appropriate manifestation dates, as the Petitioner did not have a medical doctor relate her left shoulder pain to her work activities until February 1, 2017. Therefore, the Arbitrator finds that the third alleged accident date, January 6, 2017, is when the relation of the Petitioner's left shoulder condition to her work activities become plainly apparent, leading her to follow up on February 1, 2017 with an orthopedic surgeon.

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

Incorporating the above, the Petitioner must show that some act or phase of employment was a causative factor in her resulting condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 205 (2003). In repetitive trauma cases, the Petitioner generally relies on medical testimony to establish the causal connection between work activities performed and subsequent disablement. *Nunn v. Industrial Commission*, 157 Ill. App. 3d 470, 477 (1987). When a Petitioner alleges a repetitive trauma accident, it is for the Commission to determine whether the disability is solely the consequence of the degenerative process, or an aggravation of a pre-existing condition due to repetitive trauma. *Cassens Transport Co. v. Industrial Commission*, 262 Ill. App. 3d 324, 331 (1994).

Petitioner needed to make anywhere from 300-500 rotations on the steering wheel of the fork truck on a daily basis with her left arm. The Petitioner testified that as long as the fork truck was being given gas, the steering wheel was easily moved. However, if the fork truck was at a stop, a great deal more effort had to be put in to steering the wheel with her left arm extended in front of her body at shoulder level.

Petitioner provided clear, consistent, credible and unrebutted testimony that the repetitive use of the steering equipment with her left arm while operating a fork truck for the Respondent, caused her pain in her left shoulder leading her to seek medical attention, and be given restrictions or taken off of work by her providers. The medical record supports Petitioner's testimony that she only sought medical attention for pain in her left shoulder as a consequence of performing her job duties operating the fork truck.

Respondent offered the opinion of its examiner, Dr. Frederick, who opined that Petitioner's current condition of ill-being in her left shoulder was not caused by her work activities as a fork truck driver. Dr. Frederick ignored the chain of events in this matter, as well as her own finding that Petitioner's Type 2 acromion would cause the Petitioner to be more likely develop a symptomatic left shoulder. The Arbitrator is not persuaded by the opinions of Dr. Frederick.

Petitioner's treating physician, Dr. Mendel, a board-certified orthopedic surgeon, examined the Petitioner regularly, performed surgery on her left shoulder, and had an accurate understanding of her job duties, and was in the best position to judge the cause of Petitioner's complaints. Dr. Mendel testified that Petitioner's work activities significantly aggravated her underlying left shoulder problem, and caused her need for subsequent medical care.

The Arbitrator is persuaded by the chain of events, the totality of the evidence, and the opinion of Dr. Mendel. The Arbitrator finds that Petitioner's current condition of ill-being in her left shoulder is causally related to her repetitive trauma work injury.

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

Incorporating the above, the Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary. The Arbitrator finds that Respondent has not paid all appropriate charges for all reasonable and necessary medical services. Respondent is ordered to pay the outstanding $90.00 bill at Orthopedic Specialists, pursuant to the fee schedule. Additionally, the Respondent is ordered to reimburse the Petitioner directly for her $1,570.00 in out-of-pocket payments for her reasonable and necessary medical expenses related to this work injury.

Respondent shall be given a credit of $22,583.36 for other medical benefits which have been paid. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

Incorporating the above, the Petitioner testified that she was off work from January 7, 2018 as Respondent placed a restriction on her left shoulder that was not accommodated. Petitioner testified that she was taken off work by Dr. Hussain on February 1, 2017. On June 29, 2017, Dr. Hussain released Petitioner to return to work with restrictions. The Respondent again was unable to accommodate these restrictions and Petitioner remained off of work at that time. The Petitioner testified that she underwent her surgical procedure on August 15, 2017. At that point she was taken off work by Dr. Mendel.

Dr. Mendel released Petitioner to return to an "anticipated final" full duty release on December 15, 2017, despite Petitioner's ongoing left shoulder complaints, complementing his aggressive strengthening plan for her recovery. The Respondent would not allow Petitioner to return to work at that time due to the JDMC's permanent restrictions placed on the Petitioner. The Respondent brought the Petitioner back to light duty on January 17, 2018. Dr. Mendel released Petitioner to final full duty and MMI on March 16, 2018.

The Arbitrator finds Dr. Mendel's March 18, 2018 final full duty release for the Petitioner to be persuasive as to Petitioner's work capacity. Dr. Mendel credibly testified that permanent restrictions for a 36-year-old with an intact rotator cuff is not indicated. The JDMC's permanent restriction for the Petitioner, placed there by an individual or individuals of unknown medical qualifications, is not supported by the record.

Petitioner is entitled to TTD at the rate of $465.74 from January 7, 2017 to January 17, 2018, or 53 4/7 weeks of TTD. Respondent is entitled to a full credit for any non-occupational disability benefits paid during this period.

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

An analysis applying the five statutory factors set forth in ILCS 305/8.1(b)(b) is as follows:

(i) Reported level of impairment: Dr. Camilla Frederick, Respondent's Section 12 examiner, found the level of impairment to be 3% upper extremity or 2% person-as-whole pursuant to the AMA impairment guides, 6th Edition. The Arbitrator has considered and gives some weight to this factor.

(ii) Occupation of the injured employee: Petitioner is no longer a fork truck driver, but is still employed by Respondent, working as a paint inspector. Petitioner's treating surgeon released Petitioner to full duty as a fork truck driver. The Arbitrator has considered and gives some weight to this factor as Petitioner was able to return to her prior occupation, however, Respondent elected to provide a less strenuous job for the Petitioner.

(iii) Age: Petitioner was 34 years old at the time of injury. The Arbitrator has considered and gives moderate weight to this factor as Petitioner has many years left in the labor force.

(iv) Employee's future earning capacity: No evidence was presented reflecting a diminution of Petitioner's future earning capacity as a result of the injury. However, the record indicates that in Petitioner's inspector position with Respondent, she now earns $26.72/hour, whereas she was earning $17.52/hour in her fork truck driver position. The Arbitrator has considered and gives some weight to this factor.

(v) Disability corroborated by the treating medical records: The Petitioner testified at Arbitration that she continues to experience pain and discomfort in her left shoulder. She testified that this is particularly true with any activities that cause her left arm to be at or above shoulder height. The Petitioner testified that when she does have problems with her left shoulder it can cause pain and discomfort between a 2 to 7 out of 10. The Petitioner testified that she takes over-the-counter ibuprofen to alleviate the pain. Petitioner has not received medical treatment for her left shoulder subsequent to her final March 16, 2018 office visit with Dr. Mendel. At that final visit Petitioner reported no symptoms of pain, and that her left shoulder was doing very well, though she did have some generalized muscle soreness. At that final office visit, Dr. Mendel found smooth ROM in the left shoulder, 5/5 strength, and released Petitioner at MMI and full duty.

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 10% permanent partial disability to Petitioner's person as a whole pursuant to §8(d)(2) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC007500
Case Name	STEWART, ANGELA v. JOHN DEERE HARVESTER
Consolidated Cases	17WC007486 17WC007487
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0174
Number of Pages of Decision	13
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	David Hunt
Respondent Attorney	John Harris

DATE FILED: 5/10/2022

/s/*Carolyn Doherty, 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 ROCK ISLAND	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
	)		☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANGELA STEWART,

Petitioner,

vs. NO: 17 WC 7500

JOHN DEERE HARVESTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by Petitioner and 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, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof.

The Commission also affirms and adopts the Decision of the Arbitrator as stated by the Commission in its Decision and Opinion in the companion case of No. 17 WC 7486. As a result, in this matter 17 WC 7500, the Commission concludes that all benefits resulting from the causally related conditions of ill-being to be awarded Petitioner, including medical expenses, temporary total disability, and permanent partial disability, are awarded by the Commission in its Decision and Opinion in the companion case of No. 17 WC 7486. No award of additional benefits is made herein.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 8, 2021 is hereby affirmed and adopted.

IT IS FURTHER FOUND BY THE COMMISSION that medical expenses, temporary total disability, and permanent partial disability at issue in this matter 17 WC 7500 are awarded by the Commission in its Decision and Opinion in the companion case of No. 17 WC 7486. No award of additional benefits is made herein.

No additional bond beyond that required for removal of this cause to the Circuit Court by Respondent in case No. 17 WC 7486 is required. 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.

May 10, 2022

o: 5/5/22
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

DECISION SIGNATURE PAGE

Case Number	17WC007500
Case Name	STEWART, ANGELA v. JOHN DEERE HARVESTER
Consolidated Cases	No Consolidated Cases
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Adam Hinrichs, Arbitrator

Petitioner Attorney	David Hunt
Respondent Attorney	John Harris

DATE FILED: 10/8/2021

/s/Adam Hinrichs, Arbitrator

Signature

INTEREST RATE WEEK OF OCTOBER 5, 2021 0.05%

STATE OF ILLINOIS)
)SS.
COUNTY OF Rock Island)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ANGELA STEWART Case # **17 WC 007500**
Employee/Petitioner
v.
JOHN DEERE HARVESTER
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 **Adam Hinrichs**, Arbitrator of the Commission, in the city of **Rock Island**, on **August 10, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **May 2, 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 **January 6, 2017**, Petitioner **did** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned $**9,780.66**; the average weekly wage was $**698.32**.

On the date of accident, Petitioner was **34** years of age, **married** with **2** dependent children.

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

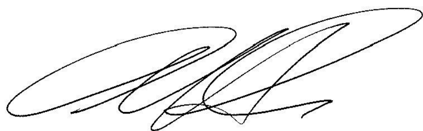
Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

ORDER

Based upon the decision in the consolidated case, 17WC 7486, no further award or credit shall issue in this matter.

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

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



Signature of Arbitrator

October 8, 2021

FINDINGS OF FACT

The Petitioner filed three Applications for Adjustment of Claim with the IWCC alleging repetitive trauma injuries to her left shoulder while driving a fork truck. Petitioner alleged three accident dates: May 2, 2014, June 1, 2016, and January 6, 2017. The parties proceeded to hearing with the following issues in dispute in all three matters: Accident, Causal Connection, Medical Bills, TTD, and the Nature and Extent of the injury.

Angela Stewart (hereinafter "Petitioner") testified that she was employed at John Deere Harvester (hereinafter "Respondent") as a fork truck driver starting around 2008 or 2009. The Petitioner testified that operating the fork truck required her to make anywhere from 300-500 rotations on the steering wheel on a daily basis. There was a quick turn knob equipped on the steering wheel to make these turns.

At hearing, the Petitioner demonstrated that the operation of this fork truck required her to be in a sitting position with her left arm on the steering wheel, straight in front of her, at shoulder level. The Petitioner testified that she is right-hand dominant and would use her right arm to adjust the forks on the fork truck. She testified that her left arm was used exclusively for steering the fork truck. The Petitioner testified that as long as the fork truck was being given gas, the steering wheel easily moved. However, if the fork truck was at a stop, a great deal more effort had to be put into turning the steering the wheel with her left arm.

The Petitioner testified that in the months leading up to May 2, 2014, her job was busier due to personnel changes. She testified that in May of 2014 her left shoulder began bothering her and that on May 5, 2014 she sought treatment with the John Deere Medical Clinic ("JDMC"). Petitioner reported pain and fatigue in her left shoulder from driving the fork truck arm over arm. On May 9, 2014, the JDMC gave Petitioner permanent work restrictions. The Petitioner was subsequently referred out for an MRI and EMG/NCV. (Px. 1)

On July 30, 2014, the Petitioner underwent an MRI Arthrogram that was interpreted as normal. (Px. 3). On September 17, 2014, Petitioner underwent an EMG/NCV that was also interpreted as normal. (Px 5). The Petitioner was referred for an orthopedic consult with Dr. Suleman Hussain at ORA Orthopedics.

On August 22, 2014, Petitioner presented to Dr. Hussain complaining of sensitivity, numbness, and tingling in her left shoulder down to her left elbow since March. Dr. Hussain performed a physical exam and reviewed the MRI. Dr. Hussain noted that he was concerned with Parsonage Turners post infection versus brachial plexus. Dr. Hussain found no significant shoulder dysfunction, stated that this was not a shoulder condition, and released Petitioner back to work full duty. (Px. 4)

On September 22, 2014, Petitioner returned to Dr. Hussain noting that all of her symptoms in her left shoulder went away when she was off work. Dr. Hussain reviewed the EMG/NCV and examined the Petitioner. Dr. Hussain released the Petitioner at MMI, full duty work, and related her complaints in her left shoulder to an infection. (Px 4)

The Petitioner testified that after her release from Dr. Hussain, she initially returned to work as a fork truck driver. However, shortly thereafter, the Petitioner became pregnant. Her pregnancy was deemed to be high risk, so Respondent transferred her to an office job where she worked until she gave birth in May 2015.

The Petitioner testified that after the birth of her child, she returned to work as a fork truck driver in August 2015. She testified that the job continued to be very busy, and shortly after her return to her fork truck duties, she began to again have the same pain in her left shoulder.

The Petitioner returned to the JDMC on June 1, 2016 with similar pain complaints in her left shoulder as she had made in 2014. Petitioner testified that it hurt in the exact same area of her left shoulder. She treated with the JDMC using ice therapy for approximately one week. (Px. 2)

On January 6, 2017, the Petitioner returned to the JDMC to inform them that her symptoms had increased in her left shoulder. On January 17, 2017 the JDMC placed a permanent restriction on the Petitioner's left shoulder of "rare use of left upper extremity," and that the JDMC "will have her see her provider as a personal medical condition as her symptoms cannot be explained based on her work exposure of driving a fork truck." (Px 2). Petitioner testified that Respondent did not have an accommodated position available for her at that time.

On February 1, 2017, the Petitioner returned to see Dr. Hussain. She informed Dr. Hussain that beginning in 2016 she constantly drove a fork truck at work which caused her to rotate her left arm 300-500 times per day. She informed Dr. Hussain that by the end of the week, she was barely able to lift her left arm due to the pain. Dr. Hussain diagnosed a left shoulder contusion from overuse at work, gave the Petitioner an injection in her left shoulder, and prescribed an MRI. (Px. 4) Petitioner testified she was taken off work by Dr. Hussain at this visit. Dr. Hussain continued the off-work restriction through June 29, 2017. (Px. 4)

On March 27, 2017, Petitioner returned to Dr. Hussain who reviewed the MRI, Px. 7, which revealed degenerative changes in the AC joint along with mild edema. Dr. Hussain's records indicate another injection was performed in the left shoulder, however, there is a typo indicating it occurred in the right shoulder. (Px. 4)

On May 1, 2017, Petitioner followed up with Dr. Hussain reporting one week of relief from the injection. Dr. Hussain diagnosed impingement syndrome, and AC Joint arthrosis. As conservative measures had failed to cure and relieve the Petitioner's complaints of pain in her left shoulder, Dr. Hussain recommended an arthroscopic procedure. (Px 4)

On June 29, 2017, Dr. Hussain released Petitioner to return to work with the following restrictions: "no pushing, pulling, or lift more than 5 lbs. floor to chest high, no overhead lifting." (Px. 4) Respondent did not accommodate Petitioner's restrictions.

On July 14, 2017, the Petitioner met with Dr. Tuvi Mendel at Orthopedic Specialists for a second opinion regarding the need for surgery. Petitioner gave Dr. Mendel a consistent history, and Dr. Mendel examined her. After his examination of the Petitioner, and his review of the objective tests, Dr. Mendel found that given her failure to respond to conservative care, surgery was indicated. Dr. Mendel further opined that the Petitioner's condition "does appear to be correlated with work activities specifically turning the speed dial on the fork truck." (Px 6)

On August 15, 2017, Dr. Mendel performed a glenohumeral joint labral debridement and synovectomy, subacromial decompression, and acromioclavicular joint resection and biceps tendon tenodesis on Petitioner's left shoulder. Dr. Mendel's post-operative diagnosis was left shoulder impingement, acromioclavicular joint degenerative arthritis, and biceps tendinopathy. Dr. Mendel found no rotator cuff tear during the procedure, but performed an aggressive glenohumeral joint labral debridement and synovectomy. Significant biceps tendinopathy was noted and tenodesed. There was significant degeneration of the AC joint that was then resected. (Px. 8). Petitioner was taken off work following surgery.

Petitioner testified that she participated in post-operative physical therapy at Rock Valley Physical Therapy. (Px. 9)

Dr. Mendel released Petitioner to return to work "anticipated final" full duty on December 15, 2017. During that office visit, Dr. Mendel noted Petitioner continued to complain of throbbing anterior left shoulder pain between

3-7 out of 10. Petitioner reported she was ready to try to return to full work duties, and agreed with Dr. Mendel's plan to aggressively strengthen the shoulder. (Px. 6).

However, the JDMC continued to place a permanent restriction on the Petitioner, and Respondent did not bring her back to work until January 17, 2018. At that time, the Petitioner returned to work in the paint department. The Petitioner testified that she continued to work in this department until January 30, 2019.

On March 16, 2018, Petitioner returned to Dr. Mendel reporting no symptoms of pain and doing very well. She reported doing her HEP and having generalized muscle soreness in the shoulder. On exam, Dr. Mendel found smooth ROM in the left shoulder and 5/5 strength. Dr. Mendel released Petitioner at MMI and full duty.

The Petitioner testified that on January 30, 2019, the Respondent determined that her job duties in the paint department were outside the permanent restrictions that the JDMC had placed on her, and disqualified her from that position. The Respondent began paying the Petitioner non-occupational benefits from January 30, 2019 through January 30, 2020. The Petitioner testified that Respondent brought her back to work on February 18, 2020. At that time, the Respondent found a permanent job as an inspector in the paint department.

The Petitioner testified that her job as a paint inspector is quality control and does not require her to do any activities at or above shoulder level with her left arm. The Petitioner testified that she has continued working as an inspector in the paint department since February 19, 2020, and her hourly pay has increased from $17.52 per hour as fork truck driver to $26.72 per hour as an inspector.

The parties deposed Dr. Tuvi Mendel on April 29, 2019. Dr. Mendel testified that he is a board-certified orthopedic surgeon. Dr. Mendel was given a hypothetical consistent with the Petitioner's testimony of her job duties. Dr. Mendel testified that based on that job description it "definitely would lead to the type of symptoms that she described which necessitated" the medical care provided. (Px 10, pp. 18-19). Dr. Mendel testified that Petitioner's work activities as a fork truck driver "significantly aggravated her underlying problem." (Id, at 21). Dr. Mendel testified that Petitioner was capable of returning to her prior position as a fork truck driver, and he would not place a permanent restriction on a 36-year-old with an intact rotator cuff. (Id, at 23). On cross-exam, Dr. Mendel testified that he likely reviewed Dr. Hussain's notes regarding Petitioner's use of her left arm at work, however, he no longer dictates his notes so they do not include all the information he reviews during his office visits. (Id, at 29)

At the Respondent's request, pursuant to Section 12, the Petitioner was examined by Dr. Camilla Frederick on October 29, 2018. The parties deposed Dr. Frederick on July 25, 2019. Dr. Frederick testified that she is board certified in family practice, but 100% of her practice is dedicated to occupational medicine. Occupational medicine has a board certification. Dr. Frederick testified that she is not board certified in occupational medicine. (Rx. B, pp. 17-18).

Dr. Frederick testified that during her physical exam of the Petitioner, she found positive impingement signs in the left shoulder, and bicipital tendinitis. (Id. at 13). Dr. Frederick opined that there was no causal connection between the Petitioner's job duties and the shoulder condition for which she had surgery. Dr. Frederick opined that the Petitioner's job was neither repetitive, according to OHSA guidelines, nor was the work above shoulder level, which were both necessary components for Petitioner to sustain her shoulder injury. (Id, pp. 22 -24).

Dr. Frederick testified that the findings made by Dr. Mendel during his surgery could be causally related to repetitive trauma if the activities were repetitive and above shoulder height. (Id. at 24). Dr. Frederick noted the Petitioner had a Type 2 acromion, which is curved or hooked, unlike a normal Type 1 acromion. (Id. at 26). Dr. Frederick testified that with a Type 2 acromion, one would become symptomatic with activity, and asymptomatic without activity, which Dr. Frederick noted is what happened in this case. (Id.). Dr. Frederick testified that a person with a Type 2 acromion is more likely to develop symptoms with activity than a person

with a normal Type 1 acromion. Dr. Frederick confirmed that Dr. Mendel shaved off the curve on the Petitioner's acromion during his surgery. (Id. at 24).

The Petitioner testified that she continues to experience pain and discomfort in her left shoulder when performing activities at or above shoulder height with her left arm. She stated that this could be putting dishes away on a top shelf or folding laundry in front of her at chest level. She testified that these activities can cause her left shoulder to ache for several hours and can range in pain, sometimes going up to 7 out of 10. She testified that she takes ibuprofen for the pain. The Petitioner testified that prior to 2014 she never had any of these problems with her left shoulder. She further testified that subsequent to 2014, she had never had any other accidents or injuries involving her left shoulder.

The Arbitrator observed the Petitioner and found her to be sincere, consistent and credible. Petitioner provided an account at hearing that matched her reports to her treating physicians, the company clinic, and the Respondent's examiner.

CONCLUSIONS OF LAW

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

Petitioner was working as fork truck driver for Respondent when she noticed pain in her left shoulder on multiple occasions after steering the wheel 300-500 times per day with her left arm straight out in front of her. The Petitioner testified that as long as the fork truck was being given gas, the steering wheel was easily moved. However, if the fork truck was at a stop, a great deal more effort had to be put in to steering the wheel.

In the months leading up to May 2014, Petitioner's job duties as a fork truck driver had significantly increased. On May 5, 2014 she sought treatment with the John Deere Clinic reporting pain and fatigue in her left shoulder beginning on May 2, 2014 from driving the fork truck arm over arm. Petitioner continued to have pain in her left shoulder until August 2014, when she went off work. During this off-work period her pain complaints resolved. In September 2014 she was released to return to work full duty after Dr. Hussain told her she did not have a left shoulder issue, but instead had an infection which caused her complaints.

Shortly after Petitioner returned to work, due to a high-risk pregnancy, Respondent placed Petitioner in a light duty office position. Petitioner returned to driving the fork truck sometime in August 2015, a few months after the birth of her child. Her job continued to be very busy, and after her return to the fork truck, she began to have the same pain in her left shoulder.

Petitioner returned to the JDMC on June 1, 2016 with similar pain complaints, in the same place on her left shoulder as she had made to the JDMC in 2014. Petitioner worked through the pain until January 6, 2017, when Petitioner returned to the JDMC, informing them that her symptoms had increased in her left shoulder. The JDMC advised the Petitioner that her complaints could not be related to driving the fork truck and she should consult with her personal physician.

On February 1, 2017, Petitioner returned to Dr. Hussain. Petitioner reminded Dr. Hussain of her left shoulder complaints arising only after driving a fork truck at work, which required her to rotate her left arm 300-500 times per day. She reported to Dr. Hussain that by the end of the week, she was barely able to lift her left arm due to the pain. Dr. Hussain placed Petitioner on restrictions due to her left shoulder complaints from overuse at work. Respondent did not accommodate Petitioner's restrictions.

On July 14, 2017, the Petitioner met with Dr. Mendel for a second opinion. Petitioner again provided a history of pain in her left shoulder aggravated by her job duties as a fork truck driver. Dr. Mendel, a board-certified orthopedic surgeon testified that Petitioner's work activities as a fork truck driver "significantly aggravated her underlying problem."

Respondent's Section 12 examiner. Dr. Frederick, dedicates 100% of her practice to occupational medicine. Occupational medicine has a board certification. Dr. Frederick is not board certified in occupational medicine. Dr. Frederick opined that the Petitioner's job was neither repetitive, according to OHSA guidelines, nor was the work above shoulder height, which were necessary components for Petitioner to sustain a shoulder injury.

However, Dr. Frederick also noted the Petitioner had a Type 2 acromion, which is curved or hooked, unlike a normal Type 1 acromion. Dr. Frederick testified that a person with a Type 2 acromion is more likely to develop symptoms with activity than a person with a normal Type 1 acromion.

Petitioner's testimony that her job aggravated her left shoulder is credible, unrebutted and supported by the medical record. Dr. Frederick's opinion is not supported by the record, and is not persuasive. Dr. Mendel's opinion is supported by the record and is persuasive.

The record is clear, the Petitioner became symptomatic in her left shoulder only when performing her repetitive job duties steering the fork truck, making 300-500 rotations per day, with her left arm extended at shoulder level in front of her body. Petitioner made a good faith effort to work through her pain in the hopes that it would abate, however, the pain did not resolve on its own, and she reasonably sought medical attention rather than working to collapse.

Given the chain of events, the totality of the evidence, the Petitioner's treatment records and the persuasive opinion of Dr. Mendel, the Arbitrator finds that the Petitioner sustained a repetitive trauma accident arising out of and in the course of her employment by the Respondent.

The initial two accident dates, May 2, 2014 and June 1, 2016, alleged by the Petitioner are not the most appropriate manifestation dates, as the Petitioner did not have a medical doctor relate her left shoulder pain to her work activities until February 1, 2017. Therefore, the Arbitrator finds that the third alleged accident date, January 6, 2017, is when the relation of the Petitioner's left shoulder condition to her work activities become plainly apparent, leading her to follow up on February 1, 2017 with an orthopedic surgeon.

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

Incorporating the above, the Petitioner must show that some act or phase of employment was a causative factor in her resulting condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 205 (2003). In repetitive trauma cases, the Petitioner generally relies on medical testimony to establish the causal connection between work activities performed and subsequent disablement. *Nunn v. Industrial Commission*, 157 Ill. App. 3d 470, 477 (1987). When a Petitioner alleges a repetitive trauma accident, it is for the Commission to determine whether the disability is solely the consequence of the degenerative process, or an aggravation of a pre-existing condition due to repetitive trauma. *Cassens Transport Co. v. Industrial Commission*, 262 Ill. App. 3d 324, 331 (1994).

Petitioner needed to make anywhere from 300-500 rotations on the steering wheel of the fork truck on a daily basis with her left arm. The Petitioner testified that as long as the fork truck was being given gas, the steering wheel was easily moved. However, if the fork truck was at a stop, a great deal more effort had to be put in to steering the wheel with her left arm extended in front of her body at shoulder level.

Petitioner provided clear, consistent, credible and unrebutted testimony that the repetitive use of the steering equipment with her left arm while operating a fork truck for the Respondent, caused her pain in her left shoulder leading her to seek medical attention, and be given restrictions or taken off of work by her providers. The medical record supports Petitioner's testimony that she only sought medical attention for pain in her left shoulder as a consequence of performing her job duties operating the fork truck.

Respondent offered the opinion of its examiner, Dr. Frederick, who opined that Petitioner's current condition of ill-being in her left shoulder was not caused by her work activities as a fork truck driver. Dr. Frederick ignored the chain of events in this matter, as well as her own finding that Petitioner's Type 2 acromion would cause the Petitioner to be more likely develop a symptomatic left shoulder. The Arbitrator is not persuaded by the opinions of Dr. Frederick.

Petitioner's treating physician, Dr. Mendel, a board-certified orthopedic surgeon, examined the Petitioner regularly, performed surgery on her left shoulder, and had an accurate understanding of her job duties, and was in the best position to judge the cause of Petitioner's complaints. Dr. Mendel testified that Petitioner's work activities significantly aggravated her underlying left shoulder problem, and caused her need for subsequent medical care.

The Arbitrator is persuaded by the chain of events, the totality of the evidence, and the opinion of Dr. Mendel. The Arbitrator finds that Petitioner's current condition of ill-being in her left shoulder is causally related to her repetitive trauma work injury.

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

Incorporating the above, the Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary. The Arbitrator finds that Respondent has not paid all appropriate charges for all reasonable and necessary medical services. Respondent is ordered to pay the outstanding $90.00 bill at Orthopedic Specialists, pursuant to the fee schedule. Additionally, the Respondent is ordered to reimburse the Petitioner directly for her $1,570.00 in out-of-pocket payments for her reasonable and necessary medical expenses related to this work injury.

Respondent shall be given a credit of $22,583.36 for other medical benefits which have been paid. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

Incorporating the above, the Petitioner testified that she was off work from January 7, 2018 as Respondent placed a restriction on her left shoulder that was not accommodated. Petitioner testified that she was taken off work by Dr. Hussain on February 1, 2017. On June 29, 2017, Dr. Hussain released Petitioner to return to work with restrictions. The Respondent again was unable to accommodate these restrictions and Petitioner remained off of work at that time. The Petitioner testified that she underwent her surgical procedure on August 15, 2017. At that point she was taken off work by Dr. Mendel.

Dr. Mendel released Petitioner to return to an "anticipated final" full duty release on December 15, 2017, despite Petitioner's ongoing left shoulder complaints, complementing his aggressive strengthening plan for her recovery. The Respondent would not allow Petitioner to return to work at that time due to the JDMC's permanent restrictions placed on the Petitioner. The Respondent brought the Petitioner back to light duty on January 17, 2018. Dr. Mendel released Petitioner to final full duty and MMI on March 16, 2018.

The Arbitrator finds Dr. Mendel's March 18, 2018 final full duty release for the Petitioner to be persuasive as to Petitioner's work capacity. Dr. Mendel credibly testified that permanent restrictions for a 36-year-old with an intact rotator cuff is not indicated. The JDMC's permanent restriction for the Petitioner, placed there by an individual or individuals of unknown medical qualifications, is not supported by the record.

Petitioner is entitled to TTD at the rate of $465.74 from January 7, 2017 to January 17, 2018, or 53 4/7 weeks of TTD. Respondent is entitled to a full credit for any non-occupational disability benefits paid during this period.

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

An analysis applying the five statutory factors set forth in ILCS 305/8.1(b)(b) is as follows:

(i) Reported level of impairment: Dr. Camilla Frederick, Respondent's Section 12 examiner, found the level of impairment to be 3% upper extremity or 2% person-as-whole pursuant to the AMA impairment guides, 6th Edition. The Arbitrator has considered and gives some weight to this factor.

(ii) Occupation of the injured employee: Petitioner is no longer a fork truck driver, but is still employed by Respondent, working as a paint inspector. Petitioner's treating surgeon released Petitioner to full duty as a fork truck driver. The Arbitrator has considered and gives some weight to this factor as Petitioner was able to return to her prior occupation, however, Respondent elected to provide a less strenuous job for the Petitioner.

(iii) Age: Petitioner was 34 years old at the time of injury. The Arbitrator has considered and gives moderate weight to this factor as Petitioner has many years left in the labor force.

(iv) Employee's future earning capacity: No evidence was presented reflecting a diminution of Petitioner's future earning capacity as a result of the injury. However, the record indicates that in Petitioner's inspector position with Respondent, she now earns $26.72/hour, whereas she was earning $17.52/hour in her fork truck driver position. The Arbitrator has considered and gives some weight to this factor.

(v) Disability corroborated by the treating medical records: The Petitioner testified at Arbitration that she continues to experience pain and discomfort in her left shoulder. She testified that this is particularly true with any activities that cause her left arm to be at or above shoulder height. The Petitioner testified that when she does have problems with her left shoulder it can cause pain and discomfort between a 2 to 7 out of 10. The Petitioner testified that she takes over-the-counter ibuprofen to alleviate the pain. Petitioner has not received medical treatment for her left shoulder subsequent to her final March 16, 2018 office visit with Dr. Mendel. At that final visit Petitioner reported no symptoms of pain, and that her left shoulder was doing very well, though she did have some generalized muscle soreness. At that final office visit, Dr. Mendel found smooth ROM in the left shoulder, 5/5 strength, and released Petitioner at MMI and full duty.

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 10% permanent partial disability to Petitioner's person as a whole pursuant to §8(d)(2) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC013315
Case Name	GALLEGOS, SILVANO v. TOTAL STAFFING
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0175
Number of Pages of Decision	16
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Jack Epstein
Respondent Attorney	Thomas Boyd

DATE FILED: 5/10/2022

/s/Deborah Simpson, 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: medical expenses	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SILVANO E. GALLEGOS,

Petitioner,

vs. NO: 17 WC 13315

TOTAL STAFFING SOLUTIONS,

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, modifies the Decision of the Arbitrator as stated herein and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Following a §19(b) hearing held on March 22, 2021, the Arbitrator determined that Petitioner's treatment with Dr. Lee De Las Casas and Dr. Udit Patel exceeded his choice of treatment providers allotted under §8(a). Based on her breakdown of the treatment and referral lines, the Arbitrator determined that the last treatment provider covered under §8(a) was Dr. Sergey Neckrysh. As such, the Arbitrator found that Respondent was only liable for the treatment through April 26, 2018, which was the last date Petitioner saw Dr. Neckrysh. However, following a careful review of the entire record, the Commission modifies the Decision of the Arbitrator to find that, in addition to the medical expenses awarded, Petitioner is entitled to all reasonable and necessary medical expenses provided by Dr. Kevin Tu through September 24, 2020, pursuant to the medical fee schedule, as provided by §8(a) and §8.2 of the Illinois Workers' Compensation Act.

In relevant part, §8(a) states that the employer's liability to pay for medical services selected by the employee shall be limited to:

> "(1) all first aid and emergency treatment; plus (2) all medical, surgical and hospital services provided by the physician, surgeon or hospital initially chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said initial service provider or any subsequent provider of medical services in the chain of referrals from said initial service provider; plus (3) all medical, surgical and hospital services provided by any second physician, surgeon or hospital subsequently chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said second service provider or any subsequent provider of medical services in the chain of referrals from said second service provider. Thereafter the employer shall select and pay for all necessary medical, surgical and hospital treatment and the employee may not select a provider of medical services at the employer's expense unless the employer agrees to such selection…" 820 ILCS 305/8(a).

In the present matter, Petitioner, who was placed in a general labor and food service line position by Respondent, sustained lumbar spine and left knee injuries after slipping and falling on wet flooring on April 12, 2017. Petitioner first presented for treatment on the accident date at Physicians Immediate Care, where he was sent by Respondent. He then presented to The Pain Center of Illinois and was seen by Dr. Neema Bayran on May 2, 2017. Petitioner testified that his former lawyer had sent him to The Pain Center of Illinois. As such, the Commission finds The Pain Center of Illinois to be Petitioner's first choice of treatment provider under §8(a). Petitioner thereafter presented to Cavero Medical Group and testified that someone close to him and his family had recommended this provider to him. The Commission thus finds that Cavero Medical Group represents Petitioner's second choice of treatment provider. During this time, Petitioner also presented for physical therapy upon the recommendation of Physicians Immediate Care.

Eventually, Petitioner began seeing Dr. Tu of G & T Orthopaedics and Sports Medicine on August 31, 2017 after Dr. Luis Angarita of Cavero Medical Group and Dr. Bayran recommended that he see an orthopedic specialist/surgeon. Petitioner testified that Dr. Bayran had referred him to Dr. Tu. At his deposition, Dr. Tu also testified that Dr. Bayran had referred Petitioner to him for his left knee. Thereafter, on December 19, 2017, Dr. Bayran also referred Petitioner for a spinal consultation. Petitioner then presented to Dr. Neckrysh of Academic Spine Consultants on February 1, 2018, at which time Dr. Neckrysh's treatment note listed Dr. Bayran as the referring physician. Petitioner also confirmed at the hearing that Dr. Bayran had referred him to Dr. Neckrysh. Petitioner's testimony, along with the medical exhibits, establish that both Dr. Tu and Dr. Neckrysh fell within Petitioner's chain of referrals.

However, Petitioner subsequently presented to Dr. De Las Casas of Grandview Health Partners on November 29, 2018 and Dr. Patel of Chicago Pain and Orthopedic Institute on January 15, 2019 without any clear referral from his treatment providers. This places these doctors outside of Petitioner's choice of two providers and the chain of referrals. Based on this, the Commission affirms the Arbitrator's denial of the treatment provided by Dr. De Las Casas and Dr. Patel.

However, the medical records show that Petitioner continued treating with Dr. Tu, who he was properly referred to by Dr. Bayran, through September 24, 2020. As such, the record does not support cutting off Respondent's liability for medical expenses on April 26, 2018. Instead, the Commission modifies the award of medical expenses to include Dr. Tu's treatment through September 24, 2020 while still denying any and all medical expenses from Dr. De Las Casas and Dr. Patel. For all other issues not specifically stated herein, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated August 4, 2021 is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS FURTHER ORDERED that Respondent is liable for all reasonable and necessary medical expenses provided by Dr. Tu through September 24, 2020, pursuant to the medical fee schedule, as provided by §8(a) and §8.2 of the Act. The award of other medical expenses as outlined in the Decision of the Arbitrator is otherwise affirmed. The Commission also affirms the denial of all medical expenses for treatment provided by Dr. De Las Casas and Dr. Patel, as they exceed Petitioner's choice of providers afforded to him by §8(a) of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $35,000.00. 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.

May 10, 2022

DLS/met
O- 3/30/22
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/s/*Deborah L. Simpson*
Deborah L. Simpson

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC013315
Case Name	GALLEGOS, SILVANO v. TOTAL STAFFING SOLUTIONS
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Elaine Llerena, Arbitrator

Petitioner Attorney	Jack Epstein
Respondent Attorney	Thomas Boyd

DATE FILED: 8/4/2021

THE INTEREST RATE FOR THE WEEK OF AUGUST 3, 2021 0.05%

/s/ *Elaine Llerena, Arbitrator*
Signature

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

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

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

Silvano E. Gallegos
Employee/Petitioner

v.

Total Staffing Solutions
Employer/Respondent

Case # **17** WC **013315**

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 **March 22, 20201**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. ☐ What was the date of the accident?

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

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

G. ☒ What were Petitioner's earnings?

H. ☒ What was Petitioner's age at the time of the accident?

I. ☐ What was Petitioner's marital status at the time of the accident?

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

K. ☒ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☒ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On the date of accident, **April 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*** causally related to the accident.

In the year preceding the injury, Petitioner earned $3,664.51; the average weekly wage was $**356.46**.

On the date of accident, Petitioner was **41** 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 $**3,983.48** for other benefits, for a total credit of $**3,983.48**.

Respondent is entitled to a credit of $**3,983.48** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $237.64 per week for 144 & 6/7 weeks, commencing December 19, 2017 through September 27, 2020, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services through April 26, 2018, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for a left knee diagnostic arthroscopy with possible partial meniscectomy, possible synovectomy and possible chondroplasty and a lumbar injection as recommended by Dr. Bayran and Dr. Neckrysh, along with all resulting treatment and follow-up care.

Respondent shall be given a credit of $3,983.48 for medical benefits that have been paid under Section 8(j) of the Act, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In 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/ Elaine Llerena
Signature of Arbitrator

AUGUST 4, 2021

STATEMENT OF FACTS:

Hearing on Petitioner's claim was held on March 22, 2021. Petitioner testified with the use of an interpreter.

Petitioner testified he is a welder and worked for Respondent Total Staffing Solutions, Inc. when there was no welding work available. (T.35-36) Petitioner testified he started working for Respondent in 2015. (T.12) During a stint with Respondent from January 2017 through March 2017, Petitioner worked as a welder. (T.15-16) Petitioner testified that his most recent return to Respondent was on April 10, 2017. (T.13) Respondent sent Petitioner to Baja Foods on April 10, 2017 to do "general labor work." (T.16) Petitioner described the job as working on a service line at a conveyor belt putting together and handing off packaged foods such as ground beef and hotdogs. (T.16-17)

Petitioner testified that on April 12, 2017 he was in a small area where carts used to transport food are washed. (T.17-18) Petitioner explained that there was a lot of soap in the area and, when he went to move a box onto a pallet, he slipped and fell. (T.17-19) Petitioner testified that he twisted his left leg, did almost a complete circle and fell on his left side injuring his left leg. (T.19) Petitioner testified that his back also hit the ground when he fell. *Id.* According to Petitioner, his co-workers and supervisor witnessed his fall. (T.19-20) Petitioner testified he "was a bit out of it" and "wasn't all there" after his slip and fall. (T.42) Petitioner testified that once he "came to" he left, which was about a half hour after the fall. *Id.*

Petitioner completed an accident report in Spanish and signed it on April 12, 2017. (T.20-21, PX16) Petitioner testified that he was asked by Respondent to complete the accident report. (T.23) The interpreter read the Spanish portion of the report at trial and indicated that it stated "a bit of pain in the back -- or on the back and pain on my left knee -- or on the left knee." (T.23) The report also states at the bottom, in different handwriting and in English: "I slipped. A slight pain on my back. A pain on my left knee." (PX16) Petitioner testified that after he completed the accident report, Respondent sent him to Physicians Immediate Care. (T.24) Petitioner confirmed that he did not go straight from Baja Foods to Physicians Immediate Care but went later that day. (T.43)

At Physicians Immediate Care Petitioner was seen by David Gilmore, PA-C. (PX1) Petitioner reported that while at work the floor was wet and he slipped and fell backwards, causing his left leg to internally rotate. *Id.* Petitioner complained of left knee and lower back pain and intermittent left hip pain. *Id.* Regarding the use of unprescribed drugs, Gilmore noted that Petitioner reported using marijuana daily or almost daily to help him sleep. (PX1 & RX8) Gilmore diagnosed Petitioner as having left knee and low back muscle strain and prescribed pain medication. (PX1) He also told Petitioner to ice the affected area and keep the knee elevated when possible. *Id.* Gilmore released Petitioner to return to work with the following restrictions: sit for 5 minutes for every 1 hour of standing work. *Id.*

Petitioner followed up at Physicians Immediate Care on April 17, 2017 complaining of ongoing pain. *Id.* Petitioner saw Dr. Nicholas Apostolopoulos, who provided Petitioner back exercises and continued Petitioner's work restrictions. *Id.* Petitioner returned to Gilmore on April 20, 2017. *Id.* Petitioner reported that his pain had worsened since the last visit. *Id.* Gilmore provided Petitioner knee and back exercises and released Petitioner to return to work without restrictions. *Id.*

On May 2, 2017, Petitioner started treating with Dr. Neema Bayran of The Pain Center of Illinois. (PX6 & RX9) Petitioner reported a work accident on April 12, 2017. *Id.* Petitioner explained that the floor was wet, his leg twisted, and he fell on his left side. *Id.* Petitioner also indicated that he was sent to Physicians Immediate Care, which sent him back to work, and that he was fired shortly thereafter. *Id.* Petitioner further stated that he

had not been able to see any physicians since. *Id.* Petitioner complained of left knee pain with radiation into his left toes, a cold and tingly feeling in his left leg, left leg numbness, left side lower back pain that radiated into the shoulder blade area and bilateral shoulder pain. *Id.* Dr. Bayran diagnosed Petitioner as having low back and left knee pain and opined that Petitioner's current condition was related to the work injury sustained on April 12, 2017. *Id.* Dr. Bayran ordered physical therapy and released Petitioner to return to work with the following restrictions: no lifting more than 15 lbs. *Id.*

On May 4, 2017, Petitioner followed up at Physicians Immediate Care and complained of a cold feeling and pain in his left knee. *Id.* Petitioner also reported that his back pain was much worse and was made worse by the back exercises. *Id.* Gilmore noted that Petitioner complained that he was not provided stronger pain medicine during his last visit and that Physicians Immediate Care was not doing anything for him. *Id.* Gilmore also noted that Petitioner began to swear, was asked to stop and told that if he continued to swear, he would have to leave. *Id.* Gilmore noted that Petitioner got up and left. *Id.* Gilmore prescribed physical therapy for Petitioner's knee and back pain and that Petitioner was to follow up on May 18, 2017. *Id.*

Petitioner saw Dr. Luis Angarita of Cavero Medical Group on May 5, 2017. (PX3) During that first visit, Dr. Angarita noted that Petitioner complained of left knee and back pain, ordered a lumbar MRI and prescribed physical therapy. *Id.* Dr. Angarita issued a letter, undated, indicating that Petitioner had been under his care since May 5, 2017 as a result of a work accident. (PX3 & RX11) The letter further indicated that he had referred Petitioner to an orthopedic specialist which Petitioner was scheduled to see on June 23, 2017. *Id.* Dr. Angarita opined that Petitioner was not able to work. *Id.*

Petitioner began physical therapy at ATI Physical Therapy on May 9, 2017. (PX4) Petitioner complained of low back and left knee pain during his initial evaluation. *Id.*

Petitioner underwent the lumbar MRI on May 9, 2017, the results of which revealed L4-5 and L5-S1 disc bulging with posterior central annular tears and mild proximal foraminal stenosis at both levels. (PX5)

Dr. Angarita reviewed the MRI results on May 15, 2017 and continued Petitioner's physical therapy. (PX3) Petitioner also saw Dr. Angarita on June 1, 2017 and June 6, 2017. *Id.* During Petitioner's last visit at ATI Physical Therapy on June 6, 2017, the physical therapist noted that Petitioner was able to complete all the exercises with increased weight and no issues. (PX4) The physical therapist also noted that Petitioner would benefit from continued therapy for return to work duties. *Id.* Petitioner saw Dr. Angarita for the last time on June 29, 2017, who noted that Petitioner complained of constant back pain. (PX3)

Petitioner returned to Dr. Bayran on August 1, 2017. (PX6) Petitioner reported that he underwent physical therapy with minimal relief. *Id.* Petitioner also reported having undergone a left knee injection, performed by his primary care physician, which provided only 2 days of relief. *Id.* Petitioner complained of continued lower back pain with radiation into the buttock, thighs and left calf. *Id.* Petitioner indicated that his shoulder blade pain was much better. *Id.* Dr. Bayran prescribed pain medication, ordered a lumbar transforaminal stenosis injection and an MRI of Petitioner's left knee and released Petitioner to return to work with the following restriction: no lifting/pushing more than 10 lbs. *Id.*

Petitioner underwent the left knee MRI on August 2, 2017, the results of which revealed a horizontal medial meniscal tear involving the posterior horn. (PX7)

On August 7, 2017, Petitioner underwent a Section 12 Independent Medical Examination ("IME") with Dr. Christos Giannoulias at Respondent's request. (RX4) Dr. Giannoulias noted that a Spanish interpreter was present and available to assist with communication. *Id.* Dr. Giannoulias noted that Petitioner reported a work

accident on April 12, 2016, (should be April 12, 2017) while working as a welder, where he slipped and fell on his back and twisted his left knee. *Id.* Dr. Giannoulias reviewed Petitioner's medical records and diagnostic exams and examined Petitioner. *Id.* Dr. Giannoulias diagnosed Petitioner as having sustained a left knee strain and noted that Petitioner's physical exam and MRI were normal. *Id.* Dr. Giannoulias found that it had been about 4 months since the injury and felt that work restrictions were not needed regarding Petitioner's left knee. *Id.* Dr. Giannoulias felt Petitioner's treatment to that point had been reasonable and found that Petitioner did not have any preexisting or degenerative conditions in the left knee prior to April 12, 2017. *Id.* Dr. Giannoulias declared Petitioner to be at maximum medical improvement ("MMI") and listed Petitioner's impairment rating at 0%. *Id.*

On August 25, 2017, Dr. Bayran noted that Petitioner's lumbar injection had been denied based on the findings and opinions in the IME. (PX6) Petitioner complained of continued lower back pain with radiation into the left posterior thigh and left buttock, as well as left knee pain. *Id.* Dr. Bayran referred Petitioner to an orthopedic surgeon to address his knee pain and continued Petitioner's work restrictions. *Id.*

Petitioner started treating with Dr. Kevin Tu for his left knee on August 31, 2017. (PX8) During that first visit, Petitioner complained of left knee pain that started after a work injury on April 12, 2017. *Id.* Petitioner described the accident as a slip and fall on a wet floor. *Id.* Petitioner reported that he had not had any physical therapy to the left knee. *Id.* Dr. Tu reviewed Petitioner's MRI and the IME report. *Id.* Dr. Tu diagnosed Petitioner as having left knee pain secondary to a medial meniscus tear and recommended a left knee diagnostic arthroscopy with possible partial meniscectomy, possible synovectomy and possible chondroplasty. *Id.*

Petitioner followed up with Dr. Tu on October 19, 2017. *Id.* Petitioner reported worsening of his left knee pain with episodes of giving way. *Id.* Dr. Tu again recommended diagnostic arthroscopy and placed the following restrictions on Petitioner: no lifting more than 10 lbs and no kneeling or squatting activities. *Id.* On December 7, 2017, Dr. Tu noted that authorization for the recommended surgery had not been granted and continued Petitioner's restrictions. *Id.*

On December 19, 2017, Dr. Bayran reviewed the IME report. (PX6) Dr. Bayran noted that Petitioner continued to have low back pain despite conservative treatment and referred Petitioner for a spinal consultation. *Id.* Dr. Bayran continued to recommend the lumbar injection and took Petitioner off work since Petitioner indicated having a lot of discomfort even when standing for a short period of time. *Id.*

Petitioner continued to follow up with Dr. Tu, who kept noting that Petitioner continued to complain of left knee pain, giving way episodes and difficulty with kneeling and squatting. (PX8) Dr. Tu also continued to note that he was waiting on authorization of the recommended knee surgery. *Id.* Dr. Tu continued Petitioner's restrictions throughout. *Id.*

Petitioner saw Dr. Sergey Neckrysh regarding his ongoing back pain on February 10, 2018. (PX9) Dr. Neckrysh noted that Petitioner slipped and fell on a wet surface at work in April 2017 and landed on his left side. *Id.* Petitioner complained of low back and bilateral leg pain, more on the left side. *Id.* Dr. Neckrysh reviewed the lumbar MRI and opined that Petitioner's radiculopathy and the pathology on the lumbar MRI were a direct result of the work accident. *Id.* Dr. Neckrysh recommended physical therapy and lumbar epidural steroid injections at L5-S1, two to three times. *Id.* Dr. Neckrysh indicated that if the injections failed then Petitioner would need a bilateral L5-S1 decompression via laminotomy and medial facetectomy. *Id.*

The parties stipulate that Petitioner failed a drug test on February 22, 2018. (T.120)

On March 6, 2018, Dr. Bayran noted that Dr. Neckrysh had recommended a lumbar injection and indicated her office would work on getting preauthorization for the procedure. (PX6) Dr. Bayran kept Petitioner off work. *Id.*

Petitioner returned to Dr. Neckrysh on March 15, 2018. (PX9) Dr. Neckrysh noted that Petitioner had not undergone the recommended physical therapy or injections. *Id.* Dr. Neckrysh reiterated his recommendations and kept Petitioner off work. *Id.* On April 26, 2018, Dr. Neckrysh noted that Petitioner reported attending physical therapy without any improvement. *Id.* Dr. Neckrysh further noted that the injections had not yet been approved. *Id.* Dr. Neckrysh advised Petitioner to continue physical therapy for 2 more months and to get 2-3 epidural steroid injections. *Id.*

Petitioner started work conditioning at Grandview Health Partners with Dr. Lee De Las Casas on November 29, 2018. (PX11) There is nothing indicating that Petitioner was referred to Dr. De Las Casas by his other treating physicians. The referral section in the Initial Evaluation report is blank. *Id.*

Dr. Tu's evidence deposition was taken on December 12, 2018. (PX13) Dr. Tu's testimony was consistent with his findings and opinions in his medical records. *Id.* Dr. Tu testified that he reviewed the left knee MRI and that there was no clear indication of meniscus tear, but "to me, it showed signs of a meniscus tear." *Id.* at 10. Dr. Tu explained the meniscus tear is "not 100 percent definitive on MRI with my reading" and that his surgical recommendation is only diagnostic or exploratory. *Id.* at 16. Dr. Tu testified that "a lot of the acute findings that [Petitioner] may have had, may have dissipated such as bone bruising and whatnot" by the time of the MRI was taken. *Id.* at 18. Dr. Tu confirmed that his opinions are based on Petitioner's reported mechanism of injury. *Id.* at 13. He testified that he did not review any of the urgent care records from the first two weeks following the accident. *Id.* at 14. Dr. Tu testified that Petitioner's left knee pain "wouldn't be a nerve issue from the back." *Id.* at 19. Dr. Tu explained he relied on Petitioner's reported history in determining the possible meniscus tear was acute and testified that a medial meniscus tear can remain asymptomatic for years. *Id.* at 20.

On December 20, 2018, Petitioner was re-evaluated at work conditioning and stated he had, overall, improved by 50%. (PX11)

On January 15, 2019, Petitioner saw Dr. Udit Patel, DO, at Chicago Pain and Orthopedic Institute. (PX12) Petitioner reported suffering a work injury when he slipped and fell on a wet floor while carrying a plastic basket. *Id.* Petitioner indicated that his left leg moved laterally which caused him to rotate his left leg and fall on his buttocks and back. *Id.* Dr. Patel indicated that he needed to review the medical records from Dr. Neckrysh and Dr. Bayran to see what treatment plans they had recommended. *Id.* Dr. Patel diagnosed Petitioner as having low back and left knee pain and continued Petitioner's restrictions as provided by Dr. Tu. *Id.* There is nothing indicating that Petitioner was referred to Dr. Patel by his other treating physician.

The last documented visit at Grandview Health Partners, dated February 8, 2019, indicates that Petitioner's overall improvement was estimated by Petitioner as 60%. (PX11) Dr. Aldrin Carrion, DC, noted that improvement included Petitioner's degree of flexibility, active ranges of motion and functional ability with activities of daily living. *Id.* Dr. Carrion noted that sitting for more than 1 hour and 30 minutes increased Petitioner's back pain and that repetitive bending, standing, walking, going up and down stairs, squatting and sitting exacerbated Petitioner's symptoms. *Id.* Petitioner reported he was still doing his home exercise program. *Id.*

Dr. Giannoulias's evidence deposition was taken on March 5, 2019. (RX4) Dr. Giannoulias's testimony was consistent with his findings and opinions in the August 7, 2017 IME report. *Id.* Dr. Giannoulias confirmed

he reviewed the actual left knee MRI films as part of the Section 12 examination and did not see any meniscus tear or chondromalacia in Petitioner's left knee. *Id.* at 9.

Petitioner returned to Dr. Patel on April 23, 2019. (PX12) Dr. Patel noted that he still had not received the medical records from Dr. Bayran and Dr. Neckrysh and that Petitioner's pain remained unchanged. *Id.* Petitioner requested pain medication, but Dr. Patel prescribed an anti-inflammatory medication. *Id.*

Petitioner underwent a Section 12 IME with Dr. Kern Singh on February 24, 2020 at Respondent's request. (RX5) Dr. Singh noted that a Spanish interpreter was present. *Id.* Petitioner reported that on April 12, 2017 he was lifting a 50 lb box when he slipped and fell and reported knee pain. *Id.* Petitioner complained of low back pain and left knee pain. *Id.* Petitioner reported that his pain was worse in the morning and at night and was made worse by activity, except walking. *Id.* Dr. Singh noted that Petitioner can sit for 60 minutes at a time, stand for 20 minutes at a time and walk for 60 minutes at a time. *Id.* Petitioner reported no relief from a left knee cortisone injection. *Id.* Dr. Singh reviewed Petitioner's medical records and diagnostic exams and examined Petitioner. *Id.* Dr. Singh diagnosed Petitioner as having a lumbar muscular strain and L5-S1 disc protrusion. *Id.* Dr. Singh opined that Petitioner sustained a soft tissue muscular strain of the lumbar spine which had resolved and had an L5-S1 central disc protrusion which was preexisting and asymptomatic. *Id.* Dr. Singh found that Petitioner had a normal neurological exam and normal MRI. *Id.* Dr. Singh did not agree with the surgery recommendation and felt that Petitioner's treatment to that point had been excessive. *Id.* Dr. Singh opined that 4 weeks of physical therapy was reasonable and necessary. *Id.* Dr. Singh opined that Petitioner could return to work, without restrictions, regarding his back and could have returned to work, without restrictions, 4 weeks after the accident. *Id.* Finally, Dr. Singh declared Petitioner to be at MMI. *Id.*

On September 24, 2020, Dr. Tu again noted Petitioner continued to complain of pain and problems with the left knee and that surgery had not yet been approved. (PX8) Dr. Tu continued Petitioner's restrictions of no lifting more than 10 lbs. *Id.*

Dr. Singh's evidence deposition was taken on September 30, 2020. (RX5) Dr. Singh's testimony was consistent with his findings and opinions in the February 24, 2020 IME report. *Id.* Dr. Singh confirmed he personally reviewed the actual images of the MRI of the lumbar spine from May 9, 2017. *Id*. at 10-11.

At trial, Petitioner confirmed that he wrote down a social security number on his job application materials and that he did not have his own social security number. (T.50) Petitioner indicated he did not know where the number came from. *Id.* Petitioner testified that he sometimes smokes marijuana but that he was unaware of Respondent's zero tolerance policy related to drug use. (T.64) Petitioner testified that he had not smoked for days prior to the accident. (T.73) Petitioner denied stating at Physicians Immediate Care that he smoked marijuana daily to help him sleep. *Id.*

Petitioner testified that, as of the date of trial, he was working full time for "Adams" and had been doing so since September 28, 2020. (T.30, 66) Petitioner testified that it was the type of job he could do in his condition. (T.31) Petitioner explained that the job involved putting sponges in a machine and operating the machine with buttons. (T.65) Petitioner testified that his back and knee have not hurt while working at Adams. (T.67) Petitioner testified that he was experiencing back pain while sitting at trial. (T.33) Respondent's Exhibit 7 is a bill from Cook County Health and Hospitals System indicating that Petitioner underwent a lumbar MRI on January 12, 2011, 6 years before the work accident. The results of the MRI are unknown.

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

A claimant has the burden of proving, by a preponderance of the evidence, all the elements of his claim. *O'Dette v. Industrial Com'n*, 79 Ill. 2d 249 (1980); *Peoria County Nursing Home v. Industrial Comm 'n*, 115 lll.2d 524 (1987). An injury arises out of one's employment if it has its' origin in a risk that is connected to or incidental to the employment so that there is a causal connection between the employment and the accidental injury. *Technical Tape Corp. vs Industrial Commission*, 58 Ill. 2d 226 (1974). To be compensable under the Act, the injury complained of must be one "arising out of and in the course of the employment." 820 ILCS 305/2. An injury "arises out of" the claimant'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. *Parra v. Industrial Comm 'n*, 167 Ill. 2d 385 (1995).

In deciding questions of fact, it is the function of the Commission to resolve conflicting medical evidence, judge the credibility of the witnesses, and assign the weight to the witnesses' testimony. *R & D Thiel v. Illinois Workers' Compensation Com'n*, 398 Ill. App. 3d 858, 868 (1st Dist. 2010); See also *Hosteny v. Illinois Workers' Compensation Com'n*, 397 Ill. App. 3d 665, 674 (1st Dist. 2009). Although an employee's testimony about an alleged accident might be sufficient, standing alone, to justify an award of benefits under the Act, it is not enough where consideration of all facts and circumstances demonstrate that the manifest weight of the evidence is against it. *Caterpillar Tractor Co. v. Industrial Comm'n*, 83 Ill. 2d 213, 218, (1980).

The Arbitrator notes that Petitioner testified that he slipped and fell on a wet floor while working on April 12, 2017. The Arbitrator also notes that Petitioner's histories of the work accident in the medical records and IMEs are consistent in stating that Petitioner slipped and fell on a wet floor while working. On May 2, 2017, Dr. Bayran opined that Petitioner's current condition of ill-being was related to the work injury sustained on April 12, 2017. On August 7, 2017, Dr. Giannoulias opined that Petitioner suffered a left knee injury on April 12, 2017 and found no evidence of any preexisting or degenerative conditions in Petitioner's left knee prior to the April 12, 2017 accident. On February 24, 2020, Dr. Singh found that Petitioner had suffered a back injury on April 12, 2017.

The Arbitrator notes that the May 9, 2017 lumbar MRI revealed L4-5 and L5-S1 disc bulging with posterior central annular tears and mild proximal foraminal stenosis at both levels and the August 2, 2017 left knee MRI revealed a horizontal medial meniscal tear involving the posterior horn. The Arbitrator further notes that while RX7 shows that Petitioner underwent a lumbar MRI on January 12, 2011, there is nothing in the record to indicate that Petitioner underwent any lumbar treatment prior to April 12, 2017. Additionally, RX7 does not provide the results of the January 11, 2011 lumbar MRI. The Arbitrator also notes the medical records fail to show that Petitioner had undergone any left knee injury or treatment prior to the April 12, 2017 accident.

Therefore, based on the above, the Arbitrator finds that Petitioner suffered a work-related injury to his left knee and lower lumbar spine on April 12, 2017.

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

Regarding Petitioner's left knee, the Arbitrator again notes that the left knee MRI revealed a horizontal medial meniscal tear involving the posterior horn. The Arbitrator notes that Dr. Tu diagnosed Petitioner as having left knee pain secondary to a medial meniscus tear and Dr. Giannoulias diagnosed Petitioner as having suffered a left knee strain. The Arbitrator further notes that Petitioner has continued to complain of left knee pain and problems since the accident. Additionally, as previously noted above, Petitioner did not have any left knee problems prior to the April 12, 2017 accident. As explained by the court in *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63 (1982), "[a] chain of events which demonstrates a previous condition of

good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." Although Dr. Tu, the radiologist and Dr. Giannoulias may disagree as to the extent of the left knee injury, it is clear to the Arbitrator that a left knee injury occurred, and that Petitioner has had left knee pain and problems since.

Regarding the lumbar spine, the Arbitrator notes that Gilmore, Dr. Bayran, Dr. Angarita, Dr, Neckrysh and Dr. Singh all diagnosed Petitioner as having a lumbar spine injury. The Arbitrator notes, as with the left knee, that Petitioner has continued to complain of back pain and problems since the accident. Additionally, as previously noted above, the record is absent of any documented back problems prior to the April 12, 2017 accident. Again, while Dr. Bayran, Neckrysh and Dr. Singh may disagree as to the extent of Petitioner's back injury, it is clear to the Arbitrator that a back injury occurred, and that Petitioner has continued to have pain and problems since the injury occurred.

Therefore, based on the above, The Arbitrator finds Petitioner has proven by a preponderance of the evidence that his conditions of ill-being regarding his left knee and lumbar spine are causally related to the work accident on April 12, 2017.

WITH RESPECT TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes that PX14 and PX15 show what Petitioner was paid in March 2017 and April 2017, respectively. Further, the exhibits show that Petitioner worked for Respondent in March and April of 2017 and not just one day in April as claimed in AX1 by Respondent. Therefore, based on PX14, and PX15, the Arbitrator finds that Petitioner earned $3,664.51 in the year preceding the injury and had an average weekly wage of $356.46.

WITH RESPECT TO ISSUE (H), WHAT WAS THE PETITIONER'S AGE AT THE TIME OF THE ACCIDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that he was born on February 10, 1976 and that he was 41 years old on April 12, 2017. (T.9-10) Respondent did not provide any evidence to rebut Petitioner's testimony. As such, the Arbitrator finds that Petitioner was 41 years old at the time of the work accident.

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

The Arbitrator notes that in Sections (C) and (F) the Arbitrator found that Petitioner sustained a compensable work injury to Petitioner's left knee and lumbar spine and that Petitioner's current conditions of ill-being regarding his left knee and lumbar spine are causally related to the work accident. The Arbitrator further notes that Petitioner has reported improvement following treatment but has continued to have pain and problems. As such, the Arbitrator finds that Petitioner's medical treatment has been reasonable and necessary.

Next, the Arbitrator notes that under Section 8(a) of the Act, Respondent's liability to pay Petitioner's medical expenses is limited to:

(1) all first aid and emergency treatment; plus

> (2) all medical, surgical and hospital services provided by the physician, surgeon or hospital initially chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said initial service provider or any subsequent provider of medical services in the chain of referrals from said initial service provider; plus
> (3) all medical, surgical and hospital services provided by any second physician, surgeon or hospital subsequently chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said second service provider or any subsequent provider of medical services in the chain of referrals from said second service provider. Thereafter the employer shall select and pay for all necessary medical, surgical and hospital treatment and the employee may not select a provider of medical services at the employer's expense unless the employer agrees to such selection. At any time the employee may obtain any medical treatment he desires at his own expense. This paragraph shall not affect the duty to pay for rehabilitation referred to above. 820 ILCS 305/8(a) (2013).

The Arbitrator notes that Petitioner's first choice was Dr. Bayran. Petitioner's second choice was Dr. Angarita. Dr. Angarita then referred Petitioner to an orthopedic specialist. Subsequently, Dr. Bayran also referred Petitioner to an orthopedic surgeon, specifically to address Petitioner's ongoing left knee pain. Petitioner started treating with Dr. Tu, an orthopedic surgeon, on October 19, 2017. On December 19, 2017, Dr. Bayran referred Petitioner for a spinal consultation. As a result, Petitioner saw Dr. Neckrysh, a neurologist and spinal specialist, on February 10, 2018. Both Dr. Bayran and Dr. Neckrysh recommended a lumbar injection. Further, Dr. Neckrysh recommended that Petitioner continue physical therapy for 2 more months. However, on November 29, 2018, Petitioner began work conditioning with Dr. De Las Casas. Additionally, Petitioner started seeing Dr. Patel on January 15, 2019. The Arbitrator notes that there are no referrals for Dr. Patel or Dr. De Las Casas or for the treatments and services they provided.

Based on the breakdown of Petitioner's treatment and referral line, the last treater covered under Section 8(a) is Dr. Neckrysh. The Arbitrator finds that Dr. De Las Casas and Dr. Patel exceed Petitioner's choice under Section 8(a).

Therefore, based on the above, the Arbitrator finds that Respondent is liable for Petitioner's medical treatment through April 26, 2018, the last time Petitioner saw Dr. Neckrysh.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes that in Sections (C) and (F) the Arbitrator found that Petitioner sustained a compensable work injury to Petitioner's left knee and lumbar spine and that Petitioner's current conditions of ill-being regarding his left knee and lumbar spine are causally related to the work accident. The Arbitrator further notes that in Section (J), the Arbitrator found that Petitioner's treatment was reasonable and necessary, and that Respondent is responsible for payment of Petitioner's medical expenses through April 26, 2018, Petitioner's last visit with Dr. Neckrysh. The Arbitrator also notes that while Petitioner has reported improvement following treatment, he continues to complain of pain and problems in his left knee and lumbar spine. Furthermore, as previously noted, the MRIs of the left knee and lumbar spine revealed L4-5 and L5-S1 disc bulging with posterior central annular tears and mild proximal foraminal stenosis at both levels, as well as a horizontal medial meniscal tear involving the posterior horn.

The Arbitrator notes that both Dr. Giannoulias and Dr. Singh found that Petitioner had simply suffered a lumbar strain and left knee strain. Considering the diagnostic exams, the findings of Dr. Bayran, Dr. Neckrysh and Dr. Tu, and Petitioner's ongoing problems with his lumbar spine and left knee after conservative treatment, the Arbitrator does not find the diagnosis by Dr. Giannoulias or Dr. Singh persuasive.

Therefore, based on the above, the Arbitrator finds that Petitioner is entitled to prospective medical care in the form of a left knee diagnostic arthroscopy with possible partial meniscectomy, possible synovectomy and possible chondroplasty as recommended by Dr. Tu and a lumbar injection as recommended by Dr. Bayran and Dr. Neckrysh. The Arbitrator orders Respondent to approve and pay for these procedures and all resulting treatment and follow-up care.

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

The Arbitrator notes that Dr. Bayran has continued to keep Petitioner off work while Dr. Tu has released Petitioner to return to work with restrictions of no lifting/pushing more than 10 lbs. While Petitioner had been released to return to work, restricted duty, the Arbitrator notes that there is nothing in the record to indicate that Respondent had made any offer to accommodate Petitioner's restrictions. The Arbitrator further notes that Dr. Bayran took Petitioner off work on December 19, 2017. More importantly, the Arbitrator notes that Petitioner has not been released to return to work by Dr. Bayran who is still awaiting authorization for a lumbar injection for Petitioner.

The Arbitrator also notes that in an undated letter, Dr. Angarita indicated that Petitioner was unable to work. However, since this was in an undated letter, there is no way of knowing when Dr. Angarita made that determination.

Finally, the Arbitrator notes that Petitioner testified that Petitioner testified that he had been working for a different employer since September 28, 2020.

Therefore, based on the above, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from December 19, 2017 through September 27, 2020.

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

The Arbitrator notes that Respondent has paid $3,983.48 in medical expenses through its group medical plan. As such, the Arbitrator finds that Petitioner is entitled to a credit of $3,983.48 under Section 8(j) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC027044
Case Name	DE JARNATT, KATHLYN v. CONTINENTAL TIRE NORTH AMERICA INC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0176
Number of Pages of Decision	8
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Brian McGovern
Respondent Attorney	James Keefe, Jr.

DATE FILED: 5/11/2022

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS	)		
	) SS.		
COUNTY OF JEFFERSON	)		

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KATHLYN DEJARNATT,

Petitioner,

vs. NO: 20 WC 27044

CONTINENTAL TIRE,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of permanent partial disability (PPD) benefits and the amount of credit due Respondent, 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 30, 2021 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

May 11, 2022

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

CAH/pm
O: 5/5/22
052

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC027044
Case Name	DEJARNATT, KATHLYN v. CONTINENTAL TIRE NORTH AMERICA INC
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	5
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Brian McGovern
Respondent Attorney	James Keefe, Jr.

DATE FILED: 11/30/2021

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 30, 2021 0.09%

/s/*William Gallagher, Arbitrator*
Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Kathlyn DeJarnatt
Employee/Petitioner

Case # 20 WC 27044

v.

Consolidated cases: n/a

Continental Tire North America, Inc.
Employer/Respondent

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on October 13, 2021. By stipulation, the parties agree:

On the date of accident, May 18, 2019, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $41,194.40; the average weekly wage was $792.20.

At the time of injury, Petitioner was 49 years of age, single, with 0 dependent child(ren).

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

Respondent shall be given a credit of $226.34 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $226.34. The parties stipulated TTD benefits were paid in full.

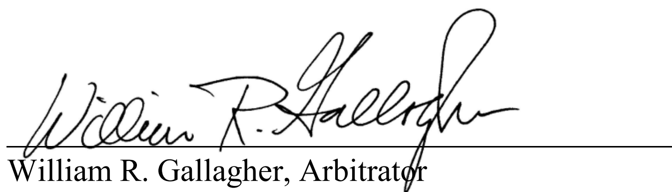
After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $475.32 per week for 14.25 weeks because the injury sustained caused the 22 1/2% loss of use of the right hand and 20% loss of use of the left hand. Respondent shall be given a credit for the prior settlement of 17 1/2% loss of use of each hand. Petitioner is entitled to a net of five percent (5%) loss of use of the right hand (22 1/2% - 17 1/2%) and a net of two and one-half percent (2 1/2%) loss of use of the left hand (20% - 17 1/2%), as provided in Section 8(e) of the Act.

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

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



William R. Gallagher, Arbitrator

NOVEMBER 30, 2021

ICArbDecN&E p. 2

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment by Respondent. The Application alleged date of accident (manifestation) of May 8, 2019, and Petitioner sustained "Repetitive trauma" to her "Bilateral upper extremities" (Arbitrator's Exhibit 2). Petitioner and Respondent stipulated Petitioner sustained a work-related repetitive trauma injury and medical and temporary total disability benefits were paid in full. The primary disputed issue was the nature and extent of disability. Further, Petitioner and Respondent stipulated Petitioner had a prior workers' compensation claim which was settled and Respondent was entitled to a credit for same (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a tire inspector. This was a job which required the repetitive use of both of her hands. There was no dispute Petitioner's work as a tire inspector caused the injuries to both of her hands.

Petitioner's prior workers' compensation case was settled for 17 1/2% loss of use of both hands. Respondent tendered into evidence in the record of that prior settlement (Respondent's Exhibit 1).

In regard to this case, Petitioner was treated by Dr. David Brown, an orthopedic surgeon. Dr. Brown initially evaluated Petitioner on December 13, 2019. He opined Petitioner had right epicondylitis and ordered EMG/nerve conduction studies (Petitioner's Exhibit 1).

Petitioner was seen by Dr. Dan Phillips, a neurologist, on June 15, 2020. At that time, he performed EMG/nerve conduction studies which were positive for recurrent right carpal tunnel syndrome (Petitioner's Exhibit 1).

On August 6, 2020, Dr. Brown performed surgery on Petitioner's right hand. The procedure consisted of a revision right carpal tunnel release (Petitioner's Exhibit 1).

Petitioner subsequently had left hand symptoms. She saw Dr. Brown on October 26, 2020, and he again referred Petitioner to Dr. Dan Phillips for EMG/nerve conduction studies (Petitioner's Exhibit 1).

Dr. Phillips saw Petitioner on October 26, 2020, and performed EMG/nerve conduction studies at that time. They were positive for recurrent left carpal tunnel syndrome (Petitioner's Exhibit 1).

Dr. Brown performed surgery on Petitioner's left hand on December 2, 2020. The procedure consisted of a revision open left carpal tunnel release (Petitioner's Exhibit 1).

Petitioner last saw Dr. Brown on January 25, 2021. Dr. Brown noted Petitioner had a good range of motion of both hands, but grip strength of the right hand was less than the left hand. Dr. Brown opined Petitioner was at MMI (Petitioner's Exhibit 1).

Petitioner testified she was able to return to work as a tire inspector. She said she still experiences weakness, especially when pulling on objects. Petitioner stated her hands experience fatigue and soreness on a regular basis. Petitioner said she exercises caution when carrying objects because she has a fear of dropping them.

Conclusions of Law

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 22 1/2% loss of use of the right hand and 20% loss of use of the left hand.

In support of this conclusion the Arbitrator notes the following:

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

Petitioner worked for Respondent as a tire inspector, a job which required repetitive use of both hands. Petitioner was able to return to work to that job. The Arbitrator gives this factor moderate weight.

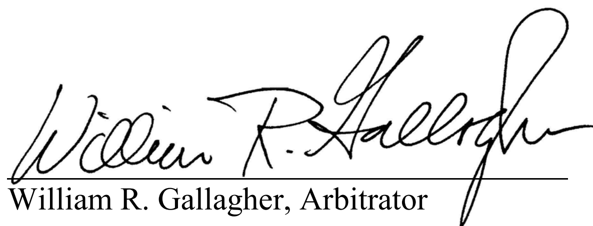
Petitioner was 49 years old at the time of the accident. She will have to live with the effects of the injury for the remainder of her working and natural life. The Arbitrator gives this factor moderate weight.

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

Petitioner sustained a repetitive trauma injury to both hands which caused right and left recurrent carpal tunnel syndrome. Petitioner had to undergo revision carpal tunnel release surgery on both hands. Petitioner continues to have complaints consistent with the injury she sustained including reduced right grip strength. The Arbitrator gives this factor significant weight.

Section 8(e)(17) of the Act requires that where a prior permanent partial loss of use has been paid, that lost should be taken into consideration and deducted from any award made for a subsequent injury.

As noted herein, Petitioner had a prior workers' compensation case which was settled for 17 1/2% loss of use of both the right and left hands. The Arbitrator has concluded Petitioner has sustained permanent partial disability of 22 1/2% loss of use of the right hand and 20% loss of use of the left hand. Taking into consideration the prior settlement of 17 1/2% loss of use of each hand, the Arbitrator concludes Petitioner is entitled to a net of five percent (5%) loss of use of the right hand (22 1/2% - 17 1/2%) and a net of two and one-half percent (2 1/2%) loss of use of the left hand (20% - 17 1/2%) as calculated by Respondent.



William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC031948
Case Name	CORTEZ, SAUL v. ELITE STAFFING
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0177
Number of Pages of Decision	31
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Julio Costa
Respondent Attorney	Peter Stavropoulos

DATE FILED: 5/11/2022

/s/Deborah Baker, 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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SAUL CORTEZ,

Petitioner,

vs. NO: 19 WC 31948

ELITE STAFFING,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section 19(b) of the Act having been filed by the Respondent herein, and notice given to all parties, the Commission, after considering the issues of benefit rates/wage calculation, whether Petitioner's current condition of ill-being is causally related to the stipulated accident, Petitioner's entitlement to reasonable and necessary medical expenses, Petitioner's entitlement to prospective medical care, Petitioner's entitlement to temporary total disability benefits, and Respondent's due process rights, and being advised of the facts and law, changes the Decision of the Arbitrator as set forth below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E. 2d 1322 (1980).

The Commission hereby incorporates by reference the findings of fact and conclusions of law contained in the Decision of the Arbitrator, which delineate the relevant facts and analyses. However, as it pertains to Respondent's due process rights, which Respondent argues were violated as a result of the Arbitrator's denial of its request to call an additional witness during the arbitration hearing, the Commission writes additionally to address this argument.

During the arbitration hearing, Respondent requested a bifurcation of trial in order to call an additional witness to testify regarding the overtime policy relative to Petitioner's employment as there was evidence that Petitioner's overtime work was not mandatory. The Arbitrator denied this request and included mandatory overtime wages in calculating Petitioner's average weekly

wage.

In its brief, Respondent argues that the Arbitrator violated its due process rights by denying bifurcation of the trial to allow Respondent to call Luis Lopez as a rebuttal witness after being named by Petitioner during Petitioner's rebuttal testimony. Petitioner's rebuttal testimony was that Mr. Lopez, Respondent's manager, was the person who informed Petitioner of the mandatory overtime policy at Fibre Drums, the company where Petitioner was assigned to work and sustained the stipulated work accident. *Transcript of Evidence on Arbitration, p. 46-47*.

When discussing who informed him of the overtime policy at Fibre Drums on rebuttal examination, Petitioner testified that both someone on behalf of Fibre Drums, and Mr. Lopez on behalf of Respondent had done so. At that point, Respondent requested a bifurcation in order to call Mr. Lopez as a witness, based on surprise. *Transcript of Evidence on Arbitration, p. 51-54*. Respondent argued that it is not responsible for determining whether overtime was mandatory, and that this was the first time Mr. Lopez had been mentioned throughout the litigation process. Respondent argued that its' General Counsel, Marc Cairo, drafted the contract between Respondent and Fibre Drums, and is the most knowledgeable person employed by Respondent to speak on whether overtime is mandatory. Respondent argues in its brief that Petitioner's testimony regarding Mr. Lopez informing him of mandatory overtime was a surprise to Respondent, and it was denied a right to a fair trial by the Arbitrator when the Arbitrator denied Respondent's request for a hearing bifurcation to allow Respondent the opportunity to question Mr. Lopez.

The Commission has considered Respondent's argument but finds that there was no bias or prejudice when the Arbitrator denied the request to bifurcate the hearing. Commission Rule 9030.20(g) provides:

> Bifurcated hearings will be allowed only for good cause. Examples of good cause include, but are not limited to, situations in which the number or location of witnesses makes it impossible to conclude the hearing in one day or the testimony of a witness must be taken prior to a deposition. *50 Ill. Adm. Code 9030.20(g)*.

The granting or denial of a motion for a continuance lies within the sound discretion of the Arbitrator or Commission, whose decision will not be reversed absent an abuse of that discretion. *South Chicago Community Hospital v. Industrial Commission*, 44 Ill. 2d 119, 123 (1969).

Here, the Arbitrator concluded that bifurcation was not warranted given that Respondent "failed to show good cause or surprise." The Commission agrees and finds that Respondent was on notice prior to trial that the average weekly wage calculation was at issue, indicating that there would be a dispute regarding mandatory overtime. The Commission notes that the parties' stipulations on the Request for Hearing form indicate that Respondent disputed the average weekly wage calculation and asserted that it was lower than what Petitioner claimed the average weekly wage to be. The Commission finds further that Respondent was aware of who Petitioner's supervisor was and Respondent's own General Counsel testified on cross examination that Mr. Lopez would have been the person to inform Petitioner of the overtime policy. Respondent's General Counsel also testified that this notice would have been documented in Petitioner's Employment Notice but failed to produce said notice at trial. Despite these facts, Respondent elected not to have Mr. Lopez available at the time of the arbitration hearing. Lastly, taking judicial notice of this date, the Commission finds that while the Commission had begun operating under emergency procedures as of March 14, 2020 in response to the COVID-19 pandemic, there is

nothing in the record indicating that these emergency procedures precluded Respondent from having additional witnesses testify at the arbitration hearing. *Marque Medicos Farnsworth, LLC v. Liberty Mut. Ins. Co.,* 2018 IL App (1st) 163351, 117 N.E. 3d 1155, 1163 (1st Dist. 2018).

Accordingly, the Commission finds that Respondent failed to provide good cause for bifurcation, and that the Arbitrator's decision whether to bifurcate the hearing was not an abuse of discretion. The Commission declines to reverse this ruling.

All else is affirmed.

IT IS THEREFORE FOUND BY THE COMMISSION that the Decision of the Arbitrator filed December 16, 2020, as changed above, is hereby affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $486.49 per week for a period of 39 & 5/7ths weeks, from October 23, 2019 through July 26, 2020, 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 is entitled to temporary total disability credit in the amount of $2,108.19.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner temporary partial disability benefits in the amount of $233.15 per week for a period of 12 & 1/7ths weeks, from July 27, 2020 through October 19, 2020 as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner reasonable and necessary outstanding medical expenses in the amount of $21,572.05 as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a medical benefits credit in the amount of $636.39.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the left knee surgery and post-operative treatment prescribed by Dr. Sompalli for Petitioner's left knee condition of ill-being as provided in §8(a) of the Act.

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

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

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

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

May 11, 2022
O: 3/16/22
DJB/wde
043

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

/s/*Stephen Mathis*
Stephen Mathis

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

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

CORTEZ, SAUL
Employee/Petitioner

Case# **19WC031948**

ELITE STAFFING - HAMMOND
Employer/Respondent

On 12/16/2020, 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 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5755 COSTA IVONE LLC
JULIO COSTA
3111 N ABERDEEN ST SUITE 100 B
CHICAGO, IL 60607

1120 BRADY CONNOLLY & MASUDA PC
PETER STAVROPOULOS
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Saul Cortez
Employee/Petitioner

v.

Elite Staffing - Hammond
Employer/Respondent

Case # 19 WC 31948

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 **Joseph D. Amarillio**, Arbitrator of the Commission, in the city of **Chicago**, on **10/19/20**. 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. [x] Is Petitioner's current condition of ill-being causally related to the injury?

G. [x] What were Petitioner's earnings?

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

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

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

K. [x] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[x] TPD [ ] Maintenance [x] TTD

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

N. [ ] Is Respondent due any credit?

O. [x] Other How many dependents does Petitioner have?

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 **$2,750.80**; the average weekly wage was **$729.73**.

On the date of accident, Petitioner was **39** years of age, **SINGLE** with **5** 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 **$2,108.19** for TTD, **$N/A** for TPD, **$N/A** for maintenance, and **$636.39 in Medical Benefits** for other benefits, for a total credit of **$2,744.58**.

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

ORDER

TTD & TPD: Respondent shall pay Petitioner temporary total disability benefits of $486.49/week for 39-5/7 weeks, commencing October 23, 2019 through July 26, 2020, as provided in Section 8(b) of the Act. Respondent shall pay Petitioner temporary partial disability benefits of $233.15/week for 12-1/7th weeks, commencing July 27, 2020 through October 19, 2020, as provided in Section 8(a) of the Act.

CREDIT: Respondent is entitled to a TTD credit of $2,108.19.

MEDICAL: Respondent shall pay to Petitioner reasonable and necessary outstanding medical services in the amount of $21,572.05, as provided in Section 8(a) and 8.2 of the Act.

Prospective Medical: Respondent shall authorize and pay for post-operative medical treatment prescribed by Dr. Sompalli for Petitioner's left knee condition of ill-being.

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 **Joseph D. Amarilio**

12/15/2020
Date

ICArbDec19(b)

DEC 1 6 2020

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

SAUL CORTEZ,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 19 WC 31948
	)	
ELITE STAFFING,	)	
	)	Arbitrator Joseph Amarilio
	)	
Respondent.	)	

ATTACHMENT TO ARBITRATION DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACTS

1. **The Accident**

On October 22, 2019, Saul Cortez (Petitioner), then 39 years old, was employed by Elite Staffing (Respondent), an employment agency. (Testimony Exhibit "TX" at 11-12). At the time, Petitioner had been working for Respondent for approximately a month and was assigned to work as an assembler at Fibre Drum, a packing industry. (*Id.* at 12). On October 22, 2019, Petitioner was outside performing assembly work when a gust of wind knocked over eight to nine containers, which bounced on the ground and hit Petitioner's lower, left leg and left knee. (*Id.* at 14-15) (Petitioner Exhibit 1 "PX1" at 1). Upon impact, Petitioner's left foot bent forward. (*Id.* at 15). Petitioner felt immediate pain in his left knee and then back pain the following day. (TX at 15-16). Petitioner reported his injury to both Fibre Drum and Respondent. (PX1 at 15).

2. **Medical Treatment**

Following his accident, Petitioner presented to Physician's Urgent Care at Respondent's direction. (TX at 17). Petitioner presented with "constant muscle pain of the left, lower leg." (PX1

at 1). Following a physical examination and x-rays, which indicated narrowing joint space of the left knee, Petitioner was diagnosed with strain of muscles and tendons at the lower, left leg; contusion of the left, lower leg; and left knee pain. (*Id.* at 4). Petitioner was given medication, instructed to wear a left knee brace, and placed on a 50-pound work restriction until October 24, 2019. (*Id.* at 5). Petitioner testified he felt incapable of performing work with a 50-pound restriction and when he conveyed his hesitation to Respondent, he was threatened with termination. (TX at 18).

On October 25, 2019, Petitioner presented to Dr. Thomas Pontinen of Midwest Anesthesia and Pain Specialists (MAPS) with complaints of low back, right hip, and left knee pain. (Petitioner Exhibit 2 "PX2" at 19). Following a physical examination and review of Petitioner's symptomology, Dr. Pontinen diagnosed Petitioner with low back pain, unspecified inflammatory spondylopathy of the lumbar region, muscle and lower back tendon strain, pain in right hip, and pain in left knee. (*Id.* at 22). Dr. Pontinen prescribed Petitioner medication, instructed him to begin a home exercise program, and continued his off-work status. (*Id.* at 22-23, 25).

On November 19, 2019, Petitioner returned to MAPS; this time under the care of Dr. Darrel Saldanha. (PX2 at 26). Petitioner reported ongoing complaints of low back pain that radiated to the flanks and buttocks, subjective weakness in the left lower extremity, significant left knee pain, and buckling of his left leg. (*Id.*). Dr. Saldanha continued Petitioner's medication, recommended physical therapy, and ordered MRIs of the lumbar spine and left knee. (*Id.* at 29-31). Dr. Saldanha continued Petitioner's off work restriction. (*Id.* at 29-30).

On November 20, 2019, on referral from MAPS, Petitioner presented to United Rehab Providers for physical therapy. (Petitioner Exhibit 3 "PX3" at 10). Petitioner presented with average pain on an 8/10 scale in his low back, left knee, and right hip. (*Id.*). Upon physical

examination, Petitioner was assessed to have symptoms consistent with low back mobility deficits associated with a sprain and strain, hip mobility deficits associated with a sprain and strain, and left knee mobility deficits associated with a sprain and strain. (*Id.* at 14). Petitioner underwent physical therapy at United Rehab Providers until March 11, 2020, with continued complaints of low back, left knee, and right hip pain on a scale ranging from 5/10 to 7/10. (*Id.* at 22-180). Petitioner testified that physical therapy initially helped relieve his low back and left knee pain, but the pain ultimately persisted. (TX at 20).

On December 6, 2019, Petitioner presented to MRAD Imaging Center for MRIs of the left knee and lumbar spine. (PX2 at 71, 73). Petitioner's left knee MRI revealed severe degenerative tear of the medial meniscus, possible degenerative tear of the anterior horn of the lateral meniscus with marked joint space narrowing, grade 3-4 chondromalacia in the medial compartment, and associated tear of the anterior cruciate ligament (ACL). (*Id.* at 73). Additionally, the findings revealed a Grade 3 sprain of the medical collateral ligament, sprain of the medial compartment, retinacular sprain, and strain/tendinosis of the fibular collateral ligament/popliteal tendon. (*Id.*). Petitioner's lumbar spine MRI revealed a right, neuroforaminal broad-based lumbar disc protrusion with moderate to severe bilateral neuroforaminal stenosis, a 3 mm bilateral neuroforaminal broad-based disc protrusion with moderate to severe bilateral neuroforaminal stenosis at the L4-L5 levels, and 3 mm annular disc bulge with severe neuroforaminal stenosis at the L5-S1 levels. (*Id.* at 71).

On December 10, 2019, at Respondent's request, Petitioner presented for an Independent Medical Evaluation (IME) with Dr. Michael S. Lewis at Illinois Bone & Joint Institute (IBJI). (Respondent Exhibit 1 "RX1" at 97). Dr. Lewis diagnosed Petitioner with a resolved lumbar strain, left hip strain, left leg contusion, and a left knee contusion that required no additional medical

treatment. (*Id.* at 100). Additionally, Dr. Lewis found Petitioner had reached maximum medical improvement (MMI) as of December 10, 2019, and capable of working full duty. (*Id.*). Petitioner testified that following the IME, Respondent terminated his temporary disability benefits. (TX at 23).

On December 17, 2019, Petitioner followed up with Dr. Saldanha. (PX2 at 33). Given Petitioner's left knee MRI findings and persistent complaints, Dr. Saldanha referred Petitioner for an orthopedic evaluation and continued his off-work restriction. (*Id.* at 36).

On January 21, 2020, on referral from Dr. Saldanha, Petitioner presented to Dr. Chandrasekhar Sompalli at Elite Orthopedics and Sports Medicine. (Petitioner Exhibit 4 "PX4" at 1). There, Petitioner presented with an average pain on a 7/10 scale and sharp left knee pain that had not improved with two months of physical therapy. (*Id.*). After performing a physical examination and reviewing Petitioner's left knee MRI, Dr. Sompalli diagnosed Petitioner with left knee pain, complex tear of the left knee medial meniscus, peripheral tear of the left knee lateral meniscus, chondromalacia patellae, sprain of the left knee ACL, and left knee unilateral primary osteoarthritis. (*Id.* at 3-4). That same day, Dr. Sompalli also administered a left knee cortisone injection. (*Id.* at 4). Afterwards, Dr. Sompalli prescribed Petitioner medication and x-rays, instructed him to continue physical therapy, and placed him off work. (*Id.* at 4-5).

On January 27, 2020, Petitioner presented to MRAD Imaging Center for a left knee x-ray. (PX3 at 75). Petitioner's x-ray indicated that Petitioner had moderate tri-compartmental degenerative changes of the left knee. (*Id.*).

On April 29, 2020, Petitioner followed up with Dr. Sompalli. (PX4 at 6). Petitioner presented with left knee pain on a 10/10 scale when walking, standing, lifting, and sitting for long periods of time. (*Id.*). Petitioner also reported that the cortisone injection alleviated his pain for

one month before the pain returned. (TX at 21). Given Petitioner's persistent left knee pain and failed conservative treatment, Dr. Sompalli recommended surgery in the form of a left knee partial medial-lateral meniscectomy, chondroplasty of the patella, and excision of loose body. (PX4 at 8-9). Dr. Sompalli continued Petitioner's off work restriction. (*Id.*). On May 29, 2020, Dr. Sompalli responded to Dr. Lewis's IME to express his disagreement with the opinion that Petitioner had suffered a resolved contusion. (*Id.* at 15). Specifically, Dr. Sompalli indicated Petitioner still exhibited 10/10 scale pain as a result of his injury which caused his left knee arthritis to come symptomatic and permanently aggravated. (*Id.*). Additionally, Dr. Sompalli highlighted the fact that when Petitioner's accident occurred, he felt a pop when his left knee hyperextended which supports the mechanism of injury for an ACL tear. (*Id.*). Dr. Sompalli reiterated his recommendation for left knee surgery in the form of ACL reconstruction, partial medial-lateral meniscectomy, chondroplasty, and removal of loose body. (*Id.*).

On June 18, 2020, Petitioner presented for a second orthopedic evaluation with Dr. Samuel Park with complaints of persistent left knee pain. Petitioner testified he wanted a second opinion to confirm the need for surgery. (Petitioner Exhibit 5 "PX5" at 1) (TX at 22). Dr. Park reviewed Petitioner's diagnostic studies, including the left knee MRI and x-ray, and diagnosed Petitioner with sprain of the medial collateral ligament, contusion, medial and lateral meniscus tears, loose body, and osteoarthritis. (PX5 at 1-2.). Dr. Park instructed Petitioner to continue physical therapy and placed him off work. (*Id.* at 2).

On July 2, 2020, Petitioner returned for a final evaluation with Dr. Park. (PX5 at 3). Following a physical examination and repeat review of the left knee MRI, Petitioner's diagnosis was updated to include a complete tear of the left knee ACL, in addition to the medial and lateral meniscal tears, knee osteoarthritis, and loose body. (*Id.* at 3-4). Dr. Park continued Petitioner's

physical therapy, recommended a left knee ACL brace, and administered a left knee injection. (*Id.* at 4-5). If Petitioner continued exhibiting left knee symptoms, Dr. Park opined he may require surgery in the form of a left knee ACL reconstruction. (*Id.* at 4). Additionally, Dr. Park continued Petitioner's off work restrictions. (*Id.*).

3. **Deposition of Dr. Chandrasekhar Sompalli**

The Parties presented for Dr. Sompalli's evidence deposition on July 9, 2020. (Petitioner Exhibit 6 "PX6"). Dr. Sompalli testified he is an orthopedic surgeon who specializes in joint replacement and sports medicine. (*Id.* at 5, 7). Dr. Sompalli testified to reviewing Petitioner's left knee MRI films, which revealed meniscus tear, joint space narrowing, chondromalacia in the medial compartment, and ACL tear. (*Id.* at 10). Additionally, Dr. Sompalli noted that Petitioner's left knee MRI revealed a sprain of his medial collateral ligament, sprain of his medial retinaculum, loose body in his interchondral notch area, and some chondromalacia of the patella. (*Id.*). Dr. Sompalli testified he performed a physical examination, which revealed effusion, zero to 100 degrees range of motion in the knee, positive anterior drawer, positive vulgus stress test, and positive McMurray's test; all of which were consistent with the left knee MRI findings documenting injuries to ACL, MCL, and meniscus. (*Id.* at 10-11, 17). Dr. Sompalli testified that given Petitioner's lack of improvement with conservative treatment, which included physical therapy and left knee injection, he recommended Petitioner undergo a left knee arthroscopy, partial meniscectomy, chondroplasty, and excision of the loose body. (*Id.* at 15). Dr. Sompalli testified that based on interoperative findings, he would also likely perform an ACL reconstruction. (*Id.* at 16).

Dr. Sompalli testified he disagreed with Dr. Lewis's opinion that Petitioner suffered a simple contusion that had resolved. (PX6 at 17). According to Dr. Sompalli, Petitioner was last

seen on April 29, 2020, and still reported 10/10 knee pain, so Petitioner's condition of ill-being had clearly not yet resolved. (*Id.*). Dr. Sompalli acknowledged Petitioner had pre-existing arthritis in his left knee but considering his asymptomatic state at the time of his accident, it was likely his work injury permanently aggravated his pre-existing arthritis. (*Id.*). Additionally, Dr. Sompalli testified that the way Petitioner hyperextended his left knee was a likely mechanism for an ACL tear. (*Id.* at 19). Dr. Sompalli confirmed Petitioner's condition of ill-being is causally related to the work accident he sustained on October 22, 2019. (*Id.* at 18, 20). Dr. Sompalli testified that if Petitioner undergoes a regular knee arthroscopy, he would require three months of physical therapy post-operatively. (*Id.* at 20). If Petitioner undergoes an ACL reconstruction, Dr. Sompalli testified he would require six to nine months of physical therapy post-operatively. (*Id.*).

On cross-examination, Dr. Sompalli clarified that although he may have diagnosed Petitioner with an ACL "strain," the ICD-10 code diagnoses a tear as a strain. (*Id.* at 24). To process bills, Dr. Sompalli is required to use the ICD-10 code for a strain. (*Id.*). Dr. Sompalli testified that had the cortisone injection relieved Petitioner's pain for three to four months, then the pain generator is the arthritis and he wouldn't have recommended a simple knee arthroscopy. (*Id.* at 26). Conversely, if the injection lasts much shorter, then that means the pain generator is not the arthritis. (*Id.*). Dr. Sompalli reiterated Petitioner's need for surgery and clarified that the determination for ACL reconstruction would have to be done intra-operatively. (*Id.* at 27). On redirect examination, Dr. Sompalli testified Petitioner's injury likely accelerated the need for a potential knee replacement in the future as a result of his arthritis. (*Id.* at 28). Dr. Sompalli did not believe Petitioner's ACL tear is chronic because chronic tears mimic normal ACLs in that they form scar and tissue, which was not identified on Petitioner's MRI films. (*Id.* at 29).

4. **Deposition of IME Dr. Michael Lewis**

The Parties presented for Dr. Lewis's evidence deposition on August 3, 2020. (Respondent Exhibit 2 "RX2"). Dr. Lewis testified that he is a general orthopedic surgeon. (*Id.* at 6). Dr. Lewis testified that Petitioner had no swelling and a remarkably normal examination on the date of his IME. (*Id.* at 14-15). Furthermore, Dr. Lewis reviewed Petitioner's left knee MRI films and x-rays taken that day in his office, both of which revealed severe degenerative arthritis and a preexisting tear of his ACL. (*Id.* at 15). Dr. Lewis testified he did not find any objective evidence of orthopedic pathology related to Petitioner's left knee and diagnosed Petitioner with resolved strains of the left hip and lumbar spine, as well as resolved contusions of the left leg and left knee (*Id.* at 14, 17).

On cross-examination, Dr. Lewis testified that in addition to the Lachman's test, he examined Petitioner's range of motion and muscle atrophy; both of which were normal. (RX2 at 25). When asked if he performed any other tests to detect abnormalities in the MCL or meniscus, Dr. Lewis testified he would have documented the tests if they were performed and revealed any instability. (*Id.*). Further, Dr. Lewis acknowledged Petitioner has severe tears of the medial meniscus and even though he didn't expressly document it in his report, its "implicit" in his diagnosis of severe degenerative arthritis. (*Id.* at 29). Dr. Lewis admitted that he did not read the radiologist report of Petitioner's left knee MRI and instead, puts "more stock" into his own MRI readings than those of the radiologist even though he normally does consider the radiologist's report. (*Id.* at 27-28).

On re-direct examination, Dr. Lewis testified that a physical examination of the knee would include the following tests: range of motion, strength, reflexes, Lachman, and McMurray. (RX2 at 37-38). However, Dr. Lewis does not list every single test on his reports, including his IME report.

(*Id.*). Dr. Lewis emphasized that it is "well-known" and "well-established" that severe, degenerative arthritis of the knee indicates a torn medial and lateral meniscus. (*Id.* at 39).

5. **Petitioner's Testimony**

At trial, Petitioner testified that his work injury has affected his activities of daily living and he would like to proceed with the left knee surgery as recommended by both orthopedic surgeons, Dr. Sompalli and Dr. Park. (TX at 26). When asked if he had ever sustained any prior work injuries, Petitioner recalled a minor injury that occurred in 2018 when a piece of metal hit his forehead. (*Id.*). Petitioner denied sustaining any previous injuries to his left knee. (*Id.* at 16-17). Petitioner testified that he stopped receiving workers' compensation benefits in December 2019 following his Section 12 examination with Dr. Lewis. (*Id.* at 23). To manage financially without income, Petitioner testified he took out several loans and moved in with his uncle who assists him with rent. (*Id.*). Petitioner testified that despite being off work pursuant to his physicians' orders, he chose to return to work in July 2020 in order to financially support his five daughters, all of whom are under the age of 18. (*Id.* at 26). Specifically, Petitioner testified he currently works at Nexus Staffing operating a forklift as a full-time employee making $9.50/hour. (*Id.* at 25). Petitioner testified his current job does not affect his left knee as he is sitting down while working. (*Id.*).

Further, Petitioner testified he worked for the borrowing employer 10 hours a day Monday through Friday, and that he was required to work approximately six to seven hours of overtime on Saturdays. (*Id.* at 13). In explaining the mandatory nature of his overtime hours, Petitioner testified he would have been fired if he did not work on Saturdays. (*Id.* at 14).

On cross-examination, Petitioner confirmed that he listed all five of his daughters as dependent children on his most recent tax return. (TX at 30). When asked if he presented his initial,

fifty-pound work restriction from Physician's Urgent Care to Respondent, Petitioner testified that he gave his restrictions to his manager Luis Lopez. (*Id.* at 32). However, Petitioner admitted that he did not return to work despite the fifty-pound work restriction because he felt unable to perform the work and Respondent did not "give [him] work someplace else." (*Id.*).

Following the testimony of Respondent's witness, Marc Cairo, Petitioner was recalled to the witness stand. On direct examination, Petitioner confirmed both supervisors for Respondent and Fibre Drum established from the onset of his employment that Petitioner was required to work ten hours a day Monday through Friday, as well as overtime on Saturdays. (TX at 45-46). On cross-examination, Petitioner testified he never received a notice of employment or other related paperwork; he was simply given an address and sent to work at Fibre Drum with understanding of what his hours were. (*Id.* at 48-49).

6. **Testimony of Marc Cairo**

At hearing, Respondent called its General Counsel, Marc Cairo, to testify about its overtime policy. (TX at 36). In his capacity as General Counsel, Mr. Cairo oversees Respondent's Workers' Compensation program and litigation nationwide. (*Id.*). With respect to overtime practices, Mr. Cairo testified Respondent does not have a "per se policy for overtime." (*Id.* at 37). On one hand, if Respondent's clients indicate they have extra work available, the offer is made to the temporary workers who can choose to work it or not. (*Id.*). On the other hand, if Respondent's clients indicate that overtime for temporary employees is mandatory, the temporary workers are informed of this at the onset of their employment and they can either choose to accept the assignment or request a different one. (*Id.*). Mr. Cairo testified that Fibre Drum ran regular shifts during the week (Monday through Friday) and employees could voluntarily accept the overtime

work offered on Saturday. (*Id.* at 38). Further, Mr. Cairo testified that mandatory overtime would have been documented on Petitioner's employment notice. (*Id.*).

On cross-examination, Mr. Cairo testified that Respondent's branch office would have conveyed to Petitioner that the overtime hours were voluntary and documented it on his employment notice. (TX at 41). When asked if he had a copy of the notice, Mr. Cairo denied bringing Petitioner's personnel file as he originally planned on just watching the trial and listening in as the company representative. (*Id.* at 42-43).

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below. Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his or her claim *O'Dette v. Industrial Commission,* 79 Ill. 2d 249, 253 (1980) including that there is some causal relationship between his employment and his injury. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 63 (1989). It is well established that the Act is a humane law of remedial nature and is to be liberally construed to effect the purpose of the Act - that the burdens of caring for the casualties of industry should be borne by industry and not by the individuals whose misfortunes arise out of the industry, nor by the public. *Shell Oil v. Industrial Comm'n,* 2 Ill.2nd 590, 603 (1954). Decisions of an Arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

Petitioner testified in open hearing before the Arbitrator who had opportunity to view Petitioner's demeanor under direct examination and under cross-examination. The Arbitrator finds the Petitioner was a sincere and credible witness. The Arbitrator notes that Petitioner's testimony regarding the mechanism of his injury and his symptoms were corroborated by and consistent with the medical records and objective findings.

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

The Arbitrator incorporates the forgoing findings of fact as though fully set forth herein. Having considered all the evidence and the record as a whole, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that his left sided soft tissue injuries which resolved prior to the 19(b) hearing was causally connected to the accident of October 22, 2019 and that his left knee pathology which remains symptomatic is casually related to his accident of October 22, 2019.

The Arbitrator finds that Petitioner's knee injury and current condition of ill-being is causally related to his October 22, 2019, work injury. In so finding, the Arbitrator relies on the "chain of events" analysis and the credibility of both Petitioner and his treating physicians over Respondent's Section 12 medical expert, Dr. Lewis. Whether a causal relationship exists between a claimant's employment and his current condition of ill being is a question of fact to be resolved by the Commission, who is to judge the credibility of the witnesses and resolve any conflicting medical testimony. *Sisbro, Inc. Industrial Comm'n*, 207 Ill.2d 193, 206-07 (2003).

a. **"Chain of events" analysis supports causation**.

The Arbitrator finds that a causal connection is apparent under *Martin's* "chain of events" analysis frequently cited by the Commission and other reviewing courts. *Martin Young*

Enterprises, Inc. v. Industrial Comm'n, 51 Ill.2d 149 (1972). A chain of events that demonstrates a previous condition of good health, an accident, and subsequent injury resulting in disability may be sufficient evidence to prove a causal connection between the accident and the employee's injury. *International Harvester v. Industrial Com.*, 93 Ill.2d 59, 63-64 (1982).

In this case, the Arbitrator finds Petitioner credibly established a condition of good health prior to his October 22, 2019, accident. At trial, Petitioner gave unrebutted testimony that he was symptom free at the time of his accident with a history of no left knee injuries in the past. (TX at 16-17). In fact, Petitioner testified the only prior injury he had was a minor incident in 2018, when a piece of metal hit his forehead. (TX at 16). Petitioner's testimony is corroborated by the contemporaneous medical records from Dr. Sompalli and Dr. Park; all of which report no history of preexisting knee injuries. (PX4 at 1) (PX5 at 1). Specifically, Dr. Sompalli indicated that prior to Petitioner's injury, Petitioner was "healthy and symptom-free." (PX4 at 1).

It is undisputed that Petitioner was performing his regular duties as an assembler at the time of his work injury. Following his injury, Petitioner credibly testified to an immediate onset of pain to his left knee and pain to his low back the following day, followed by treatment consisting of diagnostic testing, physical therapy, left knee injections, and ultimately recommendation for left knee surgery. (TX at 15-16). Petitioner's unrebutted testimony and medical records clearly show that Petitioner's knee complaints have been consistent, ongoing, and unabated since his work injury on October 22, 2019. After his accident, Respondent sent Petitioner to Physicians Urgent Care, where he reported left knee complaints (PX1 at 1). Petitioner credibly testified he felt low back pain the following day. (TX at 15-16). Thereafter, Petitioner presented to MAPS, with reports of left knee pain and low back pain, which did not subside despite extensive physical therapy and medications. (PX2 at 19-37). Once Petitioner exhausted all conservative measures to

relieve his left knee pain, Dr. Sompalli and Dr. Park recommended left knee surgery. (PX4 at 8-6) (PX5 at 4). Further, the Arbitrator finds Respondent has not submitted any evidence into the record rebutting Petitioner's testimony regarding his mechanism of injury or lack of pre-existing history relative to his left knee.

Reviewing Petitioner's medical history in its entirety, the Arbitrator finds Petitioner sustained a left knee injury on October 22, 2019, that resulted in a condition of ill-being that has not resolved despite extensive efforts at conservative management. Given the lack of any prior left knee injury and Petitioner's asymptomatic state at the time of his accident, the Arbitrator finds that a causal connection is apparent under a "chain of events" analysis.

b. **<u>Arbitrator places greater weight to the opinions of Dr. Sompalli and Dr. Park than Dr. Lewis</u>.**

The second and most critical factor the Arbitrator weighs in determining whether Petitioner's left knee condition is casually related to his October 22, 2019, accident is the credibility of the medical experts.

Here, the Arbitrator places greater weight on the opinions of Dr. Sompalli, and Dr. Park, than on the opinion of Respondent's Section 12 examining medical expert, Dr. Lewis. Petitioner's testimony regarding his left knee injury is consistent with the histories noted in the contemporaneous medical records; specifically, that Petitioner was working full duty prior to his work injury on October 22, 2019, and since then, this left knee complaints have been consistent and uninterrupted. The Arbitrator finds the findings and opinions of the treating physicians to be more persuasive than those of Dr. Lewis.

The Arbitrator finds Dr. Sompalli and Dr. Park's recommendation for left knee surgery to be credible based on Petitioner's treatment that yielded: (1) exhaustion of all conservative treatment, including two left knee injections, pain medication, and physical therapy; (2) positive

physical exam findings consisting of left knee swelling, medial joint tenderness, positive McMurray's test, positive valgus test, and positive Lachman's test (PX5 at 3); (3) an MRI of the left knee indicating a severe tears of the medial and lateral meniscus, grade 3 sprain of the left medial collateral ligament, and ACL tear (PX2 at 73); and (4) ongoing subjective complaints of left knee pain (PX2 at 75). The Arbitrator finds that Dr. Sompalli and Dr. Park's incorporated a more thorough medical assessment as it relates to causation and future medical care. Further, while Dr. Sompalli does not dispute Dr. Lewis's conclusion that Petitioner had pre-existing arthritis in the left knee, Dr. Sompalli persuasively testified that the pre-existing arthritis is not the main source of Petitioner's symptoms because the knee injection did not provide him with longer relief. (PX6 at 13). Accordingly, given Petitioner's mechanism of injury, Dr. Sompalli persuasively concluded that Petitioner's work injury aggravated his pre-existing arthritis and caused traumatic tears of his meniscus and ACL. (PX6 at 17, 19). The Arbitrator finds that the existence of pre-existing arthritis is not fatal to causation recovery for an accidental injury and will not be denied so long as Petitioner can show that his employment was a causative factor to his condition of ill-being. *Corn Belt Energy Corp. v. Ill. Workers' Comp. Comm'm.*, 2016 IL App (3d) 150311WC, ¶ 28. The Arbitrator finds that given Petitioner's asymptomatic state and lack of left knee injuries, there is no doubt that Petitioner has established by a preponderance of the evidence that his uncontested October 22, 2019 accident was a causative factor to his ongoing symptomatic state and current need for surgery.

The Arbitrator further affords little, if any, weight to Dr. Lewis's opinion based on his conclusions regarding Petitioner's diagnosis, the recommendation for no further medical treatment, and maximum medical improvement. Dr. Lewis concludes that Petitioner, at most, sustained a left knee contusion that was superimposed upon severe pre-existing degenerative

arthritis and pre-existing anterior cruciate ligament tear of the left knee. (RX1 at 100). Dr. Lewis further opined that on December 13, 2019, Petitioner's diagnosis related to the left knee and left leg, had healed. (*Id.*).

During Dr. Lewis's evidence deposition, Dr. Lewis testified that Petitioner's left knee had "excellent range of motion," a low Lachman's test rating, and no swelling or joint effusion on the day of the IME. (RX2 at 10, 14, 23). However, the Arbitrator finds it very suspect that Dr. Lewis was the only physician who did not document any degree of swelling in Petitioner's left knee. Specifically, the medical notes reviewed and referenced in his own Section 12 report clearly show Petitioner consistently presented for medical treatment with left knee swelling. (PX1 at 1) (PX2 at 21). Additionally, the medical notes from Dr. Sompalli and Dr. Park, months after the independent medical examination, also document swelling in the left knee. (PX4 at 3, 8, 12) (PX5 at 1, 3). The Arbitrator also questions Dr. Lewis's thoroughness given his decision not to review the left knee MRI report, specifically because he puts "more stock" in his own readings. (RX2 at 28). Dr. Lewis repeatedly testified Petitioner's left knee MRI revealed degenerative tri-compartmental changes and a "chronic tear" of the anterior cruciate ligament. (*Id.* at 12-13, 15-17, 26). Yet, when asked about the significance of the positive Lachman's test, Dr. Lewis testified it could also indicate an acute tear of the anterior cruciate ligament. (*Id.* at 10). Dr. Lewis also testified that Petitioner's severe tears of the medial and lateral meniscus, none of which are referenced in his IME report, are findings "compatible with severe degenerative arthritis of the knee" and implicit in his IME opinion. (*Id.* at 29).

Reviewing the totality of the evidence, the Arbitrator finds that Petitioner sustained low back and left knee injuries on October 22, 2019, that resulted in a left knee condition of ill-being that has not abated through conservative treatment. The Arbitrator finds Petitioner's low back

condition is resolved and therefore requires no further treatment. The Arbitrator further finds the opinions of Dr. Sompalli and Dr. Park to be more persuasive than Respondent's IME expert, Dr. Lewis. It is for the reasons above, the Arbitrator finds Petitioner has met his burden of proving by a preponderance of the evidence that his condition of ill-being is causally related to his October 22, 2019 work accident.

(G) What were Petitioner's earnings?

The Arbitrator incorporates the forgoing findings of fact as though fully set forth herein. Having considered all the evidence and the record as a whole, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that his average weekly wage was $735.21 but is bound to $729.73, the AWW which Petitioner stipulated on the Request For Hearing Form (Arb. Exhibit 1) Petitioner's total earnings during the relevant time period were $2,750.80, including overtime hours which are uncontested by the Parties. Given the testimony offered at trial by both Parties, the Arbitrator finds overtime was mandatory and therefore awards Petitioner an AWW of $729.73.

a. <u>Petitioner's overtime was mandatory</u>.

First, the Arbitrator finds that Petitioner's overtime hours were mandatory. Overtime wages are included in an average weekly wage calculation when the claimant was required to work overtime as a condition of his employment. *Freesen, Inc. v. Indus. Comm'n*, Ill. App. 3d. 1035, 1042 (2004).

Here, Respondent's General Counsel, Marc Cairo, inconsistently testified that Respondent has no "per se policy for overtime" and working overtime hours is voluntary, but at the same time refused to concede that overtime is "never mandatory." (TX at 38-39). If overtime was mandatory, it would based on the requirements of the borrowing employer. Mr. Cairo testified it would have

been documented in Petitioner's employment notice. (*Id.* at 41). However, Respondent provided no documented evidence to support that an employment notice was ever given to Petitioner, or that one even exists. (*Id.* at 40-41). To the contrary, Petitioner testified that he was never given any document at the time of his hiring; he was simply given the address to Fibre Drums and instructed by Luis Lopez to work ten hours Monday through Friday plus Saturdays. (*Id.* at 48-49). Petitioner testified that if he did not work his assigned hours, including overtime on Saturdays, he would have been fired. (*Id.* at 14, 45). Respondent did not present Luis Lopez or any other witness directly involved in Petitioner's hiring process to rebut Petitioner's testimony regarding the circumstances of his employment and mandatory nature of his overtime hours. Accordingly, the Arbitrator finds Petitioner's mandated work hours constitutes a material condition of employment and therefore finds Petitioner's overtime was mandatory based on the requirements of the borrowing employer.

The Arbitrator notes that the borrowing employer may have not notified Mr. Ciaro that it required mandatory overtime. Respondent made a oral motion to bifurcate the hearing on the issue of overtime being mandatory. Respondent failed to show good cause or surprise. Respondent's motion was denied.

b. <u>Calculation of Petitioner's AWW.</u>

Section 10 provides, in relevant part: "Where employment prior to the injury extended over a period less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee actually earned wages shall be calculated." 820 ILCS 305/10. Under this method, "the number of weeks and parts thereof" is determined by dividing the number of days that a claimant worked prior to his injury by the number of days in a full workweek. *Greaney v. Indus. Comm'n*, 358 Ill. App. 3d 1002, 1018 (2005). The claimant's

gross wages are then divided by the "the number of weeks and parts thereof" to arrive at an average weekly wage. *Id.*

In reviewing Petitioner's pre-injury wages, the Arbitrator finds Petitioner's first paycheck issued on October 4, 2019, was inexplicably issued less than a week before his second check on October 8, 2019. (Respondent Exhibit 5 "RX5" at 1). Respondent's witness. Mr. Cairo, testified that sometimes it takes payroll a while to "catch up." (TX at 69-70). Nevertheless, Petitioner's unrebutted testimony established he worked 10 hours/day Monday through Friday, plus overtime on Saturday. Accordingly, the 19 hours noted on Petitioner's first check issued on October 4, 2019, at best, reflects two days of work (2/7 or .2857) for his first week of work with Respondent. As the Arbitrator previously found overtime was a mandatory condition of employment, the wages for the remaining three (3) checks are calculated as follows using a $13/hour straight pay rate: $734.50 for week of October 8, 2020 (56.50 hours * $13.00); $726.70 for the week of October 15, 2019 (55.90 hours * $13.00); and $728.00 for the week of October 22, 2020 ($56 hours * $13.00). Adding all of the total wages at straight pay rate comes out to a total of $2,415.67 and when divided by 3.2857 weeks (and parts thereof), the Arbitrator calculates an AWW of $735.21. However, Petitioner is bound by stipulation to the $729.73 AWW noted on the Request for Hearing Form entered in evidence. (Arbitrator Exhibit 1).

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

The Arbitrator incorporates the forgoing findings of fact as though fully set forth herein. Having considered all the evidence and the record, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that the services provided to the Petitioner were

reasonable and necessary and that the Respondent has not paid all chargers for all reasonable and necessary medical services.

At trial, Petitioner introduced the following unpaid medical bills into evidence:

1.	MAPS Center for Pain Control	$1,700.00
2.	United Rehab Providers	$8,810.00
3.	Elite Orthopedics & Sports Medicine	$1,304.41
4.	Dr. Samuel S. Park	$1,080.00
5.	MRAD	$4,061.00
6.	ADCO	$4,616.64
	TOTAL:	**$21,572.05**

Respondent denied liability for these expenses based on causal connection pursuant to the opinions of Dr. Lewis, Respondent's Section 12 examining medical expert.

The Arbitrator finds the medical treatment ordered and rendered by all of the above-listed providers to be both reasonable and necessary and that Respondent has not paid all appropriate charges for Petitioner's reasonable and necessary medical services. Irrespective of causation, the Arbitrator notes Respondent did not introduce any evidence to challenge the reasonableness and necessity of all medical services rendered and recommended as of the date of trial. As such, the Arbitrator finds that Respondent lacked an evidentiary and legal basis to challenge the reasonableness and necessity of medical services, specifically: all physical therapy at United Rehab Providers, medications, diagnostic studies conducted by MRAD, and other medical services rendered by Petitioner's treating physicians. More importantly though, because the Arbitrator finds Petitioner's current condition of ill-being causally related to his work injury, the Arbitrator finds Respondent liable for all outstanding and related medical charges and shall pay the amounts due directly to the Petitioner as provided in Sections 8(a) and 8.2 of the Act.

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

The Arbitrator incorporates the forgoing findings of fact as though fully set forth herein. Having considered all the evidence and the record, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that he is entitled to prospective medical care. Petitioner has not reached maximum medical improvement as Dr. Sompalli and Dr. Park have recommended left knee surgery that Petitioner has yet to undergo given lack of approval.

As of the date of the trial, Petitioner has undergone conservative treatment and exhausted all conservative efforts to alleviate his symptomatic pain. Petitioner testified that physical therapy and injections temporarily relieved his pain, but his pain nonetheless returned and persisted afterwards. (TX at 20-21). Petitioner also testified that his pain has affected his quality of life. (TX at 26). Petitioner wishes to undergo left knee surgery to be able to perform the same activities that he did pre-injury. (*Id.*). As Petitioner suffered a compensable work accident and his present condition is causally related to his work accident, the Arbitrator finds that Petitioner is entitled and Respondent is liable to approve and pay for the left knee surgery, related medical care and post-operative treatment prescribed by his treating physicians.

(L) Is Petitioner entitled to TTD benefits from October 23, 2019 through July 26, 2020 & TPD benefits from July 27, 2020, through October 19, 2020?

The Arbitrator incorporates the forgoing findings of fact as though fully set forth herein. Having considered all the evidence and the record, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence to entitlement of additional unpaid TTD and TPD. The Arbitrator finds Petitioner is entitled to TTD from October 23, 2019, through July 27, 2020. The dispositive inquiry in deciding whether a Petitioner is entitled to TTD is whether his condition has stabilized, that is whether he has reached maximum medical improvement. *Interstate Scaffolding, Inc. Illinois Workers' Comp. Comm'n*, 236 Ill.2d 132, 142 (2010). When an injured Petitioner

demonstrates that he continues to be temporarily totally disabled as a result of his work-related injury, he is entitled to TTD benefits. (*Interstate Scaffolding Id.* at p.149). Furthermore, a temporary partial disability benefit is awarded when an employee is not yet at maximum medical improvement and works on a "full-time basis and earns less than he or she would be earning if employed in the full capacity of the job." 820 ILCS 305/8(a).

In this case, the Arbitrator finds that Petitioner was temporarily and totally disabled from October 23, 2019 through July 26, 2020, a period of 39-5/7 weeks. Respondent is entitled to a credit of $2,108.19 for TTD benefits paid through the date of the Section 12 examination of Dr. Lewis. (Respondent Exhibit 3 "RX3" at p. 1). Thereafter, Respondent denied liability for TTD benefits pursuant to the opinion of Dr. Lewis, who opined that Petitioner had reached maximum medical improvement on December 10, 2019 and required no additional medical treatment. (RX1 at 100). The medical records from MAPS reveal that Dr. Pontinen placed Petitioner off work on October 25, 2019. (PX2 at 23, 25). Drs. Saldanha, Sompalli, and Park continued Petitioner's off work restrictions and never placed Petitioner at maximum medical improvement. (PX2 at pp.23, 25) (PX4 at pp. 4, 9, 13) (PX5 at pp.2, 4). Petitioner credibly testified that he was forced to return to work on July 27, 2020, despite his doctor's off work status, in order to financially support his five daughters. (TX at p.24). Petitioner testified he currently works full time for Nexus Employment as forklift driver making $9.50/hour or $$380.00/week. He testified that his current job does not affect his left knee as he is sitting the entire time. (TX at p.25). The Arbitrator understands Petitioner's financial responsibilities to his family and appreciates his candor in his testimony. As the Arbitrator gives more weight to the opinions of Petitioner's treating physicians and finds Petitioner's left knee condition is causally related to his work accident, the Arbitrator finds Petitioner is entitled to TTD benefits from October 23, 2019, through July 26, 2020, a period

of 39-5/7 weeks, and TPD benefits from July 27, 2020, the start of his employment at Nexus, through the date of hearing on October 19, 2020, a period of 12-1/7th weeks at his TPD rate of \$233.15 (AWW \$729.73 – \$380.00 = \$349.93/3 x 2 = \$233.15)

The Arbitrator, therefore, concludes that Respondent shall pay Petitioner temporary total disability benefits of \$486.49/week for 39-5/7 weeks, commencing October 23, 2019 through July 26, 2020, as provided in Section 8(b) of the Act. Respondent shall pay Petitioner temporary partial disability benefits of \$233.15/week for 12-1/7th weeks, commencing July 27, 2020 through October 19, 2020, as provided in Section 8(a) of the Act. And, that Respondent is entitled to a TTD credit of \$2,108.19

(O) How many dependent children does Petitioner have?

The Arbitrator concludes that Petitioner has proven by a preponderance of the evidence of that he does have five dependent children. At trial, Petitioner consistently and credibly testified he has five daughters. (TX, pp.26, 30, 33). When asked to name his daughters, Petitioner provided their names without hesitation (Yosira, Katy, Leslie, Gabriella, and Jaylaine). (TX at p. 26). Further, Petitioner's Decree of Dissolution of Marriage entered into evidence lists his five daughters, all of which match the testimony provided by Petitioner at trial. (PX7 at pp. 1-2). Respondent unsuccessfully attempted to dispute Petitioner's credibility by eliciting testimony regarding the number of claimed dependents on Petitioner's tax return. (TX at p. 30). Respondent, however, did not offer the tax return into evidence and failed to introduce any evidence at all to dispute Petitioner's testimony. Accordingly, the Arbitrator finds that Petitioner has five dependent children.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC008136
Case Name	SCHOLEBO, JOHN v. DATE MINING SERVICES LLC
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0178
Number of Pages of Decision	22
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Kevin Morrisson
Respondent Attorney	John Flodstrom

DATE FILED: 5/12/2022

/s/Deborah Baker, 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 Causation, Temporary Disability, Prospective Medical	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHN SCHOLEBO,

Petitioner,

vs. NO: 19 WC 08136

DATE MINING SERVICES,

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 found Petitioner sustained an accidental injury arising out of and occurring in the course of his employment on February 12, 2019, but Petitioner's current left knee condition of ill-being is not causally related to the work accident. The Arbitrator found Petitioner's left knee condition reached maximum medical improvement as of May 22, 2019, and Petitioner's requests for Temporary Total Disability benefits beyond that date and prospective medical care were denied. Notice having been given to all parties, the Commission, after considering the issues of whether Petitioner's left knee condition of ill-being remains causally related to his February 12, 2019 accidental injury, entitlement to temporary disability benefits, and entitlement to prospective medical care, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

PROLOGUE

The Commission observes protected personal identity information was unredacted from Respondent's Exhibit 2. The Commission cautions Counsel to adhere to Supreme Court Rule 138. *Ill. S. Ct. R. 138* (eff. Jan. 1, 2018).

CONCLUSIONS OF LAW

I. Causal Connection

In finding Petitioner failed to prove his current left knee condition remains causally related to the February 12, 2019 work accident**,** the Arbitrator made an adverse credibility determination; specifically, the Arbitrator found Petitioner lacked credibility with respect to his history of left knee treatment and symptomatology. The Arbitrator further found Dr. Nogalski's opinions more credible than Dr. Davis's opinions. The Commission views the evidence differently.

We begin our analysis with a review of the applicable legal standard. It is well established that an accident need not be the sole or primary cause—as long as employment is a cause—of a claimant's condition. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). Furthermore, an employer takes its employees as it finds them (*St. Elizabeth's Hospital v. Illinois Workers' Compensation Commission*, 371 Ill. App. 3d 882, 888 (2007)), and a claimant with a pre-existing condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d 30, 36 (1982). As the Appellate Court held in *Schroeder v. Illinois Workers' Compensation Commission*, 2017 IL App (4th) 160192WC, the inquiry focuses on whether there has been a deterioration in the claimant's condition:

> That is, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been. *Schroeder* at ¶ 28.

The Arbitrator found Petitioner lacked credibility regarding his pre-accident condition and therefore failed to establish that his left knee condition deteriorated after the work accident. The Commission disagrees. In the Commission's view, Petitioner's testimony that his knee condition was stable and he was not having knee complaints prior to the work accident is credible and corroborated by medical records. *See R & D Thiel v. Illinois Workers' Compensation Commission*, 398 Ill. App. 3d 858, 866 (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.")

The Commission observes that more than six years of Petitioner's pre-accident medical records were received into evidence. These records establish that Petitioner regularly consulted with his primary care physician: from 2012 through the date of accident, Petitioner presented to

Rea Clinic 33 times. The Commission finds it significant that of those 33 office visits, knee complaints are memorialized on only four occasions:

1) October 15, 2012, Dr. Frederica Nanni:
   This 52 year old male presents with back pain Onset: 10 Years Ago. Severity level is severe. The problem is fluctuating. It occurs persistently. Location of pain was lower back, knees and hip. The patient describes pain as burning, sharp, shooting and like being beaten with sledgehammer. Symptoms are relieved by pain meds/drugs. Additional information: Knows needs knee replacement, but not ready yet. Does janitorial work. Vicodin allows him to function. Resp.'s Ex. 2 (Emphasis added).

2) May 14, 2014, Dr. Michelle Jenkins:
   [B]ack pain Onset: gradual without injury. Severity level is moderate-severe. The problem is worsening. It occurs persistently. Location of pain was lower back. There was no radiation of pain. The patient describes the pain as an ache and deep. Context: no injury. Symptoms are aggravated by standing, twisting and walking. Symptoms relieved by pain meds/drugs and rest. Additional information: also with left knee pain and left hip worse recently. Resp.'s Ex. 2 (Emphasis added).

3) September 22, 2014, Dr. Michelle Jenkins:
   Follow up of musculoskeletal pain. Onset: gradual. Duration: more than 1 hour. Severity level is moderate-severe. It occurs constantly and is fluctuating. Location: low back pain. There is no radiation. The pain is aching. Context: there is no injury. The pain is aggravated by movement, walking and standing. Associated symptoms include crepitus, decreased mobility, joint instability, joint tenderness and popping. Additional information: bilateral knee and left hip pain, occasionally feels like left hip catches. Resp.'s Ex. 2 (Emphasis added).

4) June 10, 2015, Dr. Michelle Jenkins:
   Patient here for followup [*sic*] on osteoarthritis. Complaints of bilateral ankle and knee pain and low back pain. Pain medication helps as does rest/position change in bed/at rest. Resp.'s Ex. 2 (Emphasis added).

The Commission emphasizes that not one of these mentions of knee pain resulted in a treatment recommendation. In fact, those office visits do not include any specific knee examination findings beyond noting Petitioner's gait was normal, nor any provocative testing directed to the knee, nor did either Dr. Nanni or Dr. Jenkins deem Petitioner's symptoms significant enough to warrant an X-ray let alone an MRI. Furthermore, the most recent pre-accident mention of knee pain was in June 2015; significantly, over the ensuing 32 months, Petitioner saw Dr. Jenkins another 18 times yet made no further mention of knee pain. And while the June 10, 2015 office note indicates Petitioner was "planning to seek disability," Petitioner's unrebutted testimony is that statement referred to his lower back condition. T. 35.

The Commission finds that when Petitioner's testimony is considered in the context of this medical history, his inability to recall isolated reports of knee pain made between five and eight years prior to the trial date does not reflect negatively on his credibility. We further note Petitioner readily acknowledged having undergone prior knee surgeries, and while he had difficulty

remembering specific dates, he explained his last knee treatment was "a long time ago." T. 31, 32, 34. In the Commission's view, the medical records fully support Petitioner's credible testimony that his knee was "fine" (T. 18) following the knee arthroscopy 13 years prior.

Our analysis next turns to consideration of the competing causation opinions of Dr. Davis and Dr. Nogalski. Dr. Davis concluded Petitioner's left knee remained symptomatic as a result of the work injury. During his deposition, Dr. Davis agreed that many of Petitioner's MRI findings were degenerative. Pet.'s Ex. 5, p. 13. Dr. Davis explained, however, that an individual with the level of degeneration noted on Petitioner's MRI can have minimal to no knee complaints ("…are their [*sic*] asymptomatic knees that have arthritis and degeneration, and the answer is yes") and could have gone for years without requiring surgical intervention. Pet.'s Ex. 5, p. 13, 15. The doctor further testified the mechanism of injury Petitioner described could render an asymptomatic degenerative condition symptomatic. Pet.'s Ex. 5, p. 15-16. Dr. Davis opined the work incident is causally related to both the meniscal tear and aggravation of the underlying arthritis, an opinion which was predicated on Petitioner's reported history. Pet.'s Ex. 5, p. 17, 28. While Respondent highlights the fact Dr. Davis did not review Petitioner's pre-accident medical records, we note the doctor was aware that Petitioner's medical history included two prior knee surgeries. Pet.'s Ex. 5, p. 18, 21. Furthermore, as detailed above, the Commission has reviewed Petitioner's pre-accident medical records, and we find those records are fully consistent with Dr. Davis's understanding of Petitioner's pre-accident condition and only serve to buttress Dr. Davis's opinions.

Dr. Nogalski, in turn, reached a contrary causation opinion, however the Commission does not find Dr. Nogalski's opinions to be persuasive. Initially, we observe Dr. Nogalski's theory that Petitioner's osteoarthritis symptoms were hidden by his narcotic pain medication is inconsistent with the medical records. During his deposition, Dr. Nogalski testified Petitioner "had been prescribed liberal amounts of narcotic medications for his back, hip and knees, well prior to the claimed 2/12/19 event" (Resp.'s Ex. 1, p. 12), and opined the narcotics disguised Petitioner's otherwise debilitating symptoms:

> Well, I think it's a way to gracefully reconcile an assertion by Mr. Scholebo that he didn't have problems with his knee before this time. He clearly did. He clearly had structural issues, bone on bone arthritis, grade four osteoarthritis before this time and the narcotic would likely mute or minimize that pain. He also had had, I think, a recommendation or discussion about knee replacement before this as well. And it looked like he was holding on because the narcotics were at least minimizing his pain to a level that he didn't want to have a knee replacement. Resp.'s Ex. 1, p. 13-14.

The Commission emphasizes, however, the medical records establish that Petitioner weaned himself off narcotic medication by April 2017. As such, if Dr. Nogalski correctly theorized that it was narcotic pain medication that kept Petitioner's symptoms to a bearable level, there would be corresponding reports of the now un-masked knee pain noted in the post-April 2017 medical records. Our review of the medical records reveals no such increased knee pain complaints. To the contrary, in the 21 months Petitioner was off narcotic pain medication prior to the work accident, the medical records do not document any knee complaints. Therefore, the Commission finds Dr. Nogalski's opinion that Petitioner was only able to delay knee replacement surgery because of narcotic pain medications is based on a false premise. *See*, *e.g.*, *Sunny Hill of Will County v. Illinois*

Workers' Compensation Commission, 2014 IL App (3d) 130028WC, ¶36 (Expert opinions must be supported by facts and are only as valid as the facts underlying them.)

The Commission further finds Dr. Nogalski's opinion that Petitioner suffered a temporary aggravation and has returned to his pre-accident baseline is irreconcilable with the record. There is no question that Petitioner had pre-existing osteoarthritis in his left knee, though there is disagreement between Dr. Davis and Dr. Nogalski as to the severity. There is likewise no question that the eventuality of Petitioner having a knee replacement was noted in 2012, though we observe this is mentioned in a history recorded by Petitioner's primary care physician and not as a treatment recommendation by an orthopedic surgeon. Significantly, it is undisputed that no knee-related work restrictions were imposed in 2012 nor at any time prior to the work accident. Moreover, in the medical records for the following six-plus years, there are only three sporadic notations of knee pain with no further mention of knee replacement surgery, nor any of the usual knee replacement precursors (*i.e.,* Synvisc or viscosupplementation injections), nor anything that would be considered knee-focused treatment (*i.e.*, corticosteroid injections or physical therapy). In contrast, at the February 14, 2019 evaluation, Dr. Sharath performed a focused examination on Petitioner's left knee, including provocative testing; diagnosed a left knee issue; provided Petitioner with crutches; ordered imaging studies; and authorized Petitioner off work:

> [Patient] twisted left knee while at work 1 day ago and [patient] reported the work related injury at work. PAins cale [*sic*] 9/10, sharp shooting, unable to bear full body weight on [left lower extremity]…
> MUSCULOSKELETAL: Positive lachman [*sic*] test and McMurrays [*sic*] test. [Range of motion] completely restricted due to pain, positive joint line tenderness…
> Assessments: Left knee pain, unspecified chronicity
> Treatment: Start Cyclobenzaprine…Left knee MRI as ordered, non weight bearing status till [*sic*] MRI done with walker or crutches until MRI…excuse John from work/school till [*sic*] MRI completed and reviewed and further plan of action taken by MD. Pet.'s Ex. 2, Resp.'s Ex. 2.

At the February 26, 2019 re-evaluation, Dr. Jenkins memorialized that Petitioner was weightbearing with a crutch, unable to work his job as a security guard which "involved walking distances," and should remain off work pending orthopedic evaluation. Pet.'s Ex. 2, Resp.'s Ex. 2. The subsequent medical records demonstrate that Petitioner's condition never returned to the pre-accident baseline: his pain never subsided despite a corticosteroid injection, physical therapy, and rest, and he continues to need an assistive device to ambulate.

In the Commission's view, Dr. Davis's opinion is persuasive and consistent with the clear evidence of a significant deterioration between Petitioner's pre- and post-accident left knee condition: Petitioner's knee became symptomatic; he sought treatment specifically for his left knee; within two weeks an MRI was performed and Petitioner was referred for orthopedic evaluation; Dr. Davis concluded Petitioner's current symptom level warrants surgical intervention; and Petitioner never returned to his pre-accident baseline condition of full weight-bearing without an assistive device and was never released to work without any knee-related restrictions. As such,

the work accident is *a* factor in Petitioner's current left knee condition of ill-being. The Commission finds Petitioner's condition of ill-being remains causally related to the work accident.

II. Temporary Disability

Petitioner alleged he was temporarily and totally disabled from February 14, 2019 through January 29, 2020. Arb.'s Ex. 1. The Commission observes that on February 14, 2019, Dr. Sharath of Rea Clinic ordered a left knee MRI and authorized Petitioner off work pending review of that scan. Pet.'s Ex. 2, Resp.'s Ex. 2. Upon review of the February 22, 2019 MRI, Dr. Sharath directed that Petitioner remain off work until he could be evaluated by an orthopedist. Pet.'s Ex. 2, Resp.'s Ex. 2. Petitioner thereafter came under the care of Dr. J.T. Davis and Jeremey Palmer, PA-C, who have continued to authorize Petitioner off work pending surgical intervention. Pet.'s Ex. 4.

Consistent with our determination that Petitioner's current left knee condition remains causally related to the February 12, 2019 work accident, we conclude Petitioner is authorized off work as a consequence of his work accident. The Commission finds Petitioner is entitled to Temporary Total Disability benefits from February 14, 2019 through January 29, 2020.

III. Prospective Medical Care

The record reflects Dr. Davis discussed two surgical options with Petitioner: 1) arthroscopy, which would address the pain from the mechanical tearing but not the arthritic component; or 2) knee replacement, which would address both the tearing and the arthritis such that Petitioner "can expect more full relief of his symptoms." Pet.'s Ex. 5, p. 16-17. Petitioner testified he wishes to proceed with knee replacement surgery. T. 26. While Dr. Nogalski has recommended against proceeding with knee replacement, the Commission is not persuaded by the doctor's opinion that Petitioner's "big issue may not be his knee." Resp.'s Ex. 1, p. 29.

The Commission finds Dr. Davis's surgical recommendation of either arthroscopy or knee replacement to be credible, reasonable, necessary, and causally related to the February 12, 2019 work accident. The Commission orders Respondent to provide and pay for the surgical option agreed upon by Dr. Davis and Petitioner.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 4, 2020, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $351.63 per week for a period of 50 weeks, representing February 14, 2019 through January 29, 2020, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Responent shall provide and pay for left knee surgery as recommended by Dr. Davis as provided in §8(a) of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $42,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

May 12, 2022

/s/ *Deborah J. Baker*

DJB/mck

O: 3/16/22

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

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

SCHOLEBO, JOHN
Employee/Petitioner

Case# **19WC008136**

DATE MINING SERVICES
Employer/Respondent

On 3/4/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.01% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1747 LAW OFFICE OF MARK N LEE
KEVIN MORRISSON
1101 S SECOND ST
SPRINGFIELD, IL 62704

0734 HEYL ROYSTER VOELKER & ALLEN
JOHN D FLODSTROM
301 N NEIL ST SUITE 505
CHAMPAIGN, IL 61820

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)

John Scholebo
Employee/Petitioner

Case # **19 WC 8136**

v.

Consolidated cases:

Date Mining Services
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Collinsville**, on **January 29, 2020.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

H. ☐ What was Petitioner's age at the time of the accident?

I. ☐ What was Petitioner's marital status at the time of the accident?

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

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

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

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

In the year preceding the injury, Petitioner earned **$27,427.20**; the average weekly wage was **$527.45**.

On the date of accident, Petitioner was **59** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$5,525.93** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$5,525.93**.

Respondent is entitled to a credit of any and all medical bills paid through its group medical plan under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$351.63**/week for **12** weeks, commencing **February 14, 2019** through **May 22, 2019**, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $5,525.93 for TTD benefits paid.

Respondent shall pay reasonable and necessary medical services incurred on or before May 22, 2019, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

Petitioner is not entitled to prospective medical benefits, including, but not limited to, arthroscopic or arthroplasty surgery as recommended by Dr. J.T. Davis, because Petitioner's current condition of ill-being is not causally related to the accident, and all requests for prospective medical benefits are denied.

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

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

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

22IWCC0178

Signature of Arbitrator

2/25/20
Date

ICArbDec19(b)

MAR 4 - 2020

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JOHN SCHOLEBO,)
)
Employee/Petitioner,)
)
v.) Case No.: 19 WC 8136
)
DATE MINING SERVICES)
)
Employer/Respondent.)

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on January 29, 2020, pursuant to Section 9(b) of the Act. The parties agree that on February 12, 2019, Petitioner was employed as a security guard for Respondent. The issues in dispute are accident, causal connection, temporary total disability benefits, and prospective medical care. All other issues have been stipulated.

MEDICAL HISTORY

The Arbitrator notes a long history of Vicodin and Naproxen use by Petitioner as the result of degenerative disc disease in Petitioner's lumbar spine, the onset being approximately 2002. Based on medical records dated prior to the February, 2019 accident, Petitioner had not undergone surgery for his lumbar spine condition and was treating his symptoms with pain medication. Petitioner has a history of back pain, joint pain, and joint swelling as recorded in his primary care records from REA Clinic.

On October 15, 2012, Petitioner was seen at REA Clinic for severe back pain. The office note states, "Additional information: Knows needs knee replacement, but not ready yet. Does janitorial work. Vicodin allows him to function".

On May 14, 2014, Petitioner was treated at REA Clinic for back pain and an assessment of osteoarthritis. The office note referenced worsening left knee and left hip pain. On September 22, 2014, the office note of REA Clinic noted bilateral knee and left hip pain.

On June 10, 2015, Petitioner was evaluated at REA Clinic for follow up on osteoarthritis. Petitioner complained of bilateral ankle and knee pain and low back pain. Petitioner reported that pain medication, rest, and position change helped alleviate his symptoms.

On September 3, 2015, Petitioner was seen at REA Clinic and gave a history that he was considering filing for disability. Examination revealed tender to palpation in the lumbar region, with slow getting up from a chair due to pain. Petitioner's left knee was not examined or noted on this date.

On December 28, 2016, Petitioner presented to REA Clinic with chronic pain mostly in low back. Petitioner reported he was able to tolerate low impact work with pain medication. He reported taking 4 to 6 pain pills daily and that he has been taking chronic pain pills since 2002.

On March 27, 2017, Petitioner followed up with REA Clinic at which time he reported cutting back on Hydrocodone and was taking his wife's Naproxen intermittently. On April 14, 2017, Petitioner reported to REA Clinic that he "eats his wife's Naproxen 500 mg 2 to 3 daily". He further reported that he was, "eating his Hydrocodone early each month and that he feels that this provider contributed to it by giving him extra pills because he reported increased pain with his labor job". Petitioner requested Tramadol at that visit and further controlled medications were denied due to addiction history. Hydrocodone was discontinued and Naproxen 550 mg was prescribed.

Petitioner was examined at REA Clinic on February 14, 2019 following the subject accident. Petitioner reported twisting his left knee Tuesday night at work. He described the pain as sharp/shooting and was unable to bear weight on his left leg. Examination revealed positive Lachmen Test and McMurray Test, complete restriction of range of motion due to pain, and positive joint line tenderness. Petitioner was prescribed crutches and Cyclobenzaprine, and ordered off work pending an MRI.

Petitioner underwent an MRI of his left knee on February 22, 2019 at the Diagnostic Imaging Center of Carterville, which was authorized by Respondent. The radiologist made a finding of "multidirectional acute and/or chronic degenerative oblique and free edge tears of the posterior horn and body of the medial meniscus as above. Volume loss may be partially due to previous debridement. Unfortunately without intra-articular contrast acute versus chronic meniscal tears are difficult to separate." There were no comparison studies reported.

Petitioner returned to REA Clinic on February 26, 2019 at which time he was off work and bearing weight with one crutch. He was referred for orthopedic evaluation.

Petitioner was evaluated by Dr. J.T. Davis on March 1, 2019. Petitioner provided a consistent history of the accident and reported he felt a pop in his left knee followed by immediate pain. Petitioner informed Dr. Davis he was having no complaints in his left knee prior to the accident. Petitioner reported persistent pain over the past couple of weeks and has been off work.

Examination revealed tenderness along the medial and lateral joint lines, equivocal McMurray's, Lachman's has a solid endpoint, no instability, tenderness posteriorly over the hamstrings, negative straight leg raise, decreased range of motion with extension, and some patellar grinding pain. X-rays revealed no fracture or dislocation, with some left mild to moderate predominantly medial and patellofemoral osteoarthritis. Clinical impressions were left knee osteoarthritis. Dr. Davis reviewed the MRI film and report that he interpreted as showing some radial free edge tearing of the medial meniscus. Dr. Davis stated Petitioner's history and examination were consistent with a mild strain of his hamstrings and some peripheral radial free edge tearing of the medial meniscus. Dr. Davis opined that often times this type of knee condition will improve with nonoperative care. Petitioner underwent an intra-articular corticosteroid injection in his left knee and was ordered to rest until his follow up appointment in one month. Dr. Davis opined that if Petitioner's symptoms failed to improve, physical therapy would be considered before a recommendation of arthroscopic surgery, which was not highly anticipated at that point. Dr. Davis opined in his March 1, 2019 office note that Petitioner's current complaints are directly attributed to his work injury as he had no preexisting pain prior to his injury. There is no evidence that Dr. Davis reviewed any medical records or diagnostic studies predating Petitioner's February, 2019 accident.

On April 3, 2019, Dr. Davis noted Petitioner's symptoms improved with the injection for approximately one week. Petitioner experienced pain throughout the knee, with popping and catching and a feeling the knee could give way. Examination revealed mild effusion, medial and lateral joint line tenderness, and equivocal McMurray's. Dr. Davis diagnosed a sprain of the medial meniscus. Dr. Davis ordered aquatic therapy 3 times per week for 4 weeks, Mobic, and continued Petitioner off work. Dr. Davis expressed limited benefits of knee arthroscopy given his MRI findings, current complaints, and past arthroscopic history.

On May 8, 2019, Dr. Davis discussed with Petitioner the option of arthroscopy versus total knee surgery. Petitioner was not ready to consider arthroplasty. Dr. Davis advised of the limitations of arthroscopic surgery (a 50/50 proposition whether he gets better or not), especially in the face of his prior two arthroscopic surgeries as well as the level of arthritis in his knee. Petitioner stated he would like to consider arthroscopic surgery before arthroplasty. Dr. Davis continued Petitioner off work and ordered a left partial medial meniscectomy, chondroplasty, and debridement.

TESTIMONY

Dr. J.T. Davis' evidence deposition was taken on October 1, 2019. Dr. Davis testified consistent with his medical records. He testified that Petitioner said he was having no complaints in his left knee prior to the February, 2019 accident. Dr. Davis testified he reviewed the MRI film performed on 2/22/19 and confirmed some arthritis and radial free edge tearing of the medial meniscus. Dr. Davis testified he discussed surgical management options with Petitioner as he exhausted conservative measures. Options included knee arthroscopic surgery to address any mechanical sources of pain in the form of pairs or a knee replacement to address all sources of pain including the arthritis in the knee. Dr. Davis testified he continued Petitioner off work until

surgery was performed. He opined that a person with the type of MRI result that Petitioner has could have minimal to no knee complaints. That the type of conditions revealed on Petitioner's MRI could be rendered symptomatic by an acute injury. Dr. Davis opined that the type of degenerative condition that Petitioner has could have continued for years without needing surgical intervention. Dr. Davis opined that arthroscopic surgery would address the mechanical tearing, but that arthroplasty would be required to address the arthritic condition of Petitioner's knee. Dr. Davis testified that the aggravation of Petitioner's pre-existing condition related to the meniscal tearing and the arthritis.

On cross-examination, Dr. Davis testified he has never reviewed any medical records pertaining to Petitioner prior to his February, 2019 accident. Dr. Davis testified that his assistant, Jeremy Palmer, P.A., took Petitioner's history and performed the examination at Petitioner's initial visit on March 1, 2019. Dr. Davis testified he did not have any additional information about Petitioner's accident other than what Mr. Palmer recorded in the office note. Dr. Davis testified he did not have any knowledge of when Petitioner last had symptoms in his left knee prior to February, 2019. Dr. Davis testified he was not aware that Petitioner discussed a total knee replacement with his primary care physician prior to February, 2019. Dr. Davis testified that tearing of the meniscus can occur with degenerative changes and there was no way to tell how long the tearing was present without comparing the recent MRI with a previous MRI. Dr. Davis testified he did not have a prior MRI for comparison in order to state whether Petitioner had a chronic, preexisting free edge tear versus an acute tear. Dr. Davis testified that the first time he personally performed a physical examination of Petitioner was at the last visit on May 8, 2019. Dr. Davis testified that his entire opinion as to causation is based upon the Petitioner's history that he gave to him and his assistant, Jeremy Palmer.

On redirect, Dr. Davis testified that a more detailed description of the accident as provided by Petitioner's counsel would not change his opinions regarding causation.

Petitioner was seen for a Section 12 examination with Dr. Michael Nogalski. Dr. Nogalski's evidence deposition transcript was received into evidence. Dr. Nogalski's evaluation of Petitioner included a review of the REA Clinic records prior to the February, 2019 accident. Dr. Nogalski stated that his evaluation of the medical records and examination of Petitioner revealed that Petitioner had significant pre-existing degenerative arthritis in his knee that was superimposed on some pre-existing lumbar spondylosis issues. The pre-existing arthritis in the left knee was grade IV, which is the most severe level of arthritis. Grade IV arthritis is also referred to as "bone on bone" which means there is nothing protecting the bone in the knee joint.

Dr. Nogalski reviewed the left knee MRI of February 22, 2019 and did not identify any findings consistent with an acute injury to the left knee. Dr. Nogalski's review of the past medical records identified a history of taking narcotic medication on essentially a daily basis prior to February of 2019. Dr. Nogalski concluded that the long-term use of narcotics was minimizing any pain in the left knee to the point Petitioner did not want to have a knee replacement surgery.

Dr. Nogalski testified that assuming the accident occurred the way in which Petitioner described, Petitioner would have sustained a temporary strain to his already osteoarthritic knee. Dr. Nogalski testified Petitioner was not still suffering from any effects of a strain when he saw him on May 22, 2019. Dr. Nogalski testified that when he saw Petitioner in May, 2019, Petitioner was at a reasonable baseline relative to the knee condition that was shown as grade IV finding on x-ray, and reasonably at a baseline condition relative to previous medical records reviewed that documented significant knee issues well prior to 2/12/19. Dr. Nogalski further testified that the recommendation for a knee replacement was not related to Petitioner's work incident in February, 2019.

Petitioner is 59 years old and unemployed at the time of arbitration. At the time of the alleged accident, Petitioner was a security guard for American Coal, through Date Mining Services (Respondent). Petitioner testified he worked at that position for one and a half to two years at the time of his accident. Petitioner's job consisted of driving a 50-mile radius to visit various coal mines for security purposes, including walking the perimeter, checking doors and offices, and opening and closing gates that secured coal mine properties.

Petitioner testified that on February 12, 2019, he was attempting to close a 25 to 30-foot electric gate that was stuck. He testified he was jumping on the bottom rail of the gate and tugging on the gate until it tilted when he felt a pop in his left knee. Petitioner testified that sometimes the gate was easy to open but on that date the gate had tipped off track. Petitioner testified that many employees had difficulty maneuvering the gate. He testified that the electric motor was broken and employees had to manually open and close the gate.

Petitioner offered into evidence a photograph of a gate he testified looked exactly like the gate he opened on the day of the accident. Petitioner testified that two or three days after his accident the gate was replaced with a cattle gate.

Petitioner testified that he felt pain in his left knee after the incident and noted his knee began to swell. Petitioner testified that he reported his injury to Respondent the next morning. He sought treatment with his primary care physician on February 14, 2019. Petitioner was asked on direct examination if he has ever had knee pain before February 12, 2019, to which his answer was "no". He was also asked on direct examination if he ever went to the doctor and said, "my knee hurts sometimes", to which he answered "no". When asked by his attorney if he ever mentioned to his treating physicians that his knees hurt him, Petitioner answered, "no, not since I – no, not since I had surgery on it years ago". Petitioner was asked on direct examination that if his pre-accident medical records recorded some knee problems, would those be inaccurate? Petitioner answered, "oh, no, no I didn't have nothing". When asked about a medical record dated June 10, 2015 wherein Petitioner complained of bilateral ankle and knee pain, Petitioner answered that that complaint was probably true. That when he was doing janitor work he probably just twisted his ankle or something and that was the end of that, it was no big deal. Petitioner admitted to having

a prior medial meniscus surgery approximately 13 to 15 years ago. Petitioner testified that his knee has been "fine" since. He testified that since he was released from his prior left knee surgery, he has not undergone any therapy, MRIs, injections, or been referred to an orthopedic doctor, and no permanent restrictions were placed on him after being released from his surgery. He testified he has a chronic condition in his back for which he was taking pain medication. Petitioner testified he stopped taking pain medication for his back approximately one to one and a half years prior to the accident in February, 2019. He reported no knee pain after Hydrocodone was discontinued.

Petitioner testified he has been off work and on physical restrictions since the date of accident. He testified he prefers to undergo a total knee replacement at this time. He described his pain as taking a ball-peen hammer and beating his bone all the way around his knee, which has been consistent since the date of accident. His knee swells. Petitioner testified he did not have this level of pain prior to the accident and if he had he would have sought treatment.

Petitioner testified that he did not recall his visit to his primary care physician on October 15, 2012. He testified he had never discussed a total knee replacement for either of his knees at or after that time until his February, 2019 accident. He testified that after the October 15, 2012 visit, he had not had an orthopedic referral or physical therapy for his knees.

On cross-examination, Petitioner testified he filed two prior workers' compensation claims. His first claim was filed in the early 2000s for an injury to his back while working at Hicks Oil. The Arbitrator takes judicial notice that Petitioner's back claim was settled for 28.75% of a person as a whole. John Scholebo v. Hicks Oil Company; Case No. 02-WC-45289. In approximately 2007, Petitioner filed a second claim against his then employer, Hicks Oil, for a left meniscus tear that was surgically repaired. The Arbitrator takes judicial notice that Petitioner settled this claim for 25% loss of use of a left leg. John Scholebo v. Hicks Oil Company; Case No. 03-WC-55419. Petitioner testified he had arthroscopic surgery in the early 2000s to repair his left meniscus for a nonwork related injury.

Petitioner testified he started taking Hydrocodone in 2002. Since weaning off Hydrocodone in approximately 2017 or 2018, he has taken Ibuprofen and aspirin as needed for pain and another medication for his back pain.

Petitioner testified that on September 3, 2015 he told his primary care physician we was considering filing for social security disability for his back condition. He testified he had been diagnosed with arthritis before February, 2019 around the same time as his back surgery. He stated he had painful joints from the arthritis located in his back, shoulders and both knees since early 2000s for which he took medication. That prior to February, 2019, Petitioner had physical restrictions due to his back injury of no excessive standing or sitting and a 25-pound lifting restriction. He testified he retired from Hicks Oil after 30 years. Petitioner presented at arbitration with a cane and testified he was not cane dependent prior to his February, 2019 accident.

Respondent offered a video of the actual gate used by Petitioner on the date of accident. The video depicts a woman opening and closing the gate without difficulty. Petitioner viewed the video at arbitration and confirmed it depicted the gate he injured his knee on. Petitioner testified that the gate must have been altered after his accident because if the gate had been opened all the way it would not be able to close the way it did in the video. Prior to viewing the video, Petitioner testified on cross examination that the gate was three-quarters open. Petitioner testified that if the gate was pushed all the way open, you would never get it closed."

CONCLUSIONS OF LAW

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

Petitioner testified at arbitration that he was jumping on a stuck gate to get it closed when he felt a popping sensation in his left knee. Petitioner has given a consistent history of his claimed work injury during the course of his medical treatment. Further, the Section 12 physician, Dr. Nogalski, has acknowledged that the accident as described by Petitioner would have been capable of causing a strain type injury to Petitioner's left knee. Accordingly, the Arbitrator concludes Petitioner has met his burden of proof in showing there was a work-related accident to his left knee on February 12, 2019.

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

As to the issue of causation, the Arbitrator finds Petitioner's current condition of ill being is not causally related to the accident that occurred on February 12, 2019. The medical evidence supports Petitioner's left knee was symptomatic and a degenerative process of his pre-existing condition that predates his February 12, 2019 accident.

The Workers' Compensation Act is a humane law of a remedial nature that should be liberally construed to achieve its purpose. *Hagene v. Derek Polling Const.*, 902 N.E.2d 1269, 1273 (5d Dist. 2009). When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the pre-existing [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 pre-existing condition." *St. Elizabeth's Hospital v. Workers' Compensation Comm'n*, 864 N.E.2d 266, 272-273 (5th Dist. 2007).

The question of whether the Petitioner's claimed injury is related to a degenerative process of a pre-existing condition or an aggravation of that pre-existing condition, is a factual determination to be made by the Workers' Compensation Commission. *Roberts v. Industrial Commission*, 93 Ill.2d 532, 67 Ill. Dec. 836, 445 N.E.2d 316 (1983).

In this instance, there is no question Petitioner had extensive pre-existing arthritis in his left knee. In 2012, Petitioner's primary care physician noted that Petitioner was aware he needed a knee replacement, but that he was not ready yet. No medical records leading up to this 2012 office visit were introduced into evidence reflecting Petitioner's treatment or symptoms, if any, with regard to his left knee. Additionally, it was noted that Petitioner was performing janitorial work and Vicodin allowed him to function. Although Petitioner's primary complaint at that office visit was related to his chronic back condition, the reference to taking Vicodin was stated in the comment referring to his left knee. In 2014, Petitioner was assessed with osteoarthritis and an office note referenced worsening left knee and left hip pain. A second office visit in late 2014 noted Petitioner experienced bilateral knee and left hip pain.

In 2015, Petitioner complained of bilateral ankle and knee pain to his primary care physician. In late 2016, Petitioner reported taking 4 to 6 Hydrocodone pills daily and that he had been taking pain pills for his chronic back condition since 2002. In early 2017, Petitioner reported he was cutting back on Hydrocodone and was taking his wife's Naproxen intermittently. He also reported that he "eats his wife's Naproxen 500 mg 2 to 3 daily" and that he was, "eating his Hydrocodone early each month and that he feels that this provider contributed to it by giving him extra pills because he reported increased pain with his labor job". Petitioner requested Tramadol at that visit and further controlled medications were denied due to addiction history. Hydrocodone was discontinued and Naproxen 550 mg was prescribed.

The Arbitrator does not find Petitioner credible with respect to his history of left knee treatment and symptomology. Petitioner was asked on direct examination if he has ever had knee pain before February 12, 2019, to which his answer was "no". He was also asked on direct examination if he ever went to the doctor and said, "my knee hurts sometimes". Petitioner's answer was "no". When asked by his attorney if he ever mentioned to his treating physicians that his knees hurt him, Petitioner answered, "no, not since I – no, not since I had surgery on it years ago". Petitioner was asked on direct examination that if his pre-accident medical records recorded some knee problems, would those be inaccurate? Petitioner answered, "oh, no, no I didn't have nothing". When asked about a medical record dated June 10, 2015, wherein Petitioner complained of bilateral ankle and knee pain, Petitioner answered that that complaint was probably true. That when he was doing janitor work he probably just twisted his ankle or something and that was the end of that, it was no big deal. Although Petitioner admitted to having a prior medial meniscus surgery approximately 13 to 15 years ago, Petitioner testified that his knee has been "fine" since. Petitioner's testimony is inconsistent with the treatment records received into evidence. These symptoms and complaints as reflected in Petitioner's prior medical records are consistent with what one would expect from an individual with "bone on bone" arthritis in the left knee.

The Arbitrator finds Dr. Michael Nogalski's testimony to be more credible than the testimony of Dr. J.T. Davis. Dr. Davis testified that he never reviewed any medical records pertaining to Petitioner prior to his February, 2019 accident. He testified that Petitioner told him he was not having any complaints with his left knee prior to the February 12, 2019 incident. Dr. Davis testified that his entire opinion as to causation is based upon Petitioner's history that he gave him and his

assistant, Jeremy Palmer. Dr. Davis did not personally examine Petitioner until the last office visit on May 8, 2019, at which time surgery was discussed. Dr. Davis testified that his assistant, Jeremy Palmer, P.A., took Petitioner's history and performed the initial examination of Petitioner on March 1, 2019. Dr. Davis testified he did not have any additional information about Petitioner's accident other than what Mr. Palmer recorded in the office note. Dr. Davis testified he did not have any knowledge of when Petitioner last had symptoms in his left knee prior to February, 2019. Dr. Davis testified he was not aware that Petitioner discussed a total knee replacement with his primary care physician prior to February, 2019. Dr. Davis testified that tearing of the meniscus can occur with degenerative changes and there was no way to tell how long the tearing was present without comparing the recent MRI with a previous MRI. Dr. Davis testified he did not have a prior MRI for comparison in order to state whether Petitioner had a chronic, preexisting free edge tear versus an acute tear.

Dr. Michael Nogalski testified he reviewed Petitioner's medical records prior to the February, 2019 accident. Dr. Nogalski noted significant pre-existing degenerative arthritis in Petitioner's left knee that was superimposed on some pre-existing lumbar spondylosis issues. The pre-existing arthritis in the left knee was grade IV, which is the most severe level of arthritis. Grade IV arthritis is also referred to as "bone on bone" which means there is nothing protecting the bone in the knee joint. Dr. Nogalski reviewed the MRI of February 22, 2019, and did not identify any findings consistent with an acute injury to the left knee. Dr. Nogalski testified that assuming the accident occurred the way in which Petitioner described, Petitioner would have sustained a temporary strain to his already osteoarthritic knee. Dr. Nogalski testified that Petitioner was not still suffering from any effects of a strain when he saw him on May 22, 2019 and that he had returned to a baseline pre-accident condition. Dr. Nogalski further testified that the recommendation for a knee replacement was not related to Petitioner's work incident in February, 2019.

Based on the foregoing, the Arbitrator concludes that Petitioner's current condition of ill-being in his left knee is not causally related to the work accident of February 12, 2019, and that the opinion of Dr. Nogalski that Petitioner sustained a left knee strain as a result of the accident is credible.

<u>ISSUE (K)</u>: Is Petitioner entitled to any prospective medical care?

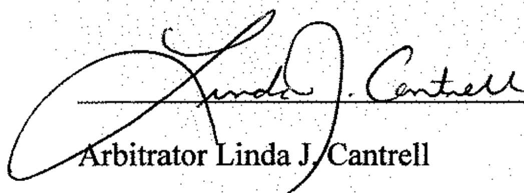
Based on the Arbitrator's finding that Petitioner's current condition of ill-being is not causally related to the injury, and the credible testimony of Dr. Nogalski, the Arbitrator finds that any need for a left total knee replacement or arthroscopy as recommended by Dr. J.T. Davis is related to a pre-existing condition and not the claimed work injury, and Respondent is not liable for Petitioner's medical care after Petitioner reached maximum medical improvement on May 22, 2019.

Accordingly, Petitioner's request for authorization of medical treatment for his left knee subsequent to May 22, 2019, including the knee replacement procedure or the arthroscopic surgery offered as a treatment option by Dr. Davis, is hereby denied.

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

Based on the Arbitrator's decision with regard to causation, the Arbitrator finds Petitioner is not entitled to temporary total disability benefits after May 22, 2019, the date Dr. Michael Nogalski opined Petitioner reached maximum medical improvement from his sprain injury resulting from his February 12, 2019 accident. Dr. Davis testified that he did not place any specific physical restrictions on Petitioner and that Petitioner was ordered off work on May 8, 2019 pending surgery. Dr. Davis testified that patients with the type of injury Petitioner suffered could typically work desk jobs on a light duty basis, but that he could not render that opinion in the instant case without reevaluating Petitioner. Petitioner did not return to Dr. Davis after his May 8, 2019 visit and there were no subsequent work orders entered after that date.

Respondent shall pay Petitioner temporary total disability benefits of $351.63/week for 12 weeks, commencing 2/14/19 through 5/22/19, as provided in Section 8(a) of the Act. Respondent is entitled to a credit for temporary total disability benefits pain in the amount of $5,525.93, pursuant to §8(j) of the Act.



Arbitrator Linda J. Cantrell

2/25/20

DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC023928
Case Name	FLYNN, LANCE v. KEURIG DR PEPPER INC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0179
Number of Pages of Decision	22
Decision Issued By	Deborah Simpson, Commisisoner

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Matthew Novak

DATE FILED: 5/13/2022

/s/Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lance Flynn,
Petitioner,

vs. NO: 19 WC 23928

Keurig Dr. Pepper, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

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

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

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $40,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

May 13, 2022

o5/11/22
DLS/rm
046

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC023928
Case Name	FLYNN, LANCE v. KEURIG DR PEPPER INC
Consolidated Cases	No Consolidated Cases
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Dennis OBrien, Arbitrator

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Matthew Novak

DATE FILED: 10/18/2021

THE INTEREST RATE FOR THE WEEK OF OCTOBER 13, 2021 0.05%

/s/*Dennis OBrien, Arbitrator*

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

LANCE FLYNN
Employee/Petitioner

Case # **19** WC **023928**

v.

Consolidated cases: ______

KEURIG DR. PEPPER, INC.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Springfield**, on **July 27, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **July 26, 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 $**46,999.68**; the average weekly wage was $**903.84**.

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

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

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

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**5,567.32** for other benefits, for a total credit of $**5,567.32**.

Respondent is entitled to a credit of **all amounts paid by its group health insurer** under Section 8(j) of the Act.

ORDER

Petitioner has proven that he suffered an accident on July 26, 2019 based upon repetitive trauma to his hands and wrists which arose out of and in the course of his employment by Respondent.

Petitioner's medical condition, bilateral carpal tunnel syndrome, is causally related to the accident of July 26, 2019.

Petitioner was temporarily totally disabled as a result of the accident from May 20, 2020 to August 3, 2020, a period of 10 5/7 weeks.

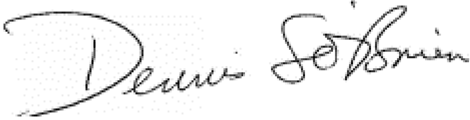
The medical bills introduced into evidence with treatment dates of June 20, 2019, July 12, 2019, July 26, 2019, September 5, 2019, May 7, 2020, May 20, 2020, June 4, 2020, June 17, 2020, July 29, 2020 and November 5, 2020 are related to Petitioner's bilateral carpal tunnel syndrome injuries, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in this accident and are to be paid pursuant to the medical fee schedule.

The medical bills introduced into evidence with treatment dates of January 11, 2019, April 12, 2019, August 23, 2019, September 8, 2019, August 18, 2020, January 7, 2021, January 21, 2021 and January 28, 2021 are not related to Petitioner's bilateral carpal tunnel syndrome injuries, and were not necessitated to treat or cure Petitioner's injuries suffered in this accident.

Petitioner sustained permanent partial disability to the extent of a 10% loss of use of the left hand and a 10% loss of use of right hand based upon his repetitive trauma injury causing bilateral carpal tunnel syndrome pursuant to §8(e) of the Act, resulting in an award of 38 weeks of permanent partial disability at $542.30 per week.

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

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



Signature of Arbitrator

OCTOBER 18, 2021

ICArbDec p. 2

FINDINGS OF FACT:

TESTIMONY AT ARBITRATION

Petitioner

Petitioner testified that he was a high school graduate, was currently employed by Respondent, and had worked for Respondent for 27 ½ years, since November 24, 1994. He said during that time he held different positions with the company, originally being hired as a merchandiser, a job he held for six months. That job entailed going to the receiving area of a grocery store, taking product off of four to six pallets, loading the product onto carts, pulling the carts onto the store floor, putting the product on the shelf, returning to the pallets and repeating that procedure until the load was completed. He would then move on to other grocery stores. He said during a day he would load 20 to 25 pallets of product, as he would unload four to five pallets per store and go to five to six stores on a daily basis. He said the amount did vary depending on sales and on the time of the year, with larger quantities being unloaded at major holidays such as Thanksgiving, Christmas and New Years. He said the product he would unload and shelve at a typical store would be one to three pallets of 12 packs of cans, a pallet of 2 liters, and a pallet of mixed water, Snapple and other brands. Some of the bottles would be plastic while others would be glass, though more plastic than glass. To unload the product from a pallet he would unwrap the pallets, as they were covered in shrink wrap. He would scan everything one to two cases at a time, he would put 50 to 60 cases on a cart, unwrap everything, taking them out of boxes, with eight 2 liters per case, four six packs of half liters per case, and two 12 pack cans per case. Once the cart was loaded he would pull it to the floor and put everything out on the shelf, one case at a time. To do that he would grasp each boxes of cans with one hand at the end of the box with his hand in a "C" shape or a "reverse C" shape. In loading the cart and shelving the items he said he handled every box twice. He said the shelves were of different heights, with 12 and 24 packs going on the three foot high floor shelf, the half liters going on the chest to mouth heigh shelves and the 2 liters going on the top shelf.

Petitioner estimated a pallet of cans in total weighed 1,000 to 1,500 pounds, with 96 cases on a pallet of cans. He thought a pallet of plastic bottles would weigh approximately 800 pounds, with 40 cases of 2 liters, each case having eight bottles. He said there were 42 cases of half liter bottles on a pallet, with four per case. He said while working as a merchandiser the unloading was his only task, and that other than time spent driving from one store to the next, about 15 minutes per store, he performed it from the beginning to the end of his work day, a period of 8 to 10 hours, six days per week, with a seventh day being overtime. He said he was the only hired merchandiser for his area at that time.

Petitioner said he was promoted to driver after six months, in about May of 1995, driving a semi. He said he was a driver for about 8 to 9 years. In that position he go to the warehouse at 3:30 to 4 in the morning, His truck was a side loader, meaning they had eight bays which were five feet high. You opened the doors to the bays by pulling them with a strap, lifting up on the strap and then stepping up onto the edge of the truck to push it the rest of the way open, with the door going overhead, inside the truck. He said as a driver he went to grocery stores, convenience stores, Walgreens, CVS, anywhere soda was sold. He had the Decatur area for a

couple of years and then was promoted to the larger Springfield route, where he worked for about a year. He then spent the rest of his time as the Jacksonville driver, as that was their largest route, going from the west side of Springfield to the Illinois River. He worked seven days a week as a driver, five driving the truck and the other two performing merchandising work as they did not have sufficient coverage for merchandisers. When driving he would work close to 12 hours per day, sometimes over 14 hours.

As a driver he would open all of the heavy bay doors, which were similar to an old style garage door, and unload what was being delivered to an account, manually unloading and stacking 30 to 400 cases onto the ground and then loading product onto a hand cart and wheeling it inside, where it was counted by a receiver. He would then take the hand cart out onto the store floor and manually put everything away. He said some stores, like Cub Foods, would have a massive sale of 12 packs and he would have eight pallets to hand stack onto eight wooden pallets on the ground and then pallet jack and pull into the store to fill the shelves. He said he also would fill coolers up in the front of the stores, grabbing two at a time to fill the cooler. He said if he was shelving 40 cases of 2 liters he would be putting up 320 bottles in one store at one time, holding the case of 2 liters in one arm while using the other hand to put the bottles on the shelves. Altogether he estimated that in a day he would be putting between 10,000 and 15,000 pounds of product into stores daily.

Petitioner testified that after eight years as a driver he was promoted to sales in 2003, the same position he held as of the date of arbitration. In his sales position he no longer drives a truck to the stores, he drives his own personal vehicle, again to all grocery stores, convenience stores, Save-A-Lot stores, Walgreens and CVS, as well as to every gas station in his entire area, which is all of Logan County, all of DeWitt County and portions of Macon and Sangamon Counties, as he is the only salesman in those areas. Upon arrival at one of the stores he first works the merchandise which is in the back of the store. They may have had stock delivered on Saturday which was to be shelved by a merchandiser on Sunday, but that would be the only day the merchandiser would be in the store, so Petitioner would stock shelves and fill coolers from product which had been in the back of the store, get his next order from the store, discuss with management if there was to be a sale or display change and make any display changes. Several of his stores do not have a merchandiser assigned to them, so Petitioner said he would work the loads the driver delivered to those stores. The driver would deliver every two days and put out half of the product and Petitioner would come in the next day and shelve the second half of the product, as well as get the next order.

Petitioner said that how much product he stocks at a grocery store varies, but it would average between 300 and 400 cases, with 250 to 275 cases being cans and the remainder bottles. There was some confusion as to whether a case of cans weighed 9 or 18 pounds, but he said a case of half liter six packs weighed approximately 25 pounds, a case of 2 liter bottles weighed 33 to 34 pounds, while a case of YooHoo weighed close to 40 pounds. Case of water, depending on the size of the bottles, weighed between 20 and 32 pounds per case. He said the bigger stores would be 100 to 300 cases and the other stores were less but still totaled 300 to 500 cases per day, every day.

Petitioner testified that everything he did at the stores as a salesman required the use of his hands to lift product and fill shelves. He said that he has cut back his work to sometimes getting weekends off at present, but from 2003 until July of 2019 he was working seven days a week most of the time, from 4:30 in the morning until 6:30 at night at times. He said his boss expected him to work weekends if that was what was necessary to

care for his stores. He said during a day he would spend about two and-a-half hours in his car driving from store to store with six to seven hours of merchandising.

Petitioner said he began noticing symptoms in his hands in mid-June of 2019 while driving. He had just filled a County Market store up with product and had made an order and was driving from Springfield to Lincoln when his hands became numb and were tingling. He thought that weird and did not know what was causing it. He said he was on the clock when this occurred. He said he told his bosses about the tingling and that he did not know what was causing it. He said he continued working as he had before and on June 20, 2019 saw his primary care physician, Dr. Pittman, who ordered an MRI of his cervical spine. Petitioner said that a few weeks earlier he had done something, perhaps pulled a muscle, in his neck and it was painful with movement and lifting cases, so he used a heated collar. So when his hands started tingling he though he might have a pinched nerve and went to the doctor. He had the MRI on July 5, 2019, reviewed that with Dr. Pittman on July 12, 2019, and then Dr. Pittman ordered an EMG and nerve conduction study, which was performed by Dr. Gelber on July 26, 2019. Petitioner said that revealed moderately severe bilateral carpal tunnel syndrome.

Petitioner said he was sent to Dr. Greatting who he saw on September 5, 2019. He was still working his regular duties as a salesman at that time. He said he explained his work duties to Dr. Greatting in detail, Dr. Greatting examined him and reviewed the EMG, and at that first visit Dr. Greatting recommended surgery. Petitioner said the surgery was not approved, however. He was then sent by his employer to see Dr. Rotman in St. Louis in January of 2020, Petitioner testified that he had continued to perform his work as a salesman through the time he saw Dr. Rotman, in fact he performed those duties through May of 2020, and his symptoms had not gone away during that period of time.

Petitioner was seen by Dr. Greatting again on May 7, 2020, and Petitioner said Dr. Greatting again recommended surgery. Right carpal tunnel surgery was performed by Dr. Greatting on May 20, 2020, and Petitioner was taken off work at that time. The left carpal tunnel surgery was performed on June 17, 2020 and Petitioner continued to be off work following that surgery. Petitioner said that two or three weeks after the second surgery his hands were still weak and tender, but the numbness and tingling had improved. He said that when seen by Dr. Greatting on June 29, 2020 he continued to be kept off work, but he was released to return to work on August 4, 2020, and he did so on that date. He said when he returned to work his hands felt worn out and the volume of cases had doubled over the previous year and continue to be at that level as of the date of arbitration.

Petitioner testified that he had one last visit with Dr. Greatting on November 5, 2020, and that time Dr. Greatting released him as being at maximum medical improvement. He had not seen Dr. Greatting since that date.

Petitioner said that as of the date of arbitration he was still performing the same salesman job he had done since 2003. He said that prior to COVID a record month was 13,000 cases for his route, but in the four months prior to arbitration he was averaging 20,000 cases a month, probably because people were not going out to eat as much as they had in the past, as they were concerned about getting it. Petitioner said that as of the date of arbitration his hands still bothered him, they ached, and sometimes he took Ibuprofen in the morning because they hurt. He said he works 12 to 13 hours a day in the first three or four days of the week and when he would get off work they hands would ache and hurt when he did almost anything. He said the bottom of his palms and

the edge of his wrist hurt. He said that occurred daily and that Ibuprofen helped take it away. He said he did not take Ibuprofen prior to noticing the symptoms in July of 2019.

Petitioner testified that he was still able to perform all of his work duties, he just worked through the pain. He said that he currently had a lot less grip strength, he could not unscrew a jar at home, his wife or son did that task. He said he has learned to drive with his hands underneath the steering wheel because if he held them at the 10 and 2 positions on the steering wheel the compression made the hands ache. He said his only hobby was fishing and that he was able to fish.

Petitioner said he considered his job to be laborious. He described the geographic parameters of his territory and said that he had three large stores he serviced in Springfield. He said Mondays, Tuesdays and Wednesdays were the most laborious days of work, with merchandising product left over from the weekends without the assistance of merchandisers, as most of the merchandisers are kept at the city stores. He said his company had five merchandisers for Central Illinois while Pepsi and Coke had between 15 and 20. He said when he got home on Mondays, Tuesdays and Wednesdays, that was when he hurt the most and had to take Ibuprofen.

Petitioner said it was now hard to grab and turn a screwdriver, that holding and pushing down on a drill caused him to hurt, and he could not do the twisting with a nutdriver or screwdriver. He said driving bothered him, and even giving his wife a one minute back rub caused him to hurt.

On cross-examination Petitioner said that prior to his leaving the County Market store and driving to Lincoln in June of 2019 he had never noticed numbness and tingling in his fingers, that it came on all of a sudden. He said there had been no traumatic incident such as a fall onto his hands that day. He said that even as a salesperson between 2003 and 2019 he was moving more product than he had as a merchandiser in his first six months with the company, and that his years as a truck driver were similar to or more than he moved as a salesman, for as a truck driver he would also work merchandise on weekends, although without the records of the company it was hard to say.

Petitioner said he smoked from the time he was sixteen until 2017, when he was in his early 40's, and that he gained 40 pounds after quitting smoking. He said ten pounds of that occurred when he was off work due to an injury involving a piece of metal in his hand, the rest was gained after ceasing to smoke. He said his doctors warned him that gaining weight could lead to diabetes, and when asked if he eventually developed Type 2 diabetes Petitioner said he did not currently have diabetes and had never been on any medications for diabetes, that he was told he had borderline diabetes and he did more dieting, eating differently. He said the doctors talked to him about being prediabetic or diabetic in 2018 or 2019, about the same time they talked to him about his blood pressure being high. He said the doctor put him on high blood pressure medication.

Petitioner agreed that his weight gain, pre-diabetes or diabetes and his high blood pressure all came on between 2017 to 2019, and that he had not had any carpal tunnel symptoms in the 25 years he worked for Respondent prior to 2019.

On re-direct examination Petitioner said he had testicular cancer in 1996 or 1997 and that worried him in later years as he had seen many people, including relatives, get lung cancer, so he and his wife both quit smoking within a month of each other. He said no doctor had ever diagnosed him with diabetes. He said his

blood pressure medication was managed with medication as it was pretty normal when tested, and that he had not had any significant health issues as a result of high blood pressure. Petitioner indicated that the piece of metal which was in his hand was in the web between his thumb and index finger, not on the palm side of his hand or in the wrist area. He said the surgery to remove that piece of metal caused tingling in his thumb for a month or so, which the doctor said was normal.

On recross examination Petitioner said he understood that his A1C test result was an indicator for diabetes, and that if the medical record had a diagnosis of Type 2 diabetes mellitis, he did not have medical knowledge to challenge that conclusion, but noted that he was told that if he went to a dietician and ate healthier that could drop it, which is what he did. He said he had never taken any medication for diabetes.

MEDICAL EVIDENCE

Respondent introduced medical records which pre-dated the claimed accident date. A Patient history & Review of Systems form, filled out in handwriting on June 5, 2018 contains no facts or complaints which appear to be relevant to this claim. It is noted that the form, apparently filled out or reviewed and signed by Dr. Pittman only notes Petitioner's brother having diabetes, not Petitioner. An Annual Examination Medical History Update form dated August 10, 2019, again apparently signed by Dr. Pittman, also does not appear to contain any information relevant to this claim (RX 3)

An office note of Nurse Practitioner (NP) Carney of November 29, 2018 reflects it was for high blood pressure evaluation and it likely being related to his weight gain. Medication was prescribed to control the blood pressure at this visit. It is noted that he had an elevated A1C and was to see a dietician the following day. The list of 20 active problems in this note included Type 2 diabetes mellitus. (RX 3)

Dr. Pittman saw Petitioner on January 11, 2019 for hypertension, anxiety and chronic GERD. Also on the list of problems was "History of elevated blood sugar and diabetes: We'll follow-up at subsequent visits." Physical examination on this date of the extremities noted no abnormalities. On this date there was a 21 item list of active problems and it again included Type 2 diabetes mellitus. (RX 3)

NP Carney saw Petitioner again on April 12, 2019 for hypertension. No mention of diabetes was made on this occasion other than the 21 item list of active problems. (RX 3)

Petitioner saw his primary care physician, Dr. Pittman, on June 20, 2019. Petitioner told the doctor that his hands had been going numb for the past couple of weeks when holding his hands outstretched, and that it was more bothersome while driving. He did not have any weakness of his hands at that time but he did have some pain in his upper neck if it was in a certain position as well as pain from shoulder blade to shoulder blade. His physical examination on that date was objectively normal. Cervical spine x-rays were performed on that date and showed only mild degenerative disc space narrowing at C6-7. An MRI of the cervical spine was performed on July 5, 2019 and was interpreted as only showing mild degenerative disc disease from C3 through C6 with no stenosis observed. (PX 2 p.4-6,11; RX 3)

Following a visit with Dr. Pittman on July 12, 2019 to discuss the MRI results, Dr. Gelber performed an EMG/Nerve Conduction Study on July 26, 2019 due to Petitioner's bilateral hand numbness that had raised the question of possible carpal or cubital tunnel syndrome. The nerve conduction studies showed prolonged median sensory and motor distal latencies bilaterally and diminished right median sensory and left median motor

amplitudes. The EMG testing indicated an increase in amplitude and duration of motor units in the abductor pollicis brevis bilaterally. Dr. Gelber's impressions after his testing were moderately severe bilateral carpal tunnel syndrome with no evidence of ulnar or radial neuropathy or cervical radiculopathy. (PX 2 p.7,14,15,17; RX 3)

Petitioner saw Dr. Greatting on September 5, 2019, with complaints of bilateral hand pain, numbness and tingling. Dr. Greatting took a very detailed history of the type of work Petitioner performed including the numbers of units Petitioner loaded and unloaded and shelved. He said Petitioner described having his hands held in a flexed position with his fingers flexed while manipulating the various products he worked with. Dr. Greatting noted that Petitioner said that while doing these activities he noticed the symptoms in his hands. During the physical examination on that day Dr. Greatting found Petitioner to have good range of motion of the forearms, wrists and hands with intact sensation to light touch at the tips of the fingers. He was found to have negative Tinel's but a positive compression and Phalen's tests at both carpal tunnels. Ulnar testing was normal. He noted Dr. Gelber's EMG/nerve conduction study showed moderately severe bilateral carpal tunnel syndrome and he diagnosed Petitioner on September 5, 2019 to have chronic bilateral carpal tunnel syndrome. He recommended bilateral carpal tunnel release surgeries, right followed by left. Dr. Greatting noted that based on the history Petitioner provided to him Petitioner's work activities were significantly repetitive and forceful and had been done over a period of many years and he felt those activities had either contributed to the development of his bilateral carpal tunnel syndrome or had been a significant factor in accelerating or aggravating the symptoms of his bilateral carpal tunnel syndrome to the point where surgical treatment was recommended. (PX 2 p.18,19)

Petitioner was seen by Dr. Pittman on September 6, 2019 and he, too, noted Petitioner's bilateral carpal tunnel diagnosis and said Petitioner's symptoms had arisen from his many years of moving and carrying heavy loads of soda and other liquids, and that he required surgery. He noted that Petitioner was continuing to move, lift and transfer bottles of soda and other liquids throughout the day and that this was apparently a causative factor in his current symptoms. (PX 2 p.22)

Petitioner returned to see Dr. Greatting on May 7, 2020. His physical examination was unchanged, and he continued to have positive compression and Phalen's tests bilaterally. Surgery was discussed and was to occur. (PX 2 p.67)

Dr. Greatting performed a pre-operative physical upon Petitioner on May 8, 2020 He found intact sensation to light touch at the tips of the fingers, intact motor function without weakness or atrophy in the radial, median and ulnar nerve distributions of both arm, and a negative Tinel's but positive compression and Phalen's tests at both carpal tunnels. (PX 2 p.63)

Dr. Greatting performed a right carpal tunnel release surgery on Petitioner on May 20, 2020. He noted that during the surgery he found an area of narrowing and compression of the median nerve directly in the middle third of the transvers carpal ligament. That area was released during the surgery. (PX 2 p.59)

Petitioner was seen by Dr. Greatting in preparation for surgery on May 29, 2020. He was continuing to have chronic numbness and tingling in both hands and the thumbs through ring fingers, but not the small fingers. He noted the symptoms had been getting worse over time. Physical examination on that date revealed intact sensation to light touch at the tips of the fingers and intact motor function without weakness or atrophy in

the radial, median and ulnar nerve distributions of both arms, and a negative Tinel's but positive compression and Phalen's tests at both carpal tunnels. (PX 2 p.52)

On June 4, 2020 Petitioner was seen in postoperative followup for the right carpal tunnel release. Petitioner said he was doing very well and his numbness and tingling had essentially resolved. He was given TheraPutty to use at that time. (PX 2 p.49)

On June 16, 2020 Dr. Greatting issued a health status form indicating that due to the scheduled carpal tunnel surgery the next day Petitioner would be unable to lift over 5 pounds and could not do any forceful or repetitive gripping, pushing or pulling with the left hand for four weeks. (PX 2 p.48)

Dr. Greatting performed a left carpal tunnel release surgery on Petitioner on June 17, 2020. During the surgery he noted an area of narrowing and compression of the median nerve directly under the middle third of the transverse carpal ligament with some increased vascularity of the nerve in the area of the compression. This area was released during the surgery. (PX 2 p.43)

Petitioner saw Dr. Greatting on June 29, 2020 and noted that the numbness in both of his hands had improved, that his right hand was doing pretty well, though he still felt he had some mild weakness. Petitioner advised the doctor that he had some left forearm pain on the lateral aspect of the forearm with activities which required wrist extension. Dr. Greatting felt he might have some irritation or compression of the posterior interosseous nerve which would have to be observed and re-evaluated. Petitioner was told to remain off work, that if he was doing well when re-evaluated in a month he would likely be released to work without restrictions. (PX 2 p.39)

Petitioner returned to see Dr. Greatting on July 29, 2020 and advised the doctor that the right side was doing very well but that on the left side he felt he was already having some recurrent symptoms in the median nerve distribution, waking occasionally at night. Petitioner felt his strength was good, however. Physical examination at that time was normal. Dr. Greatting recommended continued observation of the symptoms in the left hand as there was still potential for them to improve or resolve. It was noted that Petitioner was to return to full duty work activities August 3, 2020. (PX 2 p.35,36)

Petitioner returned to see Dr. Greatting on November 5, 2020. He reported that the residual ongoing symptoms he had when last seen had essentially resolved, he felt his strength was good and he said he was doing all of his normal work and non-work activities without any difficulty. Dr. Greatting noted that Petitioner's physical examination showed him to have a negative Tinel's over both carpal tunnels and good strength in the median nerve distribution bilaterally. Petitioner was able to use his arms and hands without restrictions and Dr. Greatting released him from his care at maximum medical improvement. (PX 2 p.73)

DEPOSITION TESTIMONY OF DR. MARK GREATTING

Dr. Greatting was deposed as a witness by Petitioner and testified that he was a board certified orthopedic surgeon with a subspecialty in hand surgery. He said his practice was 100% in regard to the upper extremities, and that he performed 600 to 700 upper extremity surgeries annually, including 150 to 200 carpal tunnel surgeries. (PX 4 p.8,9)

Dr. Greatting testified in regard to the histories received, physical examinations observed and treatment provided byminself and his nurse practitioner to Petitioner commencing on September 5, 2019 through July 29, 2020, and his testimony was consistent with the medical summary, above, and will not be repeated. (PX 4 p.10-19)

Dr. Greatting testified that in his opinion, based on his understanding of Petitioner's job activities, those activities had either contributed to the development of or the aggravation or acceleration of symptoms related to Petitioner's carpal tunnel syndrome. Dr. Greatting said he would have kept Petitioner off work as of the date of the first surgery, May 20, 2020, that his off work status would have been extended at his June 4, 2020 office visit, and that on June 16 he filled out a form noting Petitioner was having carpal tunnel release surgery on June 17, 2020 and would be unable to lift over 5 pounds or do any forceful or repetitive gripping, pushing, or pulling with the left hand for four weeks after that surgery. He said he extended his time off work when he saw Petitioner on June 29, 2020 following that second surgery, noting he was to remain off work until he was reevaluated in a month. He said when he examined Petitioner on July 29, 2020 he released him to work without restrictions effective August 3, 2020. He anticipated seeing Petitioner again on November 5, 2020 at which point it was likely he would be at maximum medical improvement. (PX 4 p.14-20)

Dr. Greatting testified that his opinion that Petitioner's bilateral carpal tunnel conditions were causally related to Petitioner's work duties was based on the job sounding sufficiently repetitive and forceful to contribute to the development of carpal tunnel syndrome. (PX 4 p.20,21)

On cross examination Dr. Greatting said that Petitioner's treatment had been routine and he had made an essentially full recovery, pending his last visit in November. (PX 4 p.21,22)

Dr. Greatting said his entire understanding of Petitioner's job duties were outlined in his September 5, 2019 report and in his testimony on direct examination, and came solely from Petitioner. He said he typically asks the patient to describe their job in some degree of detail if they think it is work related, and he then puts that information in his report. It was his understanding that Petitioner had been performing the same job for 16 or 17 years prior to his seeing him, with no recent change in his job duties being described. (PX 4 p.22-24)

Dr. Greatting said he did not believe sleeping can cause carpal tunnel syndrome, but it can provoke the symptoms of the disorder, make the symptoms manifest themselves., but not make the condition worse. He said an activity causing symptoms did not necessarily mean the activity was making the underlying disease process worse. He said if a person only occasionally lifted things throughout the day, that would not be sufficient to aggravate the underlying condition. (PX 4 p.24,25)

Dr. Greatting agreed that obesity is a risk factor for developing carpal tunnel disorder, as is diabetes. He said the most common risk factors were being female and over the age of 50, and that after that he could not rank them, but he suspected diabetes and obesity would be towards the top of the rankings. He said there were studies which indicated that high blood pressure was a risk factor for carpal tunnel disease. He said a person with three risk factors, obesity, diabetes and hypertension, would be at higher risk than a patient without those conditions, but there were many patients who had those three risks that did not have carpal tunnel syndrome. (PX 4 p.26,27)

Dr. Greatting testified that it would be unusual for a patient to have a sudden onset of carpal tunnel syndrome absent trauma. He said he would categorize Petitioner body mass index as placing him in the mildly obese category. (PX 4 p.29,30)

On redirect examination Dr. Greatting said that not all obese people ultimately develop carpal tunnel syndrome, nor do those who are diabetic or hypertensive. He said having those conditions does make a person more susceptible for the development of the condition. He said Petitioner's weight gain did not change his opinions in regard to causation. (PX 4 p.33,34)

On recross examination Dr. Greatting said that not everyone who worked in the same job as Petitioner developed carpal tunnel syndrome. (PX 4 p.34)

DEPOSITION TESTIMONY OF DR. MITCHELL ROTMAN

Dr. Rotman was deposed as a witness for Respondent. He testified that he was a board certified orthopedic surgeon with an added certification in hand surgery. He said he performed an examination of Petitioner at Respondent's request on January 13, 2020. He said he took a history from Petitioner of being a sales manager for Respondent, being right handed, and having some numbness and tingling in his hands. Petitioner noted that he had gotten his neck worked up due to pain which eventually went away and had nerve studies performed which indicated some pretty significant carpal tunnel. Dr. Rotman said he knew Petitioner's past surgical and prescription drug history and that neither were of any significance in relationship to carpal tunnel syndrome. (RX 1 p.6-9)

Dr. Rotman said he received a pretty detailed work history from Petitioner which appears similar to his testimony at arbitration and as given to Dr. Greatting with the exception of Dr. Rotman recording that Petitioner drove for about half of his work day. Dr. Rotman said he also reviewed medical records from Springfield Clinic which included nerve studies and a job description. He said the records showed Petitioner had a BMI of 31.78, which he felt was pretty significant. Dr. Rotman said he himself had carpal tunnel and that when he gained weight it became pretty bad and when he lost weight it got better. He said the fat and water in the hands increased pressures, especially at night when you lie down, as the water in the legs goes to the hands, making it worse. He said Petitioner also had an elevated A1C hemoglobin, meaning he was on his way to getting diabetes, which is one of the big risk factors for carpal tunnel syndrome, along with obesity. (RX 1 p.10-13)

Dr. Rotman said the nerve studies of July 26, 2019 showed pretty severe carpal tunnel, he agreed with Dr. Gelber's assessment. He also reviewed Dr. Greatting's medical records and said any orthopedic surgeon who saw nerve study numbers such as these would recommend surgery as it was pretty advanced and the only way to relieve the problem would be with surgery. Dr. Rotman said he reviewed a job description for Petitioner's position and it was consistent with what Petitioner had described to him. (RX 1 p.13,14)

Dr. Rotman said he performed a physical examination on Petitioner, and found him similar to himself, on the obese side. He said his grip and pinch strengths were okay, that he did not have atrophy, which was good considering the advanced nature of his carpal tunnel condition. Petitioner had positive median nerve compression tests bilaterally, all of which were findings for carpal tunnel. He said the median nerve was tested

by flexing the wrists all the way and pressing pretty hard on the median nerve with the thumb, causing numbness if it is carpal tunnel syndrome. (RX 1 p.14,15)

Dr. Rotman said that after taking the history, reviewing the medical records and performing his evaluation of Petitioner he was of the opinion that Petitioner had advanced bilateral carpal tunnel syndrome. He was also of the opinion that the condition was not caused by Petitioner's employment, that it was idiopathic, meaning its cause was unknown. He noted there were lots of reasons for the ligament to become thicker including diabetes and getting older. He said for work to be a factor the work would have to be pretty hand intensive and continuous throughout the day. He was of the opinion Petitioner's job was not that bad as most people could not work with the nerve study numbers he had. He believed Petitioner had frequent rest, and was driving for half the day, splitting his work up 15 times per day, resting while driving. He said Petitioner was not squeezing the items which he was putting on the shelf as doing so would dent the cans. Dr. Rotman felt this was actually a protective type of job, a good job for somebody with carpal tunnel. (RX 1 p.16-18)

Dr. Rotman was of the opinion that Petitioner needed carpal tunnel surgery and would be completely restricted from work for a couple of weeks and then have a 5 pound restriction for two weeks, and then 10 pound restriction for two weeks, so by six weeks the first hand would be at full duty. By doing the second hand surgery two weeks or three weeks after the first, Petitioner would be at full duty work eight weeks or so after the first surgery. (RX 1 p.18,19)

On cross examination Dr. Rotman said he only saw Petitioner on that one occasion, January 13, 2020. Dr. Rotman said that the complaints made to him were basically the same he had made to his treating physicians, except his neck complaints had resolved. The work description given to him was also similar to that given to his treating physician. He said Petitioner advised him that he worked 10 to 13 hours per day and that he lifted various bottles and cases that weighed between 9 and 32 pounds, lifting, moving, and organizing several hundred products each day. He said Respondent had not provided him with any information which would dispute that information. He agreed that Petitioner had said the numbers would increase and even double during holidays. Dr. Rotman agreed that Petitioner's job was repetitive and did at times require him to lift heavy weights. (RX 1 p.20-22)

Dr. Rotman agreed that not all carpal tunnel was idiopathic, and that not everyone Petitioner's age or weight had carpal tunnel. Dr. Rotman would not characterize Petitioner as even being pre-diabetic, saying he would defer to Petitioner's primary care provider. Dr. Rotman said the written job description he saw for Petitioner did not note the weights Petitioner would have been working with nor the number of cases of product he would have to move on a daily basis, it was just a generalized job description. He said he had not viewed a video of either Petitioner or anyone else performing these tasks. Dr. Rotman said he did not know what Petitioner's wrist and hand positioning would have been when lifting the various products. He did not believe Petitioner would have to grasp cans or bottles hard to put them on a shelf. He said Petitioner did not describe building displays at stores to him. He said he had not reviewed any ergonomic assessment of the work. (RX 1 p.22-26)

Dr. Rotman did not dispute Petitioner's having bilateral carpal tunnel syndrome or needing surgery for that, and he believed the testing and treatment Petitioner had received was reasonable and necessary. (RX 1 p.26)

Dr. Rotman was directed to a portion of his report where he stated he "did not see that his work meets specific criteria to be an aggravating factor for his bilateral, idiopathic, advanced carpal tunnel condition. He testified the criteria he was referring to was prolonged heavy gripping with or without vibration, with or without awkward wrist positions. By prolonged he meant holding something for prolonged repetitive heavy gripping, holding something hard, for more than a few seconds, repetitively, 50 percent of the day, assembly line type work. When asked if there was medical literature to support that opinion Dr. Rotman said the medical literature was inconclusive, that what he had said was his opinion based upon "just a rule of thumb over the last 30 years." (RX 1 p.26,27)

Dr. Rotman said that over 90 percent of his independent medical examinations were performed for respondents, and he performs five a week. (RX 1 p.27,28)

On redirect examination Dr. Rotman said his opinion on causation was based at least in part on Petitioner's description to him of his lifting. He said carpal tunnel is the most common condition he treats and the most common surgery he performs, that he had been treating carpal tunnel for 30 years. (RX 1 p.29,30)

OTHER EVIDENCE

Respondent introduced a job description for its "Pre Sell Manager," which would appear to be Petitioner's formal job title in the position he held for numerous years prior to July 26, 2019 and at the time of the arbitration hearing. This document includes items which would appear to include the movement onto the floor and the shelf stocking of product testified to by Petitioner including:

- "Ensure 100% distribution in all assigned accounts of all authorized brands and packages."
- "Maintain adequate store inventories in each account at all times."
- "Address and solve quickly and effectively every problem as it arises."
- "Manage allocated space properly to maximize sales."
- "Achieve established sales objective."
- "Fill cooler from shelf."
- "Fill shelf from backstock, following rotation guidelines."
- "Fill and build displays from backstock."
- "Clear aisles of product and boxes and condense backstock."

There are numerous other non-physical laboring duties as well, mainly paperwork and relationship building activities with store management and communication with Respondent in regard to business matters. (RX 2)

ARBITATOR'S CREDIBILITY ASSESSMENT

Petitioner's testimony was clear, understandable, and his description of his work did not appear to be exaggerated at all. His description of numbers of motion he would have made in performing his duties was consistent with the histories given to Dr. Greatting and to Dr. Rotman, and it was also consistent with Respondent's written job description for the position. No evidence was admitted to contradict Petitioner's description of his duties or how he performed those duties. Petitioner did not appear to exaggerate his physical

pain and other symptoms, and his complaints at arbitration appeared to be consistent with objective test results and physical examination findings of both Dr. Greatting and Dr. Rotman. The Arbitrator finds Petitioner to have been a credible witness.

The physical findings of Dr. Greatting and Dr. Rotman were quite similar, and both were consistent with the nerve study results of Dr. Gelber. Their opinions differed, but both physicians appeared to state their opinions honestly. Neither doctor attempted to evade answering questions put to them and neither was argumentative, they appeared to simply state facts in regard to their examinations and opinions as they believed them. Both are found to have been credible witnesses.

CONCLUSIONS OF LAW:

In support of the Arbitrator's decision relating to whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent on July 26, 2019, and whether Petitioner's current condition of ill-being, bilateral carpal tunnel syndrome, is causally related to the accident of July 26, 2019, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

Petitioner's testimony, which was consistent with histories given to Dr. Greatting, Dr. Rotman and with his written job description, clearly shows that for numerous years prior to July 26, 2019 Petitioner had performed an extremely hand-intensive job. As described by Petitioner, in his role as a sales person he would stock different amounts of product at different grocery stores, but it would average between 300 and 400 cases, with 250 to 275 cases being cans and the remainder bottles. A 12 pack of cans weighed approximately 9 pounds, a 24 pack would weigh 18 pounds, a case of half liter six packs weighed approximately 25 pounds, a case of 2 liter bottles weighed 33 to 34 pounds, and a case of YooHoo weighed close to 40 pounds. Cases of water, depending on the size of the bottles, weighed between 20 and 32 pounds per case. He said the bigger stores would be 100 to 300 cases with the other stores being less, but he would still shelve 300 to 500 cases per day, every day.

Petitioner testified that from 2003 until July of 2019 he was working seven days a week most of the time, from 4:30 in the morning until 6:30 at night at times. He said his boss expected him to work weekends if that was what was necessary to care for his stores. He said during a day he would spend about two and-a-half hours in his car driving from store to store with six to seven hours of merchandising. He said if he was shelving 40 cases of 2 liters he would be putting up 320 bottles in one store at one time, holding the case of 2 liters in one arm while using the other hand to put the bottles on the shelves. He said he also would fill coolers up in the front of the stores, grabbing two bottles at a time to fill the cooler. Petitioner said that to stock the shelves he would grasp each boxes of cans with one hand at the end of the box with his hand in a "C" shape or a "reverse C" shape. He said the shelves were of different heights, with 12 and 24 packs going on the three foot high floor shelf, the half liters going on the chest to mouth heigh shelves and the 2 liters going on the top shelf.

Dr. Greatting testified that in his opinion, based on his understanding of Petitioner's job activities, those activities had either contributed to the development of or the aggravation or acceleration of symptoms related to Petitioner's carpal tunnel syndrome. Dr. Greatting went on to testify that his opinion that Petitioner's bilateral carpal tunnel conditions were causally related to Petitioner's work duties was based on the job sounding sufficiently repetitive and forceful to contribute to the development of carpal tunnel syndrome.

Dr. Rotman testified that that while he was of the opinion that Petitioner had advanced bilateral carpal tunnel syndrome, he was also of the opinion that the condition was not caused by Petitioner's employment, that the condition was idiopathic, meaning its cause was unknown. He noted there were lots of reasons for the ligament to become thicker including diabetes and getting older. He said for work to be a factor the work would have to be pretty hand intensive and continuous throughout the day. He was of the opinion Petitioner's job was not that bad as most people could not work with the nerve study numbers he had. He believed Petitioner had frequent rest, and was driving for half the day, splitting his work up 15 times per day, resting while driving. He said Petitioner was not squeezing the items which he was putting on the shelf as doing so would dent the cans. Dr. Rotman felt this was actually a protective type of job, a good job for somebody with carpal tunnel.

Dr. Rotman's understanding of the job is in conflict with Petitioner's testimony as Petitioner did not testify that he drove half of his work day, Petitioner testified he drove from store to store about two and-a-half hours per day while performing six to seven hours of merchandising. Dr. Rotman did not appear to understand how Petitioner physically picked up, manipulated and set down the hudreds of cases of product daily, discounting how hard he would grasp the product. Picking up a box of 12 or 24 cans of soda with one hand, or even two, would require a firm grasp of the box or it would be dropped. He was not lifting one can, which could dent, as imagined by Dr. Rotman, but boxes where the ends of the cans could be squeezed in the "C" or "reverse C" method described by Petitioner. Lifting a 9 or 18 pound box of cans as demonstrated by Petitioner at arbitration would appear to require the firm grasp of the box, contrary to Dr. Rotman's beliefs. Dr. Rotman testified that for Petitioner's carpal tunnel to be work related the work would have to be hand intensive and continuous throughout the day. Petitioner's testimony clearly indicated he performed thousands of hand movements involving lifting, carrying, pushing, pulling, grasping and manipulating of product in an average work day.

Dr. Rotman admitted that Petitioner's job was repetitive and involved lifting heavy weights.

The Arbitrator finds that Petitioner has proven that he suffered an accident on July 26, 2019 based upon repetitive trauma to his hands and wrists which arose out of and in the course of his employment by Respondent.

The Arbitrator further finds that Petitioner's medical condition, bilateral carpal tunnel syndrome, is causally related to the accident of July 26, 2019.

These findings are based upon Petitioner's unrebutted testimony describing his work duties and the hand-intensive work he performed for Respondent over the course of numerous years prior to July 26, 2019, his description of symptoms beginning in the weeks prior to July 26, 2019, the diagnoses of bilateral carpal tunnel made by Dr. Gelber after nerve testing on July 26, 2019, and the physical examination findings, surgical findings and opinions of Dr. Greatting. The opinions of Petitioner's treating surgereon are given much greater weight than those of Respondent's examining physician as it appears Dr. Rotman did not have a true

understanding of the physical requirements of Petitioner's work or of how much time he spent performing the physical work as opposed to driving from one store to another.

In support of the Arbitrator's decision relating to what temporary benefits Petitioner is entitled to as a result of the accident of July 26, 2019, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The findings in regard to accident and causal connection, above, are incorporated herein.

Dr. Greatting testified he took Petitioner off work as of the date of the first surgery, May 20, 2020, that his off work status would then have been extended at his June 4, 2020 office visit, and that on June 16 he filled out a form noting Petitioner was having carpal tunnel release surgery on June 17, 2020 and would be unable to lift over 5 pounds or do any forceful or repetitive gripping, pushing, or pulling with the left hand for four weeks after that surgery. He said he extended his time off work when he saw Petitioner on June 29, 2020 following that second surgery, noting he was to remain off work until he was reevaluated in a month. Dr. Greatting testified that when he examined Petitioner on July 29, 2020 he released him to work without restrictions effective August 3, 2020.

Dr. Rotman testified that the surgeries Petitioner underwent would have resulted in a similar amount of temporary total disability.

The Arbitrator finds that Petitioner was temporarily totally disabled as a result of the accident from May 20, 2020 to August 3, 2020, a period of 10 5/7 weeks. This finding is based upon the testimony of Dr. Greatting summarized above.

In support of the Arbitrator's decision relating to whether the medical services that were provided to Petitioner were reasonable and necessary as a result of the Accident of July 26, 2019, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The findings in regard to accident and causal connection, above, are incorporated herein.

Medical bills were submitted in Petitioner's Exhibit #3 for services rendered from January 11, 2019 through January 28, 21.

The medical services rendered on January 11, 2019, April 12, 2019, August 23, 2019, September 8, 2019, August 18, 2020, January 7, 2021, January 21, 2021 and January 28, 2021 are either clearly for non-related medical treatment, such as hypertension, anxiety, chronic GERD, routine blood tests not in preparation for related surgery or have no medical records submitted into evidence indicating the treatment was for this work related injury.

The medical services rendered on June 20, 2019, July 12, 2019, July 26, 2019, September 5, 2019, May 7, 2020, May 20, 2020, June 4, 2020, June 17, 2020, July 29, 2020 and November 5, 2020 were for diagnosis, testing or treatment of Petitioner's bilateral carpal tunnel syndrome conditions.

The Arbitrator finds that the medical bills introduced into evidence with treatment dates of June 20, 2019, July 12, 2019, July 26, 2019, September 5, 2019, May 7, 2020, May 20, 2020, June 4, 2020, June 17, 2020, July 29, 2020 and November 5, 2020 are related to Petitioner's bilateral carpal tunnel syndrome injuries, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in this accident.

The Arbitrator further finds that the medical bills introduced into evidence with treatment dates of January 11, 2019, April 12, 2019, August 23, 2019, September 8, 2019, August 18, 2020, January 7, 2021, January 21, 2021 and January 28, 2021 are not related to Petitioner's bilateral carpal tunnel syndrome injuries, and were not necessitated to treat or cure Petitioner's injuries suffered in this accident.

These findings are based upon the medical records introduced into evidence and the testimony of both Dr. Greatting and Dr. Rotman, both of whom found that the surgeries and other treatments were necessary to cure Petitioner's bilateral carpal tunnel syndrome.

In support of the Arbitrator's decision relating to the nature and extent of the injury the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The findings in regard to accident, causal connection, temporary total disability, and medical, above, are incorporated herein.

As the accident occurred after September 1, 2011, the nature and extent of the injury must be determined through the five-factor test set out in §8.1b(b) of the Act.

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

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a salesman doing physically strenuous work at the time of the accident and that he *is* able to return to work in his prior capacity as a result of said injury. The Arbitrator notes Petitioner performs less additional work on weekends than he had prior to the date of this accident.. Because of his ability to continue in his profession, the Arbitrator therefore gives *lesser* 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. Because of his having approximately twenty additional years of work expectancy, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that no evidence was introduced indicating an increase or a decrease in Petitioner's earnings as a result of these injuries. Because of the lack of evidence of a change in earning 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 Petitioner testified that he was still able to perform all of his work duties, he just worked through the pain, that as of the date of arbitration he had a lot less grip strength, that he could not unscrew a jar at home, and that he had learned to drive with his hands underneath the steering wheel because if he held them at the 10 and 2 positions on the steering wheel the compression made the hands ache. Petitioner said he considered his job to be laborious, that Mondays, Tuesdays and Wednesdays were the most laborious days of work. He said that when he got home on Mondays, Tuesdays and Wednesdays, that was when he hurt the most and had to take Ibuprofen. Petitioner said it was hard to grab and turn a screwdriver, that holding and pushing down on a drill caused him to hurt, and he could not do the twisting with a nutdriver or screwdriver. He said driving bothered him, and even giving his wife a one minute back rub caused him to hurt. The records of Dr. Greatting for July 29, 2020 reflect that Petitioner advised the doctor that the right side was doing very well but that he was having recurrent symptoms in the median nerve distribution with waking occasionally at night. Petitioner advised Dr. Greatting at that time that he felt his strength was good. Dr. Greatting's physical examination at that time was normal. Petitioner was released to return to full duty work activities on August 3, 2020. Petitioner returned to see Dr. Greatting for the last time on November 5, 2020 and Dr. Greatting's records reflect that Petitioner said the residual ongoing symptoms he had when last seen had essentially resolved, Petitioner felt his strength was good and he was doing all of his normal work and non-work activities without any difficulty. Dr. Greatting's physical examination findings on that day revealed a negative Tinel's over both carpal tunnels and good strength in the median nerve distribution bilaterally. Because of the continuing complaints voiced by Petitioner at the time of arbitration but the fairly benign physical examinations when last seen by his surgeon, the Arbitrator therefore gives *lesser* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of a 10% loss of use of the left hand and a 10% loss of use of right hand based upon his repetitive trauma injury causing bilateral carpal tunnel syndrome pursuant to §8(e) of the Act resulting in an award of 38 weeks of permanent partial disability at $542.30 per week.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC026425
Case Name	VENCES, FREDY v. PEPSICO INC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0180
Number of Pages of Decision	23
Decision Issued By	Stephen Mathis, Commissioner, Deborah Baker, Commissioner

Petitioner Attorney	Joshua Rudolfi
Respondent Attorney	JASON ALLAIN

DATE FILED: 5/13/2022

/s/Stephen Mathis, Commissioner
Signature

DISSENT /s/Deborah Baker, 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

Fredy Vences,

Petitioner,

vs. NO. 18WC26425

PepsiCo, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 2, 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.

May 13, 2022
SJM/sj
o-3/16/22
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 the thoracic spine injury Petitioner sustained on May 28, 2018, resolved by the August 15, 2018 Section 12 examination performed by Dr. Lami, Respondent's examining physician. As a result, I also disagree with the permanent partial disability award of 3 percent loss of the person-as-a-whole. In my view, Petitioner proved by a preponderance of the evidence that his current thoracic spine condition is still causally related to the stipulated May 28, 2018 work accident; and therefore, Petitioner is entitled to additional medical and temporary disability benefits, in addition to a higher permanent partial disability award.

Petitioner testified that on May 28, 2018, he specifically felt a "tear" or a "pop" in his middle back while lifting and moving boxes/cases of beverages. Petitioner initially treated at Concentra, Respondent's designated occupational health clinic, where physical therapy was recommended. On June 19, 2018, at his tenth physical therapy session, the physical therapist noted that Petitioner's pain was better and that he had denied experiencing any pain at the moment. Petitioner was primarily concerned with his strength. However, the physical therapist also noted "Fredy Vences has reached 60% of his goal at this visit" and that the reason/goal for treatment included "decrease pain [sic]." On June 20, 2018, Petitioner returned for another physical therapy session and it was noted that Petitioner stated his back was feeling better overall but he continued to have pain with heavier activities. On June 26, 2018, Petitioner presented for his finally physical therapy session at Concentra where it was noted that he reported he did not know if he was going to get better and that he continued to have pain in his back sometimes. It was again noted that Petitioner had only reached 60% of his goals.

Of note, Petitioner was referred to Dr. Murtaza by the medical personnel at Concentra. On July 10, 2018, Petitioner treated with Dr. Murtaza and reported that he had on and off pain with constant up and down lifting of soda products, however, on "05/20/2018 [sic]" Petitioner's pain "got through ahead [sic] which causes left ribcage pain and pain slightly with deep breathing." Petitioner reported that his pain level at the time of the work injury was 8/10 and he

continued to have pain and discomfort. Petitioner reported partial improvement with physical therapy. Dr. Murtaza noted that the thoracic spine MRI showed minimal pathology, particularly in the thoracic spine, but he did have about a 1mm disc herniation, particularly at T7. On examination, Petitioner had rotational pain, worse on the left; and positive twitch responses on palpation, particularly on the left from T7 to T10. Dr. Murtaza diagnosed Petitioner with left-sided thoracic pain and rib pain with possible rib subluxation. Dr. Murtaza seemed to note that Petitioner "has not received any type of physical therapy" in error as he had just previously noted that Petitioner underwent physical therapy. Dr. Murtaza recommended trigger point injections based on his examination of Petitioner and released Petitioner to work with restrictions.

Petitioner followed up with Dr. Murtaza on August 14, 2018 where it was noted that Petitioner had more discomfort than pain. The trigger point injections that he had recommended were not authorized and Petitioner continued to have positive findings on examination, however, Dr. Murtaza assessed that work conditioning was appropriate as Petitioner did not have significant pain.

On August 23, 2018, Dr. Lami examined Petitioner pursuant to Section 12 of the Act at Respondent's request. Dr. Lami noted that there was no specific date or specific incident as it related to Petitioner's injury. However, in contrast, Dr. Lami noted the records from Concentra that specifically described Petitioner's injury as a result of lifting on May 28, 2018. Regardless, Dr. Lami opined that "the mechanism of reported injury cannot be the cause of his current illness. There was no particular inciting event. He reported doing his regular activities of his job and developing pain which is significant." Dr. Lami also noted "he did not sustain an injury." Dr. Lami opined further that no further treatment was necessary irrespective of causation and that Petitioner had reached maximum medical improvement two weeks after his "alleged incident."

On August 24, 2018, Petitioner attended his fourth work conditioning session, and it was noted that his back felt "about the same – not too sore" and he rated his pain as 3/10. It was also noted that he had been given work restrictions by his treating physician which limited his participation fully in one or more essential job functions and that he had reached 65% of his goals. This is the last work conditioning note in the record. Subsequently, Petitioner returned to work as Respondent stopped paying benefits based on the Section 12 examination performed by Dr. Lami. However, Petitioner testified that when he returned to work full duty, he experienced increased pain in the middle back.

On September 7, 2018, Petitioner treated with Dr. Salehi, a neurosurgeon. Dr. Salehi noted that Petitioner was lifting when he felt pain in the left side of his back. Petitioner reported his pain was worse with moving his arms forward and stretching. Occasionally, he felt a burning sensation or a muscle knot. Petitioner reported that he attempted to return to work full duty approximately two weeks before but it was too difficult so he took the past two days off work. On examination, Petitioner demonstrated abnormal tenderness to thoracic spinal palpation. Dr. Salehi diagnosed Petitioner with a thoracic strain and opined: "Mr. Vences has left sided thoracic pain as a result of the described work injury." Dr. Salehi recommended an additional four weeks of physical therapy "given his lack of conservative care" and referred Petitioner to Dr. Pontinen, for pain management in the form of trigger point injections, which of note, is exactly what Dr. Murtaza had recommended previously but Respondent never authorized. Dr. Salehi placed

Petitioner on light duty work again. In a letter to Dr. Salehi dated September 10, 2018, a claims examiner from Sedgewick Claims Management indicated that no further treatments would be approved as it had been determined that "[Petitioner's] work injury of 5/26/18 has resolved."

On September 13, 2018, Petitioner treated with Dr. Pontinen. On examination, Petitioner had grade three tenderness and myospasm to palpation over the left thoracic paraspinous muscles from the T4 to T8 levels. Dr. Pontinen diagnosed Petitioner with pain of the thoracic spine and myalgia. Dr. Pontinen performed three trigger point injections that day, prescribed medications, and concurred with Dr. Salehi's physical therapy and work restriction recommendations. On September 27, 2018, Petitioner followed up with Dr. Pontinen who reviewed the thoracic MRI with Petitioner. Dr. Pontinen opined that it showed a slight prominence of central canal of thoracic cord at T7.

On October 22, 2018, Petitioner returned to Dr. Salehi who recommended Petitioner undergo a Functional Capacity Evaluation (FCE) as Petitioner's pain was myofascial in nature and to determine permanent restrictions to prevent further aggravation of his pain.

Following the November 19, 2018 FCE, which was invalid, Dr. Salehi reviewed the FCE and recommended Petitioner gradually return to work with specific medium duty restrictions for two weeks, and then return to full duty work without restrictions on December 3, 2018. Dr. Salehi recommended that Petitioner follow up as needed. On November 29, 2018 and December 13, 2018, Petitioner followed up with Dr. Pontinen and stated that he underwent an FCE that was invalid. Dr. Pontinen opined:

> I believe that he will not be able to do his previous job at full capacity and that he will need work restrictions for 10 lbs lifting/pushing/pulling. His job does not have these restrictions, though and will not pay him if he does not work, which he cannot afford due to supporting a family and four children. So he needs to return to work next week without restrictions, which I do not believe is in his best interest.

Dr. Pontinen advised Petitioner to return as need. Petitioner testified that he attempted to return to work at this time, however, Respondent did not allow him to return to work as he could not work full duty.

Petitioner testified that he continues to experience pain which has worsened and he is currently taking Vicodin as prescribed by Dr. Pontinen. Petitioner testified that he has never had any previous back injuries or treatment to his back. On cross examination, Petitioner testified that his pain levels varied: "Yeah, the pain, it varies. It's never one steady point. It goes up and down…. Like depends on the situation what I was in, you know." T. 32-22. Petitioner further testified that he attempted to return to work full duty after August since that was the only way that Respondent would allow him to return to work and he needed to pay his bills, however, he told Respondent he was still hurting: "I'll do the job but I'm still hurting." T. 33-35. Petitioner testified that Respondent did not allow him to return to work. T. 34-35. Petitioner testified that he is no longer with his wife and that he has "lost everything." T. 36. Petitioner is currently receiving unemployment. T. 37.

I find that Petitioner consistently and credibly complained of pain in the thoracic spine (mid-back) and treated for thoracic spine symptoms from May 28, 2018 through December 13, 2018. Based on both a chain of events analysis and the opinions of Dr. Salehi, I find that Petitioner proved his thoracic spine condition (a severe thoracic strain with myofascial pain and myalgia) is causally related to the undisputed May 28, 2018 work accident. I find Petitioner credibly testified that he continued to experience back pain that waxed and waned since the work accident. Petitioner also credibly testified that he attempted to return to full duty work in August but could not continue due to pain. To his credit, Petitioner also attempted to return to full duty work sometime after the FCE (in November or December of 2018 based on Dr. Pontinen's records) but Respondent did not allow him to return when he stated that he was still in pain although willing to work. I find Dr. Salehi's opinion that Petitioner's left sided thoracic pain is a result of the work injury to be persuasive.

I do not find Dr. Lami's opinions persuasive as his opinions were based on his belief that Petitioner did not sustain an injury and that there was no particular inciting event for Petitioner's injury, which is a determination not supported by the medical records and more appropriately left to the Commission to decide. However, the Commission need not decide whether there was an injury or a work accident in this case as the parties stipulated to the fact that Petitioner sustained a work accident on May 28, 2018 at the arbitration hearing. I also find it significant that Petitioner had physical examination findings with all physicians except for Dr. Lami and that Dr. Lami is the only physician who opined that the mechanism of injury, lifting boxes/crates of beverages, could not have caused Petitioner's injuries. Even Dr. Murtaza, the physician Petitioner was referred to by the medical personnel at Concentra, had findings on examination and recommended trigger point injections, which Respondent would not approve. I would award all medical bills for treatment with Dr. Salehi and Dr. Pontinen related to the thoracic spine, and I would award temporary disability benefits (both temporary total and temporary partial benefits) as requested by Petitioner. I would also find that Petitioner's thoracic spine condition caused a 5% loss of the person-as-a-whole.

For the above reasons, I respectfully dissent.

/s/ *Deborah J. Baker*

Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC026425
Case Name	FREDY VENCES v. PEPSICO
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	David Kane, Arbitrator

Petitioner Attorney	Joshua Rudolfi
Respondent Attorney	Jason Allain

DATE FILED: 9/2/2021

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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Fredy Vences
Employee/Petitioner

v.

PepsiCo
Employer/Respondent

Case # **18** WC **26425**

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 **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **July 27, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **5/28/2018**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**65,503.87 (49 Weeks)**; the average weekly wage was $**1336.81**.

On the date of accident, Petitioner was **31** years of age, ***married*** with **4** dependent children.

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

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

Respondent shall be given a credit of $**0.00** for TTD, $**1,135.92** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**1,135.92**.

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

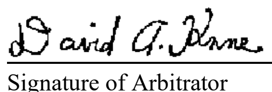
ORDER

Petitioner sustained accidental injuries arising out of and occurring in the course of the employment on May 28, 2018, resulting in a thoracic strain which resolved by the August 15, 2018 examination with Dr. Lami. Temporary disability compensation and medical treatment following the August 15, 2018, examination are denied.

The Arbitrator does find that Petitioner suffered the permanent partial loss of use of **3%** of the person, 15 weeks, or $11,859.60, due to the work-related thoracic strain he suffered on May 25, 2018.

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

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



Signature of Arbitrator

SEPTEMBER 2, 2021

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

Fredy Vences Case # **18** WC **26425**
Employee/Petitioner

v.

PepsiCo. Inc.
Employer/Respondent

This case was heard by Honorable David Kane, Arbitrator of the Workers' Compensation Commission, in the city of Chicago, Illinois, on July 27, 2021. After hearing the testimony and reviewing all the evidence presented, the Arbitrator hereby makes findings on the disputed issues below and includes those findings in this document.

I. FINDINGS OF FACT

Petitioner, Fredy Vences, testified that he was working for Respondent, PepsiCo ("Pepsi"), on May 28, 2018. He testified that he had been working for Pepsi for approximately 3 years. He testified that he worked as delivery driver. Petitioner testified that on the date of the incident, he was moving boxes/cases of Gatorade 16-ounce bottles, when he felt a "tear" in his back.

Occupational Health Centers of Illinois ("Concentra")

He reported the incident to his supervisor and was sent to Concentra on May 28, 2018. He testified that he was release to light duty work by the physicians at Concentra.

On June 6, 2018, Petitioner presented to Occupational Health Centers ("Concentra") for a recheck of his thoracic area back pain. (PX 2) He reported that his symptoms were improving, that his pain did not radiate, and was described as moderate, 4/10. He had attended four (4) sessions of therapy since his last visit and demonstrated functional improvement. He also reported working transitional duty and adhering to the prescribed work restrictions. Physical examination revealed tenderness to palpation, full range of motion, and normal gait. He was assessed with a thoracic strain, prescribed medications, and advised to continue therapy as scheduled. A 10-pound restriction was also recommended.

Petitioner returned to Concentra on June 13, 2018 for a follow-up. He reported that his symptoms were improving with left upper and mid-back pain. Tenderness was noted in the left paraspinal and rhomboid muscle but not the thoracic spine or right paraspinal and rhomboid muscle. Petitioner had full range of motion in the thoracic spine. He was advised to continue therapy and medications as directed. Work restrictions were amended to allow for pushing/pulling of up to 15-pound occasionally.

On June 20, 2018, Petitioner presented to Concentra for a recheck. He reported that his symptoms were unchanged. He had attended 10 therapy sessions since the last visit and demonstrated functional improvement. Tenderness was noted in the thoracic spine and paraspinal as well as pain with range of motion, but he had normal strength. Medications were prescribed and Petitioner was referred for an MRI and consultation with Dr. Murtaza, a physiatrist.

Petitioner underwent an MRI on June 26, 2018. (PX 3). The radiologist, Dr. Laney, noted that there were no findings to suggest an etiology of the Petitioner's current symptoms. No degenerative changes were present in the thoracic region. Slight prominence of the central canal of the thoracic cord was noted at T7 measuring 1 millimeter. The disc height and signal were well maintained.

On July 10, 2018, Petitioner presented to Dr. Murtaza for an initial consultation. He reported that while delivering soda, he had on and off pain with constant up and down from lifting the soda. He reported that on May 20, 2018, he had pain 8/10 with rotation and breathing. He noted partial improvement with therapy but continued to report pain and discomfort. Dr. Murtaza noted that the MRI showed minimal pathology, particularly in the thoracic spine. Dr. Murtaza recommended trigger point injections throughout the paraspinals from T7 to T10. Petitioner was to continue on restricted work.

Petitioner returned to Dr. Murtaza on August 14, 2018, for a follow-up of his thoracic and rib cage pain. He denied any pain at the time, but noted mild discomfort intermittently. He was working light duty but had not received the trigger point injections. Since Petitioner did not have significant pain, Dr. Murtaza recommended work conditioning for two (2) weeks and then a return to full duty work.

Petitioner then underwent a course of work conditioning with Concentra reporting no increased pain and tolerating the work conditioning well without an adverse reaction.

Independent Medical Examination, Dr. Lami

On August 15, 2018, Petitioner underwent an Independent Medical Examination with Dr. Babak Lami. (RX 1). Petitioner advised that he worked

as a deliver driver for Pepsi for three (3) years. He reported that his job duties included driving and removing products. He noted that he started developing pain in his mid-back area over two months ago. He reported no specific date or incident as it relates to the injury. He noted that his pain was 7 to 8/10, non-radiating. Petitioner also reported that he attended two (2) weeks of therapy and was doing home exercises at the time. Physical examination revealed no tenderness to palpation, full strength and Petitioner was in no acute distress.

Dr. Lami diagnosed Petitioner with musculoskeletal thoracic region pain with good prognosis. Regarding causation, Dr. Lami noted that the mechanism reported cannot be the cause of Petitioner's current illness. He noted that the amount of pain is not supported by the mechanism of his alleged injury, the time that has passed since the injury, and the MRI findings as well as Dr. Lami's examination. Dr. Lami did not believe that further treatment was required irrespective of causation. Dr. Lami opined that Petitioner had reached maximum medical improvement two weeks from the date of the incident and that there was no evidence to support any permanent impairment or disability. Petitioner could return to full-duty, unrestricted work based on Dr. Lami's examination. Dr. Lami believed that two (2) weeks of therapy was overall reasonable.

Petitioner testified that he was unable to return to full-duty work because he still had pain in his mid-back.

Post-IME Medical Treatment

On September 7, 2018, Petitioner presented to Dr. Sean Salehi, a neurosurgeon, for an initial consultation. (PX 3). He reported that he was doing normal work and lifting when he felt pain in the left side of his back. He

reported that he underwent therapy for two (2) weeks but pain persisted in the left scapular region. After a course of work conditioning, Petitioner returned to work two (2) weeks ago at full duty but found it difficult so he took the past two (2) days off.

Tenderness was noted in the left inferior scapular region. Dr. Salehi reviewed the MRI of the thoracic spine and noted it was a normal study with no disc herniation. His impression was a thoracic strain. Dr. Salehi noted that Petitioner had left sided thoracic pain as a result of the work injury, likely myofascial in nature. Dr. Salehi recommended Petitioner undergo an additional four (4) weeks of therapy given his lack of conservative care. He was also referred to pain management for trigger injections. Dr. Salehi prescribed light duty work restrictions of no lifting more than 20-pounds, no pushing/pulling more than 35-pounds, no bending/twisting more than three (3) times per hour and alternating sitting/standing every 30-45 minutes.

On September 13, 2018, Petitioner presented to Dr. Pontinen, a pain specialists, for the recommended trigger point injections (PX 4). He reported that severe/chronic mid back pain on average 8/10. He reported that he "never had pain in these areas before". Dr. Pontinen provided Petitioner with a trigger point injection to the left thoracic/rhomboid muscle. Petitioner was to return in two (2) weeks for a possible repeat injection.

On September 27, 2018, Petitioner returned to Dr. Pontinen status-post trigger point injections. He did not notice any improvement in his pain, though he rated his pain at 2-3/10. He also noted that his pain improved with therapy and massages.

Petitioner returned to Dr. Salehi on October 22, 2018 for a follow-up. Petitioner reported that he had an injection and did more therapy, which he stated did not really help, but he reported that his pain improved to 1/10. Dr.

Salehi noted that Petitioner continued with mild left scapular pain which was myofascial in nature. Dr. Salehi recommended that Petitioner undergo an FCE to determine permanent restrictions. It was recommended that he continue to work with the prior restrictions in the meantime.

On October 30, 2018, Petitioner presented to Dr. Pontinen for a follow-up He reported that his pain had not changed much. Petitioner reported that he has a TENS unit at home but that he was not using it. He was instructed to follow the recommendations of Dr. Salehi. Petitioner was not interested in any further injections.

Petitioner underwent a functional capacity evaluation (FCE) with ATI on November 14, 2018. (PX 3). The occupational physical demand level for a beverage delivery driver was medium. The FCE examiner was unable to comment on Petitioner's demonstrated physical demand level due to the invalid nature of the assessment. According to the report, an invalid determination means that Petitioner consistently represented less than a full effort.

Petitioner returned to Dr. Salehi on November 19, 2018 for a follow-up. He continued to report pain in the left mid scapular region with certain movements of his arm. The neurologic exam was normal. Dr. Salehi recommended a gradual return to work with medium duty restrictions of no lifting greater than 35-pounds, no pushing/pulling greater than 50-pounds, ability to alternate sit/stand every 30-45 minutes for two (2) weeks, then Petitioner could return to work without restrictions. Dr. Salehi indicated that he did not need to see Petitioner again.

On November 29, 2018, Petitioner presented to Dr. Pontinen for another follow-up noting that his pain had not changed much since his prior

visit. Despite the invalid FCE, Dr. Pontinen did not believe that Petitioner could return to full duty work and recommended 10-pound work restrictions.

Petitioner returned to Dr. Pontinen on December 13, 2018 for a re-check. Petitioner reported that his pain had not changed much over the past two (2) weeks. Dr. Pontinen recommended Petitioner continue taking Naproxen and Flexeril as prescribed and follow-up as needed.

Petitioner testified that he is currently taking Vicodin (hydrocodone) as prescribed by Dr. Pontinen. He testified that he has not returned to work for Pepsi or any other employer and is unable to work in any capacity. Petitioner also testified that he was currently collecting unemployment benefits at approximately $700.00/week.

II. CONCLUSIONS OF LAW

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

After considering the testimony of Petitioner, submitted records, opinions of Dr. Lami and other evidence, the Arbitrator concludes that Petitioner suffered a thoracic strain, which had resolved by the August 15, 2018 examination with Dr. Lami. Therefore, the Arbitrator finds that Petitioner's reported current condition of ill-being is not causally related to the resolved, work-related thoracic strain.

It is well established that a Petitioner carries the burden of proving his case by a preponderance of the evidence. "Preponderance of the evidence is evidence which is of greater weight or more convincing than the evidence

offered in opposition to it; it is evidence which as a whole shows that the fact to be proved is more probable than not." Parro v. Industrial Commission, 260 Ill.App.3d 551 (1st Dist. 1993); Central Rug & Carpet v. Industrial Commission, 361 Ill.App.3d 684 (1st Dist. 2005).

The Commission is not required to find for a claimant merely because there is some testimony which, if it stood alone and undisputed, might warrant such a finding. Burgess v. Industrial Commission, 169 Ill.App.3d 670 (1st Dist. 1988). The mere existence of testimony does not require its acceptance, U.S. Steel Corporation v. Industrial Commission, 8 Ill. 2d 407 (1956), and the Commission is not required to accept unrebutted testimony. Sorenson v. Industrial Commission, 281 Ill.App.3d 373, 384 (1996). Where the sole support for an Award rests on the claimant's own testimony, and claimant's actual behavior and conduct is inconsistent with that testimony, 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).

To determine whether a claimant has met his requisite burden of proof by a "preponderance of credible evidence," it is necessary for the Commission to look for consistency and corroboration between a witness' testimony, conduct, and other documentary evidence to determine the truth of the matter. Where that other evidence tends to impeach or undermine a claimant's testimony, there may be sufficient cause to find that a claimant has failed to meet his requisite burden.

Petitioner testified that he continues to have pain in his thoracic spine and needs stronger pain killers due to his on-going pain. He testified that he was currently taking Vicodin as prescribed by Dr. Pontinen. The Arbitrator notes that the last treatment record from Dr. Pontinen is from the December

13, 2018 office visit, wherein Dr. Pontinen prescribed Naproxen and Flexeril. There is no medical record evidence indicating a prescription of Vicodin from Dr. Pontinen.

Regardless, the Arbitrator assigns the most weight to the opinions of Dr. Lami. Dr. Lami diagnosed Petitioner with musculoskeletal thoracic region pain. (RX 1). Dr. Lami opined that the amount of pain described by Petitioner was unsupported by the mechanism of his alleged injury, the time passed since the injury and his MRI findings, which were noted to be unremarkable by several physicians. Dr. Lami further indicated that Petitioner would have reached maximum medical improvement within two weeks of the reported incident and there was no evidence to support any permanent partial impairment or disability.

After considering all medical opinions, trial testimony and record evidence, the Arbitrator concludes that Petitioner's claimed "current" condition of ill-being in his thoracic spine is not causally related to his employment with Respondent. Specifically, the Arbitrator finds the opinion of Dr. Lami to be the most credible here. Petitioner suffered at most a thoracic strain which had resolved by the August 15, 2018 examination with Dr. Lami.

In support of the Arbitrator's Decision relating to (J), whether claimed, unpaid medical services provided to Petitioner were reasonable and necessary, the Arbitrator finds the following:

Petitioner claims $13,463.83, as-billed, in unpaid medical bills. (PX 1.) Petitioner has not proven, by a preponderance of the evidence, entitlement to medical services not otherwise previously paid by Respondent or through group health insurance. The Arbitrator affords the greatest weight to the

opinions Dr. Lami who found that no further treatment was required, irrespective of causation, and that Petitioner had reached maximum medical improvement at the time of his August 15, 2018 examination. Accordingly, the Arbitrator concludes Respondent is not ordered to pay any of the disputed medical charges as all of the treatment occurred after the August 15, 2018, examination with Dr. Lami.

In support of the Arbitrator's Decision relating to (L), whether Petitioner is entitled temporary total disability, the Arbitrator finds the following:

Petitioner claims he is entitled to temporary total disability from October 30, 2018 to November 29, 2018. The Arbitrator notes that the parties stipulated that Respondent paid $0.00 in temporary total disability benefits.

For an employee to be entitled to temporary total disability benefits under the Illinois Workers' Compensation Act, he must prove he is "totally incapacitated for work by reason of the illness attending the injury." Mt. Olive Coal Co. v. Industrial Commission, 295 Ill. 429 (Ill. 1920). Temporary total disability exists from the time an injury incapacitates an employee for work until such time as he is as far restored as the permanent character of his injury will permit. Shell Oil Co. v. Industrial Comm'n, 2 Ill.2d 590 (1954). To prove entitlement to any temporary total disability, the employee must show not only that he did not work but that he was unable to work. Schmidgall v. Industrial Comm' n, 268 Ill.App.3d 845, 847 (4th Dist. 1984); Boker v. Industrial Comm' n, 141 Ill.App.3d 51, 55, 489 N.E.2d 913 (3d Dist. 1986).

The Arbitrator finds that in connection with the August 15, 2018 examination, Dr. Lami placed Petitioner at maximum medical improvement and noted that he could return to full-duty, unrestricted work. Though

Petitioner testified that he was unable to return to work due to pain after the examination with Dr. Lami, the Arbitrator does not find Petitioner's testimony credible.

Petitioner reported pain at 4/10 when he presented to Concentra on June 6, 2018, and that his symptoms were improving. He continued to report improving symptoms with indications of normal strength and full range of motion in his thoracic spine. The radiologist, Dr. Laney, noted that there were no findings on the June 26, 2018, MRI to suggest an etiology of the Petitioner's current symptoms. Furthermore, at the August 14, 2018 appointment with Dr. Murtaza, Petitioner denied any complaints of pain, reporting only mild discomfort intermittently. As Dr. Lami indicated in his report, the "amount of pain is not supported by the mechanism of his alleged injury, time passed since the injury, and his MRI findings."

Notwithstanding the opinions of Dr. Lami, Petitioner presented to Dr. Salehi on September 7, 2018, who noted that the MRI study was normal and that Petitioner's left sided thoracic pain was likely myofascial in nature. Petitioner then presented to Dr. Pontinen on September 27, 2018, after receiving trigger point injections and advised that he didn't notice any improvement in his pain, previously at 8/10, but also reported his pain at 2-3/10. Petitioner then return to Dr. Salehi on October 22, 2018, and reported that his pain improved to 1/10. The Arbitrator finds that Petitioner's reported subjective pain levels to be grossly exaggerated, confounding, and unsupported by the objective findings.

Therefore, Petitioner has failed to prove he was totally incapacitated for work for the period after Dr. Lami's August 15, 2018 examination by reason of the illness attending the injury. Thus, the Arbitrator finds that, Petitioner has failed to prove he was totally incapacitated for work from

October 30, 2018 to November 29, 2018 *by reason of the illness attending the injury*.

In support of the Arbitrator's Decision relating to (O), the nature and extent of Petitioner's disability, the Arbitrator finds the following:

The Arbitrator incorporates the above-referenced findings of fact and conclusions of law as if fully restated herein. The Arbitrator finds that Petitioner suffered the permanent partial loss of use of 3% of the person, 15 weeks, due to the work-related thoracic strain he suffered on May 28, 2018.

Because the accident occurred after September 1, 2011, the Arbitrator looks to Section 8.1b of the Act for guidance in assessing permanency. This section sets forth five factors to be considered in determining the nature and extent of an injury with no single factor predominating. Pursuant to Section 8.1b(b) of the Act, the Arbitrator addresses Petitioner's permanent partial disability for thoracic strain, as follows:

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

With regard to subsection (ii) of §8.lb(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a delivery driver at the time of the accident. Petitioner testified that he has not returned to work in any capacity and is currently receiving unemployment benefits. According to the

functional capacity evaluation of November 14, 2018 with ATI, beverage deliver driver has an occupational physical demand level of Medium. Furthermore, on November 19, 2018, Dr. Salehi recommended a gradual return to work with medium duty restrictions for two (2) weeks then a return to work without restrictions. Dr. Lami and Dr. Murtaza also found that Petitioner could work without restrictions. Therefore, though he has not returned to work in his pre-injury position of a delivery driver, the Arbitrator finds, per the opinions of the treating and examining physicians, that there is no indication for Petitioner to continue to remain off work. Therefore, the Arbitrator gives some weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 31 years old at the time of the accident and Petitioner has presented no evidence as to how his age might affect his future earnings. Still, the Arbitrator views Petitioner as a younger individual who, from a statistical perspective, could be expected to remain in the workforce for at least thirty more years. Therefore, the Arbitrator gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator also notes that though Petitioner has not returned to work, there is no objective basis for him to remain off work or under any sort of work restrictions. Dr. Murtaza indicated that Petitioner could return to full duty work in two (2) weeks following the August 14, 2018 appointment. Dr. Lami indicated that Petitioner could return to full-duty work following the August 15, 2018 independent medical examination. Petitioner underwent an FCE at the direction of Dr. Salehi, which was invalid, meaning he consistently represented less than a full effort. Dr. Salehi found that Petitioner had a

normal MRI and neurological examination and instructed him to return to full-duty work within two (2) weeks of his November 19, 2018 appointment. There is simply no objective basis for Petitioner to not have returned to work in a full duty capacity. Therefore, the Arbitrator gives some weight to this factor.

With regard to subsection (v) of §8.lb(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner was diagnosed with a thoracic strain. He underwent a course of conservative treatment including work restrictions, medications, trigger point injection(s) and therapy. An MRI of the thoracic spine was unremarkable. The radiologist noted that there were no findings on the MRI to suggest an etiology of Petitioner's current symptoms. Dr. Salehi found that the MRI was normal with no disc herniation. On August 14, 2018, Dr. Murtaza recommended that Petitioner undergo two (2) weeks of work conditioning and then return to full duty work. Dr. Salehi also recommended Petitioner return to work without restrictions following an invalid functional capacity evaluation.

The Arbitrator, having considered the foregoing, finds the Petitioner established permanency equivalent to 3% loss of the person, representing 15 weeks of compensation under section 8(d)2. The Arbitrator awards these benefits at the maximum rate of $790.64.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC030634
Case Name	DE MARIO, GERALD v. CITY OF AURORA
Consolidated Cases	19WC030635
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0181
Number of Pages of Decision	9
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Richard Victor
Respondent Attorney	Daniel Artman

DATE FILED: 5/20/2022

/s/*Deborah Baker, Commissioner*

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GERALD DEMARIO,

Petitioner,

vs. NO: 19 WC 30634

CITY OF AURORA,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 22, 2021 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $790.64 per week for a period of 10.75 weeks, as provided in §8(e)2 of the Act, for the reason that the injuries sustained caused a 25% loss of use of the left index finger.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall pay those benefits that have accrued from November 30, 2017 through November 12, 2021, and shall pay the remainder, if any, in weekly payments.

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.

May 20, 2022

/s/ *Deborah J. Baker*

DJB/lyc
O: 5/11/22
43

/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC030634
Case Name	DEMARIO, GERALD v. CITY OF AURORA
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	6
Decision Issued By	Stephen Friedman, Arbitrator

Petitioner Attorney	Richard Victor
Respondent Attorney	Daniel Artman

DATE FILED: 11/22/2021

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 16, 2021 0.06%

/s/*Stephen Friedman, Arbitrator*

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF Kane)

- [ ] 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
NATURE AND EXTENT ONLY

Gerald DeMario
Employee/Petitioner

v.

City of Aurora
Employer/Respondent

Case # **19** WC **030634**

Consolidated cases: **See Decision**

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Geneva**, on **November 12, 2021**. By stipulation, the parties agree:

On the date of accident, **November 30, 2017**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**87,755.20**, and the average weekly wage was $**1,687.60**.

At the time of injury, Petitioner was **62** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**6,267.74** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**6,267.74**.

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

ORDER

Respondent shall pay Petitioner the sum of $**790.64**/week for a further period of **10.75** weeks, as provided in Section **8(e)2** of the Act, because the injuries sustained caused **25% loss of use of the Left Index Finger**.

Respondent shall pay Petitioner compensation that has accrued from **November 30, 2017** through **November 12, 2021**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

/s/ Stephen J. Friedman
Signature of Arbitrator

NOVEMBER 22, 2021

ICArbDecN&E p.2

Statement of Facts

This matter was tried in conjunction with consolidated case 19WC030635 (DOA: 1/10/19). A single transcript was prepared. The Arbitrator has issued separate decisions for each claim. At the close of proofs, Respondent's oral motion to modify Arb. Ex. 1 to stipulate to Causal Connection was granted, leaving the Nature & Extent of the partial permanent disability as the only issue in dispute.

Petitioner Gerald DeMario testified he is employed by Respondent City of Aurora as an Equipment Tech. He has worked in this job since February 11, 2002. His job duties are to maintain the city equipment including trucks, cars, and smaller motorized equipment. His job includes lifting items up to 75 pounds and using tools. He is right handed. On November 30, 2017, he cut his left index finger using a grinder.

Petitioner was seen at Mercy Medical Center emergency room on November 30, 2017. He was diagnosed with a laceration of the left index finger. He reported working with a cutting tool and lacerated left hand knuckle. Examination noted a 2 cm laceration diagonally across the MCP joint. The wound appears to have penetrated the joint space on the most radial portion. The wound was closed with 5 sutures and a metal splint was applied. He was referred orthopedics for suture removal and to Dr. Popper, his PCP (PX 1).

Petitioner saw Dr. Popper on December 13, 2017 for a cut at the base of the left index finger (PX 2). He was to see orthopedics next week. X-rays of the left hand taken December 21, 2017 noted volar subluxation of the proximal phalanx on the second metacarpal head with overlying soft tissue swelling and no evidence of fracture (PX 2). Petitioner saw Dr. Tulipan on January 8, 2018. Petitioner reported while working, an angle grinder kicked back causing a laceration to the dorsum of his left hand at the MP joint. He continues to have stiffness and swelling over the dorsum. Recent x-rays revealed what may be a subluxation at the MP joint. On repeat x-rays in full extension it is unclear if there is a subluxation. It was decided Petitioner would undergo surgery (PX 2).

Petitioner underwent surgery on January 17, 2018. The postoperative diagnosis was laceration of the extensor tendon to the left index finger and subluxation of the MP joint of the index finger. Dr. Tulipan performed open reduction and internal fixation of the subluxation of the MP joint using K wire with repair of the extensor tendon. On February 12, 2018, Dr. Tulipan removed the K wire and advised Petitioner to begin range of motion exercises. On February 26, 2018, Dr. Tulipan notes definite improvement with full extension and flexion to 60-65 degrees. He ordered therapy to try and regain the last bit of motion and to start strengthening. Petitioner was discharged from therapy on April 11, 2018. The records note improved range of motion, grip strength, pinch strength, and reduced pain. Petitioner has returned to work and completing job duties with mild difficulties which is more related to decreased strength. The records note with continued HEP this should continue to improve (PX 2). On April 16, 2018, Dr. Tulipan notes full range of motion except for the terminal 10 degrees of flexion at the MP joint. On June12, 2018, Petitioner returned to Dr. Tulipan with a wound abscess. It was drained and Petitioner was provided an antibiotic.

Petitioner was seen by Dr. Vender at Respondent's request for a Section 12 examination on June 7, 2018 (RX 1a). Petitioner complained of decreased flexion and a feeling of decreased strength and dexterity, he complained of pain in the area of the MP joint of the index finger. Physical examination noted the scar and a prominence of the left index finger metacarpal head consistent with volar subluxation of the joint. There is a 10 degree extension lag at the PIP. Pain is noted with forced extension of the MP joint. X-rays noted significant degenerative change om the index finger MCP joint. Dr. Vender opined that the laceration of the extensor tendon has been repaired. Petitioner has pre-existing degenerative arthritis in the joint. Dr. Vender states that

Petitioner has essentially normal motion and needs no further treatment for range of motion or strength. He finds Petitioner at MMI. He notes that Petitioner may have difficulty with pinching the index finger (RX 1a). Dr. Vender authored an addendum report after review of additional medical records on August 6, 2018 (RX 1b). He states that the operative report notes an abnormal index MCP joint. It is unclear whether this is secondary to the injury or was pre-existing (RX 1b).

On August 6, 2018, Petitioner continued to complain of difficulty with certain work activities, particularly fine motor activities. He also feels he is lacking some strength. Dr. Tulipan ordered some additional therapy. Petitioner had 12 visits through September 17, 2018. At that time, he reported that the improvement has gotten him to the point where he can do most things. On November 5, 2018, Dr. Popper noted the left hand is better-ROM and strength.

Petitioner was off work from January 17, 2018 through February 26, 2018. He testified he returned to his full duty job and worked until his subsequent injury on January 10, 2019 (this claim is the subject of consolidated case 19WC030635 decided in conjunction with this matter). He returned to work after that injury on February 14, 2020. And continues to work his regular, full duty job. Petitioner testified he continues to experience pain, stiffness, and an incomplete grip with his left index finger on grasping and holding objects, especially at work, where he needs to use both hands.

Petitioner was examined at Respondent's request by Dr. Joshua Alpert on March 1, 2021 for both the left index finger injury and his subsequent right shoulder injury (RX 2). With respect to the left index finger, Dr. Alpert noted the surgical scar and a minimal lack of full extension of the MCP joint. Sensation is intact. There is no weakness or muscle atrophy. Dr. Alpert notes Petitioner has returned to full duty without restrictions. He prepared an AMA impairment rating of the left index finger of 7% loss of use (RX 2)

Conclusions of Law

In support of the Arbitrator's decision with respect to Nature & Extent, the Arbitrator finds as follows:

Petitioner's date of accident is after September 1, 2011 and therefore the provisions of Section 8.1b of the Act are applicable to the assessment of partial permanent disability in this matter.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 7% of Left Index Finger as determined by Dr. Alpert, pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (RX 2). The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation. The doctor noted the relevant treating medical records and his own examination. He provided the detail of his methodology and calculations in reaching his impairment rating. Because of this, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as an Equipment Tech at the time of the accident and that he is able to return to work in his prior capacity as a result of said injury. The Arbitrator notes this job requires extensive use of Petitioner's hands and the use of tools. Because of these, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 62 years old at the time of the accident. Petitioner would be considered an older worker. Because of this, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner has returned to his regular job and has no loss of future earnings. Because of this, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner suffered a laceration of the extensor tendon to the left index finger and subluxation of the MP joint of the index finger. This was surgically repaired. Petitioner underwent 2 courses of therapy and has been returned to full duty work. The objective testing notes some loss of flexion of the MCP joint of the left index finger. The records document Petitioner's continued complaints of lack of strength and dexterity. Because of these facts, 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 25% loss of use of Left Index Finger pursuant to §8(e)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC030635
Case Name	DE MARIO, GERALD v. CITY OF AURORA
Consolidated Cases	19WC030634
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0182
Number of Pages of Decision	8
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Richard Victor
Respondent Attorney	Daniel Artman

DATE FILED: 5/20/2022

/s/*Deborah Baker, Commissioner*

Signature

STATE OF ILLINOIS	)
	) SS.
COUNTY OF KANE	)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GERALD DEMARIO,

Petitioner,

vs. NO: 19 WC 30635

CITY OF AURORA,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 22, 2021 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $813.87 per week for a period of 62.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused a 12.5% loss of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall pay those benefits that have accrued from January 10, 2019 through November 12, 2021, and shall pay the remainder, if any, in weekly payments.

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.

May 20, 2022

/s/ *Deborah J. Baker*

DJB/lyc
O: 5/11/22
43

/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC030635
Case Name	DEMARIO, GERALD v. CITY OF AURORA
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	5
Decision Issued By	Stephen Friedman, Arbitrator

Petitioner Attorney	Richard Victor
Respondent Attorney	Daniel Artman

DATE FILED: 11/22/2021

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 16, 2021 0.06%

/s/Stephen Friedman, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF Kane)

- [ ] 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
NATURE AND EXTENT ONLY

Gerald DeMario
Employee/Petitioner

v.

City of Aurora
Employer/Respondent

Case # **19** WC **030635**

Consolidated cases: **See Decision**

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Geneva**, on **November 12, 2021**. By stipulation, the parties agree:

On the date of accident, **January 10, 2019**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**87,755.20**, and the average weekly wage was $**1,687.60**.

At the time of injury, Petitioner was **64** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**63,806.97** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**63,806.97**.

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

ORDER

Respondent shall pay Petitioner the sum of $**813.87**/week for a further period of **62.5** weeks, as provided in Section **8(2)2** of the Act, because the injuries sustained caused **12.5% loss of the person as a whole**.

Respondent shall pay Petitioner compensation that has accrued from **January 10, 2019** through **November 12, 2021**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

/s/ Stephen J. Friedman **NOVEMBER 22, 2021**
Signature of Arbitrator

ICArbDecN&E p.2

Statement of Facts

This matter was tried in conjunction with consolidated case 19WC030635 (DOA: 11/30/17). A single transcript was prepared. The Arbitrator has issued separate decisions for each claim. At the close of proofs, Respondent's oral motion to modify Arb. Ex. 2 to stipulate to Causal Connection was granted, leaving the Nature & Extent of the partial permanent disability as the only issue in dispute.

Petitioner Gerald DeMario testified he is employed by Respondent City of Aurora as an Equipment Tech. He has worked in this job since February 11, 2002. His job duties are to maintain the city equipment including trucks, cars, and smaller motorized equipment. His job includes lifting items up to 75 pounds and using tools. He is right handed. Petitioner testified to the November 30, 2017 injury to his left index finger and treatment thereafter including surgery (See the decision in consolidated case 19WC030634). He returned to regular work following that injury and was discharged from care on November 5, 2018. Petitioner testified that on January 10, 2019, he tripped over a heavy chain and fell on his right shoulder. Petitioner was seen at Mercy Medical Center on the date of accident (PX 1). Petitioner provided a consistent history of accident and complained of 7/10 pain in the right shoulder worse with movement. X-rays were negative. The diagnosis was contusion to the right shoulder. Petitioner was provided a sling and Norco. He was given restrictions of no above shoulder reaching with the right hand and instructed to wear his sling. (PX 1).

Petitioner then sought treatment at DuPage Medical Group (PX 2). Petitioner saw Dr. Popper on January 11, 2019. He reported the fall at work and noted a surgical repair in the shoulder many years ago with completely normal function. Dr. Popper recommended orthopedic evaluation. Petitioner was seen by Dr. Thangamani on January 11, 2019. He suspected a right rotator cuff tear and ordered an MRI. The MRI performed on January 23, 2019 showed post-surgical changes, rotator cuff tendinopathy, and a moderate partial thickness tear of distal supraspinatus tendon. On January 25, 2019, Dr. Thangamani reviewed the MRI films and stated he did not see any new tearing of the rotator cuff. He noted some inflammation. He recommended physical therapy, cortisone injection, and work restrictions. The cortisone injection was administered (PX 2). Petitioner began therapy at ATI on February 4, 2019 (PX 4). On February 22, 2019, Dr. Thangamani noted some improvement with the injection and therapy. He states that the radiologist notes the possibility of a full thickness tear. On March 13, 2019, Dr. Thangamani recommended surgery (PX 2).

On April 2, 2019, Dr. Thangamani performed an arthroscopy and repair of the rotator cuff tear (PX 2). Petitioner underwent physical therapy of ATI beginning May 15, 2019, and then a work conditioning program from December 9, 2019 to January 7, 2020 (PX 4). Dr. Thangamani released Petitioner to restricted work with no lifting over 15 pounds and limited use of the right arm on October 2, 2019. On November 4, 2019, he noted Petitioner was still on leave from work (PX 2). Petitioner underwent an FCE on May 28, 2020, which showed Petitioner could perform his normal work duties (PX 5). On June 3, 2020, Dr. Thangamani discharged Petitioner without restrictions at MMI (PX 3).

Petitioner was paid T.T.D. from January 11, 2019 through January 13, 2020. Petitioner's return to work was delayed by unrelated health issues. Petitioner currently continues to work for Respondent in his full-duty capacity. Petitioner testified that he had recovered fully from his prior right shoulder surgery 20 years before. Petitioner testified that he continues to experience pain and weakness in his right shoulder, especially on lifting, reaching and overhead. He now requires help of co-workers in performing overhead duties. Petitioner takes over the counter medications.

Petitioner attended a Section 12 examination with Dr. Joshua Alpert on March 1, 2021(RX 2). Petitioner complained his right shoulder felt weaker and he has difficulty doing overhead lifting and certain activities. He stated he has someone help him at work. It hurts with activities. Physical examination of the right shoulder noted full forward flexion and abduction. He has no muscle atrophy and normal biceps contour. He has 5/5 rotator cuff strength with pain at the extremes of motion. Dr. Alpert opined that Petitioner could due his regular job. He prepared an AMA impairment rating for the right shoulder injury of 3% whole person impairment (RX 2).

Conclusions of Law

In support of the Arbitrator's decision with respect to Nature & Extent, the Arbitrator finds as follows:

Petitioner's date of accident is after September 1, 2011 and therefore the provisions of Section 8.1b of the Act are applicable to the assessment of partial permanent disability in this matter.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 3% of whole person as determined by Dr. Alpert, pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (RX 2). The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation. The doctor noted the relevant treating medical records and his own examination. He provided the detail of his methodology and calculations in reaching his impairment rating. Because of this, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as an Equipment Tech at the time of the accident and that he is able to return to work in his prior capacity as a result of said injury. The Arbitrator notes this job requires extensive use of Petitioner's hands and arms. Petitioner testified he now needs assistance with overhead lifting. Because of these, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 64 years old at the time of the accident. Petitioner would be considered an older worker. Because of this, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner has returned to his regular job and has no loss of future earnings. Because of this, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner was diagnosed with a rotator cuff tear and underwent surgical repair. He was released to return to unrestricted work duties pursuant to the FCE. Because of this, 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 12.5% loss of use of person as a whole pursuant to §8(2) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC030756
Case Name	WILLI, STEVEN N v. STATE OF ILLINOS – IL DEPT OF CENTRAL MGMT SERVICES
Consolidated Cases	
Proceeding Type	8(a)/19(h) Petition
Decision Type	Commission Decision
Commission Decision Number	22IWCC0183
Number of Pages of Decision	5
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Aaron Wright

DATE FILED: 5/20/2022

/s/Marc Parker, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Steven N. Willi,

Petitioner,

vs. No. 13 WC 030756
18 IWCC 0421

State of Illinois—Central Management Services,

Respondent.

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

This matter comes before the Commission on Petitioner's §19(h) and §8(a) Petition, seeking additional medical expenses, prospective medical care and additional permanent partial disability benefits for his left hand condition due to a material increase in his disability since the Commission's July 2, 2018 decision. In that decision, the Commission increased the Arbitrator's permanent partial disability award from 28% loss of use of the left hand to 35% loss of use of the left hand under §8(e)9 of the Act. On August 27, 2018, Petitioner filed a timely Petition for Review under §19(h) and §8(a) of the Act. A hearing on that Petition was held before Commissioner Parker on June 9, 2021. At that hearing, the parties stipulated that the only remaining issue to be decided was to what extent the Petitioner's disability had increased. Respondent suggests a 7.5% increase would be appropriate, while Petitioner now seeks a 20% increase in his permanent partial disability under §19(h), from 35% to 55% loss of use of the left hand.

Findings of Fact:

At the time of his original accident on July 20, 2012, Petitioner was a 49-year-old carpenter foreman who injured his left thumb, wrist and forearm in an accident arising out of and in the course of his employment with Respondent. Petitioner underwent surgery on his crushed left thumb and a radial shortening osteotomy on his left wrist. Petitioner's wrist complaints

increased post-surgery, including pain in the wrist, decreased grip strength, swelling, and numbness and tingling at night. He was released from care on February 25, 2014. Petitioner then underwent additional surgery to remove the hardware in his left wrist and to release his left carpal tunnel. Petitioner received a full release from care on May 10, 2016, but his treating physician, Dr. Mall, noted that he would likely require additional left wrist surgery. On January 24, 2017, the Arbitrator awarded Petitioner medical expenses related to his left hand and thumb injuries and 28% loss of use of the left hand. On review of the Arbitrator's Decision, the Commission increased the Arbitrator's permanency award to 35% loss of use of the left hand.

On August 27, 2018, Petitioner filed a Petition for Review of Prior Award and Prospective Medical Care pursuant to §19(h) and §8(a) of the Act. Since the time of his arbitration hearing on July 7, 2016, Petitioner had continued to suffer left wrist complaints. Dr. Mall referred him to Dr. Kutnik, a hand and wrist specialist, for possible partial fusion of the left wrist.

On February 23, 2018, Dr. Kutnik noted Petitioner's complaints of pain along the wrist joint and difficulty lifting and gripping with altered sensation in his hand and fingers. After further diagnostic testing, Dr. Kutnik performed wrist arthroscopy and debridement on February 5, 2019. Petitioner noted improved sensation but suffered persistent pain in the wrist. Following post-operative physical therapy, Petitioner's complaints continued.

On August 13, 2019, Petitioner underwent a left wrist proximal carpectomy, in which Dr. Kutnik converted Petitioner's wrist into a simple hinged joint allowing for only limited range of motion. Petitioner completed additional physical therapy before undergoing a §12 evaluation by Dr. Patrick Stewart on November 2, 2020. Dr. Stewart reviewed a functional capacity evaluation that placed Petitioner at maximum medical improvement with a 27-pound occasional and 15-pound constant lifting and carrying capability. Dr. Stewart noted significant loss of range of motion in Petitioner's left wrist with tenderness and pain. However, Dr. Stewart found no causal connection between Petitioner's wrist condition and his work accident.

At the review hearing on June 9, 2021, Petitioner credibly testified that the multiple surgeries had improved his pain symptoms but did not improve his ability to use his left wrist. He drops things on a regular basis and has no feeling from his thumb to his fingers. He has lost range of motion in his wrist along with grip strength. Although his pain has diminished as a result of his multiple surgeries, his function, strength, and range of motion have also decreased.

Conclusions of Law:

Section 19(h) seeks to redress changes in circumstances after the entry of an award. *Hardin Sign Co. v. Industrial Comm'n*, 154 Ill. App. 3d 386, 389-90 (1987). To obtain an increase in the permanent partial disability award under §19(h), Petitioner herein must show that his disability at the time of his initial arbitration hearing on July 7, 2016, had increased by the June 9, 2021 review hearing, and that that increase was material. *Gay v. Industrial Comm'n,* 178

Ill. App 3d 129, 132 (1989); *Motor Wheel Corp. v. Industrial Comm'n*, 75 Ill. 2d 230, 236 (1979). In order to determine whether Petitioner's condition materially deteriorated from the time of the Arbitrator's award to the present, it is necessary to compare his condition at those two relevant times. *Howard v. Industrial Comm'n,* 89 Ill. 2d 428, 430-31 (1982).

Regarding Petitioner's §19(h) Petition, the Commission notes that the Arbitrator, in her January 24, 2017 decision, set forth facts relevant to a determination of permanent partial disability as required by §8.1b(b) of the Act. The Commission considered those same factors in its decision on review entered on July 2, 2018. The Commission again reviews those factors in order to determine whether Petitioner's permanent partial disability has materially increased to justify an increase in the permanency awarded by the Commission. The Commission assigns the following weights to these factors:

(i) **Disability impairment rating:** *no weight,* because neither party submitted an impairment rating.

(ii) **Employee's occupation:** *some weight.* Petitioner did not testify to any change in his occupation. However, the Commission notes that Petitioner has significant restrictions in his range of motion and permanent work restrictions which impact his ability to perform his occupation. Therefore, some weight should be given to this factor.

(iii) **Employee's age:** *some weight,* because Petitioner was 49 years old at the time of his original injury and will have to deal with the effects of his injuries and surgeries for several more years of his working and natural life.

(iv) **Future earning capacity:** *no weight,* because although Petitioner presented no evidence of any decrease in earning capacity.

(v) **Evidence of disability corroborated by the treating records:** *significant weight,* because Petitioner's wrist condition continued to deteriorate following his initial arbitration hearing. His wrist pain progressively increased. Dr. Kutnik performed two additional wrist surgeries, which resulted in a diminution of Petitioner's pain complaints but also reduced his ability to function, his range of motion, and the strength of his grip. Moreover, Petitioner now has permanent lifting restrictions imposed following a functional capacity evaluation.

Based upon the above factors and the record as a whole, the Commission concludes that Petitioner has proved a material increase in his disability, pursuant to §19(h), in the amount of 12.5% loss of use of the left hand.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's §19(h) Petition is granted to the extent discussed above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $712.55 per week for a period of 25.625 weeks, as provided in §19(h) of the Act, for the reason that Petitioner sustained a material increase in his permanent disability to the extent of 12.5% loss of use of the left hand. As a result of his work-related accident, Petitioner is now permanently disabled to the extent of 47.5% loss of use of the left hand under §8(e) of the Act.

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

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

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.

May 20, 2022

mp/dak
r-06/09/21
068

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC017660
Case Name	HARRIS, TRACY v. PROLOGISTIX
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0184
Number of Pages of Decision	10
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Giambattista Patti
Respondent Attorney	Monte Beaty

DATE FILED: 5/24/2022

/s/Carolyn Doherty, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TRACY HARRIS,
Petitioner,

vs. NO: 20 WC 17660

PROLOGISTIX,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, prospective medical treatment, and clerical error, 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 21, 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 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.

May 24, 2022

o: 5/19/2022
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/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	20WC017660
Case Name	HARRIS, TRACY v. PROLOGISTIX
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Giambattista Patti
Respondent Attorney	Mark Slavin

DATE FILED: 12/21/2021

/s/William Gallagher, Arbitrator

Signature

INTEREST RATE WEEK OF DECEMBER 21, 2021 0.16%

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Tracy Harris
Employee/Petitioner

Case # 20 WC 17660

v.

Consolidated cases: n/a

Prologistix
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Herrin, on November 16, 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, 8, 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 not sustain an accident that arose out of and in the course of employment.

The Arbitrator makes no determination if 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 $10,023.96; the average weekly wage was $n/a.

On the date of accident, Petitioner was 49 years of age, single with 4 dependent child(ren).

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

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

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

ORDER

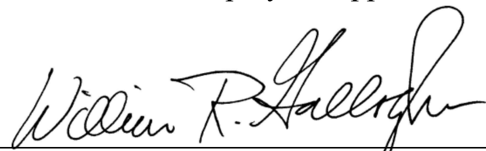
Based upon the Arbitrator's Conclusion of Law attached hereto, claim for compensation is denied.

Petitioner's petition for prospective medical treatment 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 **December 21, 2021**

ICArbDec19(b)

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 July 8, 2020. According to the Application, Petitioner was "Case Picking, Repetitive Trauma" and sustained an injury to the "MAW" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. Petitioner claimed he was entitled to temporary total disability benefits of 70 5/7 weeks, commencing July 9, 2020, through November 16, 2021 (date of trial). The prospective medical treatment sought by Petitioner was cervical disc replacement surgery as recommended by Dr. Matthew Gornet, an orthopedic surgeon. Respondent disputed liability on the basis of accident, notice and causal relationship (Arbitrator's Exhibit 1).

There was also a dispute regarding the computation of Petitioner's average weekly wage. This was based on whether or not overtime was mandatory. Petitioner and Respondent stipulated that if overtime was mandatory, Petitioner's average weekly wage was $601.62 and, if overtime was not mandatory, Petitioner's average weekly wage was $558.62 (Arbitrator's Exhibit 1).

Petitioner testified he was employed by Respondent, a temporary employment agency, and on July 8, 2020, he was working at the Fed Ex facility in Pontoon Beach, Illinois. Petitioner worked as a case fitter and his job duties included picking up boxes that weighed between two and 20 pounds. Petitioner testified that on July 8, 2020, he experienced pain in the left side of his neck.

Petitioner initially sought medical treatment in the ER of Anderson Hospital on July 8, 2020. According to the ER record, Petitioner had intermittent headaches the last two weeks and neck/left arm pain. Petitioner also advised he had a history of neck problems and there was "No recent injury or trauma." A CT scan of Petitioner's brain and cervical spine was obtained. The CT scan of Petitioner's brain was normal. The CT scan of Petitioner's cervical spine revealed mild spondylosis, but no acute abnormality (Petitioner's Exhibit 1).

Petitioner was subsequently evaluated by Dr. Raj Sajid, his family physician, on July 20, 2020. Dr. Sajid noted the complaints Petitioner had when seen in the ER of Anderson Hospital. Petitioner also complained of left side temple pain, left jaw numbness, left arm pain/numbness and right hand numbness. There was no reference in the record of Petitioner having sustained a work-related accident. Petitioner also advised he was already scheduled to be seen by Dr. Gornet on August 3, 2020 (Petitioner's Exhibit 2).

Dr. Gornet evaluated Petitioner on August 3, 2020. Dr. Gornet's record of that date noted he had previously treated Petitioner for low back pain and performed surgeries on October 2, 2013, and October 4, 2013. The surgical procedures consisted of anterior decompressions at L4-L5 and L5-S1, disc replacement at L4-L5 and an anterior fusion at L5-S1. Dr. Gornet also noted he previously treated Petitioner for neck symptoms, but Petitioner had advised he sustained a "new injury" to his neck. Petitioner advised he was lifting boxes at work on either July 7, or July 8, 2020, and experienced headaches, neck pain and numbness/tingling in his left arm. Dr. Gornet noted Petitioner had prior disc problems at C4-C5, C5-C6 and C6-C7, and also had a prior history of bilateral tingling in his arms (Petitioner's Exhibit 3).

Dr. Gornet opined lifting could aggravate or injure Petitioner's cervical disc condition. Dr. Gornet ordered an MRI scan and indicated he would compare it to the prior MRI scan. If he observed a substantial change, he would causally relate Petitioner's current symptoms, but if there was not a substantial change, he would opine Petitioner had sustained a temporary aggravation. Dr. Gornet also noted Petitioner had a multiple history of prior work injuries after only working for brief periods of time. He advised this fact "…raises some concerns." (Petitioner's Exhibit 3).

Respondent's counsel tendered into evidence medical records of Dr. Gornet for treatment he provided to Petitioner (which included records of Multicare Specialists) prior to the accident of July 8, 2020. In addition to the low back surgeries performed by Dr. Gornet in October, 2013, he also treated Petitioner for cervical spine symptoms associated to a work-related injury Petitioner sustained on December 15, 2016 (Respondent's Exhibit 5).

Following the accident of December 15, 2016, Petitioner was treated at Multicare Specialists, who subsequently referred Petitioner to Dr. Gornet. Dr. Gornet ordered an MRI scan of Petitioner's cervical spine which was performed on December 29, 2016. According to the radiologist, the MRI revealed a central annular tear/protrusion at C4-C5, central/bilateral foraminal protrusions at C4-C5, bilateral foraminal disc/disc complexes at C3-C4, spurring at C2-C3 and bilateral foraminal protrusions at C6-C7, larger left than right causing severe left foraminal stenosis (Respondent's Exhibit 5).

Dr. Gornet evaluated Petitioner on January 6, 2017, and reviewed the MRI of December 29, 2016. He opined it revealed annular tears at C4-C5 and C5-C6. He did not note any findings at C6-C7 (Respondent's Exhibit 5).

Dr. Gornet treated Petitioner's cervical spine condition conservatively. When he saw Petitioner on December 14, 2017, he again noted the cervical MRI findings at C4-C5 and C5-C6 and also opined it revealed a small left sided herniation at C6-C7. In his record he noted "My general belief would be to treat C5-C6 and C6-C7," in particular, at C5-C6 (Respondent's Exhibit 5).

In his medical note dated February 22, 2018, Dr. Gornet requested authority to perform disc replacement surgery at C5-C6 and C6-C7. However, in the medical record of May 24, 2018, Dr. Gornet requested authority to perform disc replacement surgery at C4-C5 and C5-C6. Dr. Gornet did not perform any cervical disc replacement surgery (Respondent's Exhibit 5). The next time Petitioner was seen by Dr. Gornet was on August 3, 2020.

In connection with his examination of August 3, 2020, Dr. Gornet ordered an MRI scan of Petitioner's cervical spine which was performed on October 26, 2020. According to the radiologist, the MRI revealed an annular tear and bilateral foraminal protrusions at C4-C5, an annular tear/protrusion at C5-C6 and a large left lateral foraminal protrusion at C6-C7 (Petitioner's Exhibit 3).

Dr. Gornet saw Petitioner on October 26, 2020, and reviewed the MRI performed that same day comparing it to the prior MRI of December 29, 2016. He opined there was no significant change in the disks at C4-C5 and C5-C6, but the C6-C7 disc had a large fragment coming off on the left which correlated with Petitioner's symptoms. He opined this was a new finding and Petitioner

remained temporarily totally disabled. He recommended Petitioner undergo a steroid injection at C6-C7, but if it did not provide him with relief, disc replacement surgery at C6-C7 would be appropriate (Petitioner's Exhibit 4).

At the direction of Respondent, Petitioner was examined by Dr. Michael Chabot, an orthopedic surgeon, on November 19, 2020. In connection with his examination of Petitioner, Dr. Chabot reviewed medical records and diagnostic studies provided to him by Respondent. The diagnostic studies reviewed by Dr. Chabot included the MRIs of December 29, 2016, and October 26, 2020. Dr. Chabot also compared the two MRIs and, in regard to C6-C7, he opined the more recent MRI revealed a "slight increase" in the lesion, but there were no substantial changes when compared to the 2016 MRI. He opined Petitioner's neck condition was not work-related and his symptoms were due to chronic degenerative changes which predated the accident (Respondent's Exhibit 1).

Petitioner was subsequently seen by Dr. Gornet on March 4, 2021, and July 8, 2021. Dr. Gornet noted Petitioner had undergone a steroid injection at C6-C7 on November 10, 2020, but it did not provide significant relief. He recommended Petitioner undergo disc replacement surgery at C6-C7 (Petitioner's Exhibit 4).

Dr. Gornet was deposed on July 12, 2021, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Gornet's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Specifically, Dr. Gornet testified he compared the MRIs of December 29, 2016, and October 26, 2020, and the MRI of October 26, 2020, revealed a new large disc fragment which was consistent with Petitioner's subjective complaints. He testified the prior herniation at C6-C7 was a very small protrusion and the more recent MRI revealed a large free fragment of disc. He recommended Petitioner undergo disc replacement surgery at C6-C7 (Petitioner's Exhibit 5; pp 8-10).

On cross-examination, Dr. Gornet testified he released Petitioner at MMI on May 24, 2018. However, he also said that Petitioner might require disc replacement surgery in the future at C4-C5 and C5-C6 (Petitioner's Exhibit 5; p 27).

Dr. Chabot was deposed on October 8, 2021, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Chabot's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Specifically, Dr. Chabot testified he reviewed the MRI of December 29, 2016, and October 26, 2020, and the condition he observed was a natural progression of the disc at multiple levels of the cervical spine. He said Petitioner may have sustained a strain injury as a result of the accident (Respondent's Exhibit 5; pp 15-18).

When cross-examined about his review of the MRI of October 26, 2020, Dr. Chabot testified he did not see a large free fragment, but a disc protrusions that was also present in the prior 2016 MRI (Respondent's Exhibit 5; pp 30-31).

At trial, Petitioner testified he reported the accident the same day it occurred to John Ryan, a Fed Ex employee, and his immediate supervisor. On August 27, 2020, Petitioner completed an accident report which was signed by Alexander Barrera, an employee of Respondent.

Alexander Barrera testified on behalf of Respondent. He confirmed an accident report was completed by Petitioner on August 27, 2020. He also testified that, at the time he was hired, Petitioner was given instructions on reporting accidents and watched a video regarding safety. He said he had no knowledge of Petitioner having reported an accident to John Ryan.

Petitioner testified the neck pain he has experienced since the accident is different than the neck pain he experienced in the past. He said it is more intense now than it was before and he has not able to return to work. He wants to proceed with the disc replacement surgery as recommended by Dr. Gornet.

Conclusions of Law

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

The Arbitrator concludes Petitioner did not sustain an accidental injury arising out of and in the course of his employment by Respondent on July 8, 2021, and his current condition of ill-being is not related to his work activities.

In support of this conclusion the Arbitrator notes the following:

When Petitioner sought medical treatment on July 8, 2020, at the ER of Anderson Hospital, he advised he had a history of neck problems and did not report having sustained a work-related injury.

When Petitioner was subsequently seen by Dr. Sajid on July 20, 2020, he did not report having sustained a work-related injury.

The first time Petitioner informed a medical provider he had sustained a work-related injury was when he sustained by Dr. Gornet on August 3, 2020. Dr. Gornet noted Petitioner had previously experienced cervical spine symptoms and also noted Petitioner had a multiple history of prior work accidents after having only worked for brief periods of time.

Dr. Gornet previously recommended disc replacement surgery at C4-C5 and C5-C6; however, he also recommended disc replacement surgery at C5-C6 and C6-C7. No disc replacement surgery was performed by Dr. Gornet and was not clear whether he had, in fact, previously recommended disc replacement surgery at C4-C5 and C5-C6 or C5-C6 and C6-C7.

Both Dr. Gornet and Dr. Chabot, Respondent's Section 12 examiner, reviewed and compared the MRI of Petitioner's cervical spine of December 29, 2016, and October 26, 2020. In regard to C6-C7 disc, Dr. Gornet opined there was a significant change in the pathology at C6-C7 observed in the MRI of October 26, 2020, namely, a large disc fragment that was not present before. Dr. Chabot opined that what he observed in the MRI of October 26, 2020, was only a slight increase in the lesion at C6-C7.

In light of the preceding, the Arbitrator finds Petitioner's credibility as to his having sustained a work-related accident on July 8, 2020, to be questionable.

Based upon the preceding, the Arbitrator finds the opinion of Dr. Chabot regarding the pathology observed at C6-C7 when comparing the two MRI scans to be more persuasive than that of Dr. Gornet. This finding is based, in part, on the uncertainty of exactly what cervical disc replacement procedures Dr. Gornet had previously recommended, C4-C5 and C5-C6 or C5-C6 and C6-C7.

In regard to disputed issue (K), based upon the Arbitrator's conclusion of law in disputed issues (C) and (F) the Arbitrator concludes Petitioner is not entitled to prospective medical treatment.

In regard to disputed issues (E), (G) and (L), the Arbitrator makes no conclusion of law as these issues are rendered moot because 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	18WC012613
Case Name	SLAVENS, JOEL v. STATE OF ILLINOIS/ MENARD CORRECTIONAL CENTER
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0185
Number of Pages of Decision	18
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Aaron Wright

DATE FILED: 5/24/2022

/s/*Marc Parker, 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 MADISON)		☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Joel Slavens,

Petitioner,

vs. NO: 18 WC 12613

State of Illinois/Menards
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 causal connection, medical expenses, prospective medical care, and the nature and extent of the 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 November 15, 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.

May 24, 2022

MP:yl
o 5/19/22
68

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC012613
Case Name	SLAVENS, JOEL v. MENARD CORRECTIONAL CENTER
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Aaron Wright

DATE FILED: 11/15/2021

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 9, 2021 0.06%

/s/ *Jeanne AuBuchon, Arbitrator*
Signature

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

November 15, 2021

/s/ *Brendon O'Rourke*
Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JOEL SLAVENS
Employee/Petitioner

v.

MENARD CORRECTIONAL CENTER
Employer/Respondent

Case # **18** WC **12613**

Consolidated cases: ______

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Collinsville**, on **June 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 ______

FINDINGS

On **March 25, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**59,901.63**; the average weekly wage was $**1,151.95**.

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

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

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

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

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

ORDER

Respondent shall pay the reasonable and necessary medical services of outlined in Petitioner's Exhibit 1, as provided in § 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**691.17**/week for a period of **100** weeks, as provided in § 8(e) of the Act, because the injuries sustained caused the 20% loss of his body as a whole as a result of serious and permanent injuries sustained to Petitioner's left shoulder.

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

NOVEMBER 15, 2021

PROCEDURAL HISTORY

This matter proceeded to trial on June 15, 2021. The issues in dispute are: 1) the causal connection between the accident and the Petitioner's left shoulder condition; 2) liability for medical bills; and 3) the nature and extent of the Petitioner's injury.

FINDINGS OF FACT

At the time of the accident, the Petitioner, who was 33 years old, was employed by the Respondent as a corrections officer at Menard Correctional Center. (AX1, T. 11, 18) On March 25, 2018, the Petitioner was escorting a line of inmates through the chow hall when a fight broke out. (T. 11) In trying to restrain an inmate who was resisting him, the Petitioner fell to the ground on his left arm and shoulder. (T. 11-12) The Petitioner, who is right-handed, experienced pain and numbness on the left side of his shoulder and down his arm. (T. 12, 24) He said he did not have problems with his shoulder before the incident. (T. 32)

After the incident, the Petitioner was evaluated by the on-site health care unit and sent to the Chester Hospital emergency room. (Id.) Shoulder X-rays at the hospital revealed degenerative arthrosis of the glenohumeral joint. (PX3) The Petitioner was given an arm sling, and no further treatment was recommended. (Id.)

On April 4, 2018, the Petitioner saw Dr. George Paletta, an orthopedic surgeon at The Orthopedic Center of St. Louis. (PX4) The Petitioner reported that he tried to work after the incident but had discomfort in his shoulder, particularly with trying to raise his arm. (Id.) A physical examination revealed no focal tenderness at the acromioclavicular (AC) or sternoclavicular (SC) joints or at the bicipital groove. (Id.) The Petitioner had mild motion limitations on all planes on the left side as compared to the right side. (Id.) His rotator cuff strength was good except in the supraspinatus, which showed mild discomfort with strength testing. (Id.)

Thumbs-down O'Brien's testing caused pain and weakness, but there were no translation abnormalities on load and shift testing. (Id.) X-rays taken that day showed moderate glenohumeral joint degenerative joint disease (DJD) with a large inferior "goat's beard" osteophyte, as well as joint space narrowing and flattening of the humeral head. (Id.)

Dr. Paletta diagnosed the Petitioner with osteoarthritis of the left glenohumeral joint with acute increase in symptoms and a probable superior labrum anterior posterior (SLAP) tear versus partial tear subscapularis. (Id.) He opined that the work accident could have resulted in the acute increase of symptoms related to the DJD but wanted an MRI to investigate whether there was a superior labral lesion or partial subscapularis tear. (Id.) The MRI arthrogram performed that day by radiologist Dr. David Dusek showed severe left glenohumeral osteoarthritis, a 9 mm intraarticular loose body within the axillary pouch, diffuse complex tearing of the glenoid labrum of likely degenerative etiology and an unremarkable long head of the biceps tendon. (PX5)

On April 9, 2018, Dr. Paletta read the MRI arthrogram with similar findings. (PX4) He gave three treatment options: 1) intra-articular injection; 2) arthroscopy with the removal of the loose body and debridement of the labral tear with possible comprehensive arthroscopic management (CAM) for the Petitioner's arthritis; or 3) total shoulder arthroplasty. (Id.) On June 26, 2018, Dr. Paletta performed a diagnostic arthroscopy; debridement and chondroplasty of the humeral head; debridement of the labrum; removal of loose bodies; debridement, lysis of adhesions and capsular releases at the glenohumeral joint; and subacromial decompression, bursectomy and acromioplasty. (PX4, PX6)

At a follow-up visit with Dr. Paletta on July 11, 2018, the Petitioner was doing well, and Dr. Paletta ordered physical therapy. (PX4) On August 29, 2018, the Petitioner reported to Dr. Paletta that he was doing well with activity below shoulder level but elevating the arm above

shoulder level resulted in popping and grinding in the shoulder. (Id.) He said that once he works through that, he can get the arm overhead more easily. (Id.) A physical examination revealed continued reduced supraspinatus strength with pain. (Id.) Dr. Paletta said he would be cautious about proceeding to a total shoulder replacement without exhausting additional treatment options because of the Petitioner's young age. (Id.) He recommended an intra-articular injection, which was performed that day by Dr. Kaylea Boutwell, a pain management specialist at Pain & Rehabilitation Specialists. (PX4, PX8)

The Petitioner underwent physical therapy at Red Bud Regional Hospital from July 18, 2018, through October 26, 2018, for a total of 19 visits. (PX7) At discharge, physical therapist Amy Brown reported that the Petitioner's progress had plateaued. (Id.) His strength and range of motion improved but were not as the same levels as on his right side. (Id.) The Petitioner testified that after the surgery, he did not regain his strength, his range of motion was still limited, and he was still experiencing pain. (T. 14)

At another follow-up visit with Dr. Paletta on October 17, 2018, the Petitioner reported that the injection helped with pain, but he was unable to get his strength back and was limited in using his shoulder. (PX4) This was consistent with the physical examination. (Id.) Dr. Paletta recommended a consultation with another orthopedic surgeon. (Id.)

Upon referral, the Petitioner saw Dr. Matthew Bradley, an orthopedic surgeon at Midwest Bone and Joint Surgery, on November 9, 2018. (PX9) At that time, the Petitioner reported achy pain in his left shoulder at a level of four out ten aggravated by movement. (Id.) A physical examination revealed significant palpable and auditory crepitus with active range of motion, full rotator cuff strength, positive impingement tests (Neer/Jobs/Hawkins), negative biceps provocative tests (Speed's/Yergurson's), negative instability tests (apprehension/sulcus), intact

sensation and neurovascular and full unrestricted motion and strength across the elbow, wrist and hand. (Id.) Shoulder X-rays showed severe bone-on-bone osteoarthritis of the glenohumeral joint with significant inferior glenoid and humeral head osteophyte formation. (Id.) Cervical spine X-rays were normal. (Id.) An ultrasound revealed evidence of moderate subacromial effusion and significant osteophyte formation in the inferior joint space. (Id.) Dr. Bradley ordered a repeat MRI and opined that the Petitioner would need "some sort of shoulder replacement" versus a resurfacing-type procedure to treat ongoing pain. (Id.) He reported that the need for continued evaluation and future surgery was a sequella and direct result of the work injury, which was a significant participating factor in the Petitioner's continued shoulder pain and dysfunction. (Id.)

On December 11, 2018, the Petitioner underwent an MRI arthrogram conducted by radiologist Dr. David Wu at Elite Imaging, who found: partial thickness undersurface delaminating tear involving approximately 50 percent of the craniocaudal tendon thickness in the posterior aspect of the supraspinatus myotendinous junction in the background of tendinopathy; focal full-thickness delaminating tear involving the inferior half of the subscapularis tendon without tendon retraction; post-surgical changes in the posterior inferior glenoid labral complex; type II glenoid dysplasia with posterior inferior fibrillated labral tear; and acromioclavicular osteoarthrosis and low-lying acromial arch contributing to stenosis of the rotator cuff outlet. (PX9, PX10)

At a follow-up visit to Midwest Bone and Joint Surgery on December 19, 2018, the Petitioner reported that his shoulder was progressively worse, with soreness with active lifting and motion more limited. (PX9) He also reported stabbing pain at a level of six out of 10. (Id.) A physical examination showed negative impingement, biceps provocative and instability testing but there was decreased passive range of motion and rotator cuff strength. (Id.) Left shoulder resurfacing was recommended. (Id.)

On January 8, 2019, the Petitioner underwent a Section 12 examination performed by Dr. Michael Nogalski, an orthopedic surgeon at Orthopedic Associates. (RX2) After reviewing the Petitioner's medical records and imaging studies and conducting a physical examination, Dr. Nogalski diagnosed the Petitioner as being post left shoulder strain with subsequent surgical treatment for multiple osteoarthritic glenohumeral issues and ongoing subjective complaints of pain due to osteoarthritis. (Id.) He opined that there was no causal relationship between the objective findings and the work accident and related the Petitioner's issues to his arthritis. (Id.) He added that there was "no objective validation of aggravation." (Id.) He wrote that the Petitioner had significant osteoarthritic changes within the shoulder "for some time."

Dr. Nogalski stated that irrespective of cause, medical treatment provided to date had been reasonable and necessary. (Id.) He wrote that further medical treatment would reasonably be for his osteoarthritic shoulder condition, and he would strongly advocate nonoperative treatment but added that hemiarthroplasty was a possibility. (Id.) He gave the Petitioner a fair prognosis and stated that the Petitioner would have some difficulties with range of motion and painful activities above shoulder level. (Id.) Dr. Nogalski found the Petitioner to be at maximum medical improvement and believed he could perform his usual daily activities without difficulty. (Id.)

On March 5, 2019, Dr. Bradley performed a left shoulder resurfacing with a HemiCAP implant and a subacromial decompression. (PX9, PX11) A revision of the HemiCAP was performed on the following day after the implant disassociated from its post. (Id.) At a follow-up visit on March 21, 2019, the Petitioner denied significant pain but reported stiffness in his shoulder. (Id.) Dr. Bradley prescribed physical therapy. (Id.) On April 18, 2019, the Petitioner reported dull pain with motion but no longer had the severe catching or crepitus that was present before the surgery. (Id.) On May 23, 2019, the Petitioner denied significant pain but noted stiffness that

improved with therapy. (Id.) He made similar reports at a follow-up visit on June 20, 2019. On August 21, 2019, Dr. Bradley found the Petitioner to be at maximum medical improvement. (Id.)

The Petitioner underwent physical therapy at Red Bud Regional Hospital from April 10, 2019, through August 28, 2019, for a total of 36 visits. (PX7) When he was discharged, the Petitioner's strength and range of motion had improved, and his progress again had plateaued. (Id.) He reported no pain but felt that his shoulder was "catching." (Id.)

Dr. Bradley testified consistently with his reports at a deposition on March 21, 2019. (PX13) He opined that the Petitioner was suffering from shoulder pain likely secondary to an exacerbation or acceleration of degenerative disease secondary to his work injury. (Id.) He explained that the Petitioner had no prior shoulder issues and his condition had not improved after the surgery by Dr. Paletta, so he concluded that the Petitioner had ongoing exacerbation of the labral tear and the underlying arthritis. (Id.) He further explained that the cartilage was tearing away from the bone, breaking off and floating around inside the joint. (Id.) He said that a shoulder surgery sometimes induces a huge inflammatory response that causes the arthritis "to just go crazy," resulting in the cartilage breaking away and falling off. (Id.) He said this occurrence was not very common. (Id.) He noted that Dr. Paletta stated in his operative report that the Petitioner's cartilage was "getting kind of thin" but that there was still cartilage left – while when he operated a few months later, the Petitioner had "absolutely no cartilage." (Id.)

Dr. Bradley was optimistic that not only would the Petitioner have a full recovery and be able to perform full, unrestricted work, but that the implant itself would never wear out. (Id.) He stated that the Petitioner would be able to resume working out at the gym. (Id.) He said the worst-case scenario for the Petitioner was that he may need a full shoulder replacement at age 55 or 60. (Id.)

On cross-examination, Dr. Bradley admitted that the pathologic findings in Dr. Paletta's reports were of a pre-existing nature and that his arthritis was "extremely severe." (Id.) He said that common sense would say that the Petitioner would probably have developed pain in his shoulder over time, but it was impossible to say whether it would have required any kind of surgical intervention. (Id.) Dr. Bradley compared the Petitioner's arthritis to a sleeping dog, and that the Petitioner's fall at work woke up the arthritis, causing something that was dormant to become very painful. (Id.) He explained that he did not treat the Petitioner for arthritis but for pain – he operated to get rid of the pain, not to get rid of the arthritis. (Id.)

On January 27, 2020, Dr. Nogalski issued another report after reviewing additional records, including Dr. Bradley's operative notes, follow-up reports and deposition. (RX3) He pointed to the following inconsistencies he perceived in Dr. Bradley's records and deposition testimony: 1) Dr. Bradley did not mention loose bodies in his operative report but did mention them in his deposition; 2) Dr. Bradley did not note a fairly significant posterior retroversion in the glenoid that was consistent with longstanding degenerative changes in a young patient. (Id.) Dr. Nogalski reiterated his opinion that the Petitioner could have returned to work at his regular job activities before the last two surgeries, which he characterized as an elective procedure outside the boundaries of the work injury. (Id.) He did state that at most, the work injury would have been an aggravation – or perception of aggravation – of the Petitioner's osteoarthritic shoulder. (Id.)

Dr. Nogalski testified consistently with his reports at a deposition on April 26, 2021. (RX4) He stated that if the Petitioner had been his patient, he would have recommended that after the first surgery the Petitioner optimize nonoperative treatment with physical therapy and continue to try to function with his shoulder in its osteoarthritic state. (Id.) He believed the Petitioner would have been better off stopping after the first surgery. (Id.)

On cross-examination, Dr. Nogalski testified that he did not see that the Petitioner sustained a "generalized universal some sort of injury" to his shoulder because he did not see any objective finding to support such an injury. (Id.) But he then testified that the Petitioner suffered a strain. (Id.) He stated that all three surgeries were completely unrelated to the accident. (Id.)

The Petitioner testified that after the last surgery, it took a long time to get any movement in his shoulder. (T. 16) At the time of arbitration, the Petitioner stated that his range of motion was still limited and he experienced pain in doing such things as reaching into his back pocket for his wallet. (T. 17) He said most of the time there is no pain, but his arm is weak and he has soreness if he sleeps on his left side or has to use his left arm in excess. (T. 17-20) He has issues with reaching overhead and has not lifted weights because of that. (T. 21) He also had difficulties holding his daughter in his left arm, and his hobbies – bowhunting and using a shoulder firearm – agitate his shoulder. (T. 22) He has not hunted waterfowl because of his shoulder. (T. 29)

In his current work as a machine operator for SunCoke Energy, the Petitioner runs CAT loaders, skid steers and a pusher car, cleans out hoppers and performs maintenance – spraying down machines and making sure they are clean and ready for the next shift. (T. 25-26) He said he has difficulty reaching, using certain hand tools and raking coal from a hopper. (T. 10, 23, 25) He said the surgeries did relieve his constant pain and helped his range of motion. (T. 23)

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

CONCLUSIONS OF LAW

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. Indus. Comm'n,* 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278

Ill.Dec. 70 (2003). An employer takes its employees as it finds them. *St. Elizabeth's Hosp. v. Workers' Comp. Comm'n,* 371 Ill.App.3d 882, 888, 864 N.E.2d 266, 309 Ill.Dec. 400 (5th Dist. 2007). A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm.,* 92 Ill. 2d 30, 36, 440 N.E.2d 861, 65 Ill.Dec. 6 (1982). Employers are to take their employees as they find them. *A.C.& S. v. Industrial Comm'n*, 304 Ill.App.3d 875, 883, 710 N.E.2d 837, 238 Ill.Dec. 40 (1st Dist. 1999)

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*, 371 Ill.App.3d at 888.

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. Industrial. Comm'n*, 77 Ill. 2d 469, 471-472, 397 N.E.2d 834, 34 Ill.Dec. 162 (1979); *Gano Elec. Contracting v. Industrial Comm'n*, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724, 197 Ill.Dec. 502 (4th Dist. 1994); *International Harvester v. Industrial Com.*, 93 Ill.2d 59, 63-64, 442 N.E.2d 908, 66 Ill.Dec. 347 (1982).

The Petitioner had pre-existing osteoarthritis and degenerative joint disease in his left shoulder that were asymptomatic until the accident of March 25, 2018. This circumstantial evidence leads to an inference that the accident aggravated or accelerated the Petitioner's arthritic condition.

Dr. Nogalski's opinion failed to explain the sudden onset of symptoms after the accident. He reported that the Petitioner had significant arthritic changes "for some time" but dismissed the theory that the accident aggravated the Petitioner's arthritic condition. However, Dr. Bradley's "sleeping dog" analogy better aligns with the medical and circumstantial evidence. Further, the inconsistencies that Dr. Nogalski pointed out in Dr. Bradley's testimony do not change the big picture that leads to the conclusion that the work injury aggravated or accelerated the Petitioner's arthritic condition. The Arbitrator finds inconsistencies between Dr. Nogalski's reports and testimony as well, such as reporting there may have been an aggravation of the Petitioner's arthritis and testifying there was not and reporting that the first surgery was reasonable and necessary and testifying that all three surgeries were not. For all of these reasons, the Arbitrator gives greater weight to Dr. Bradley's opinion than to Dr. Nogalski's.

Therefore, the Arbitrator finds that the Petitioner has met his burden of proving by a preponderance of the evidence that the accident of March 25, 2018, was a contributing factor to his left shoulder condition.

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, 327 Ill.Dec. 883 (2009). A claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 534, 758 N.E.2d 18, 259 Ill.Dec. 173 (1st Dist. 2001).

Aside from his causation opinion, Dr. Nogalski stated that the treatment through the first surgery was reasonable and necessary. He then found that after that first surgery, the Petitioner was at maximum medical improvement and able to work full duty. But he also stated that the Petitioner would have some difficulties with range of motion and painful activities above shoulder level. Leaving the Petitioner with these issues does not relieve the effects of the Petitioner's injury.

Like his analogy to the "sleeping dog," Dr. Bradley's theory of the Petitioner's arthritis going "crazy" after the first surgery comports with the objective medical evidence showing that at the time of the first surgery, the Petitioner still had cartilage on the glenohumeral joint, but that cartilage was completely gone less than six months later. To allow this condition to continue without intervention would have only caused his symptoms to worsen. This would run contrary to the goals of the Act.

Again, the Arbitrator gives greater weight to Dr. Bradley's opinions than Dr. Nogalski's.

Based on the findings above regarding causation and Dr. Bradley's opinions on his continued attempts to return the Petitioner to his pre-accident condition, the Arbitrator also finds that the second and third surgeries and rehabilitative treatment were 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 Exhibit 1 pursuant to Section 8(a) of the Act and in accordance with medical fee schedules.

Issue L: What is the nature and extent of the Petitioner's injury?

Pursuant to Section 8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011, is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of Section 8.1; (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." *Id.*

(i) **Level of Impairment.** No AMA impairment ratings were produced, therefore the Arbitrator gives this factor no weight.

(ii) **Occupation.** The Petitioner has changed occupations, but his description of his new job includes tasks that requires use of his shoulder. Therefore, the Arbitrator places some weight on this factor.

(iii) **Age.** The Petitioner was 33 years old at the time of the injury. He has many work years left during which time he will need to deal with the residual effects of the injury. The Arbitrator places significant weight on this factor.

(iv) **Earning Capacity.** There was no evidence of limitation of the Petitioner's earning capacity. Therefore, the Arbitrator places no weight on this factor.

(v) **Disability.** The Petitioner testified that he still experiences pain and loss of strength and range of motion. However, his reports to Dr. Bradley and PT Brown painted a better picture than his testimony. Further, Dr. Bradley was optimistic that the Petitioner would be able to perform his job duties and hobbies. The Arbitrator puts some weight on this factor.

Therefore, the Arbitrator finds the Petitioner's permanent partial disability to be 20 percent of the body as a whole as it pertains to the Petitioner's left shoulder.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC033809
Case Name	MAGGIORE, CHRISTINA v. S&L TOWING
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0186
Number of Pages of Decision	10
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Patrick Brooks
Respondent Attorney	David Christensen

DATE FILED: 5/24/2022

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christina Maggiore, as Independent Administrator of the Estate of Donald Maggiore, deceased,

Petitioner,

vs. No. 13 WC 33809

S & L Towing, The Illinois State Treasurer, as Ex-Officio Custodian of the IWBF and Jesus Macias,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein, The Illinois State Treasurer, as *ex-officio* Custodian of the Injured Workers' Benefit Fund, and notice given to all parties, the Commission, after considering the issues of employment relationship, average weekly wage, benefit rates, causal connection, medical expenses, permanent partial disability and liability of the Injured Workers' Benefit Fund, 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 Illinois State Treasurer as *ex-officio* Custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $11,400.00. 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.

May 24, 2022

MP/mcp
o-05/19/22
068

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MAGGIORE, DONALD Case# **13WC033809**

Employee/Petitioner

S & L TOWING THE ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE IWBF & JESUS MACIAS

Employer/Respondent

On 11/1/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.61% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4974 SHEA LAW GROUP
PATRICK BROOKS
2400 N WESTERN AVE 2ND FL
CHICAGO, IL 60647

0000 S&L TOWING
JESUS MACIAS
6621 W 89TH PL
OAK LAWN, IL 60453

6149 ASSISTANT ATTORNEY GENERAL
DANIELLE CURTISS
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

Donald Maggiore
Employee/Petitioner

Case # **13** WC **33809**

v.

Consolidated cases: ______

S & L Towing,
The Illinois State Treasurer, as ex-officio custodian of IWBF and Jesus Macias
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 **Arbitrator Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **08-13-19**. 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 **08-25-13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**42,000.00**; the average weekly wage was $**807.69**.

On the date of accident, Petitioner was **47** 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

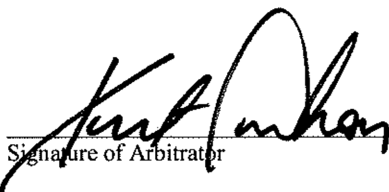
Medical Expenses
Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $1,579.00 to West Suburban Medical Center, as provided in Sections 8(a) and 8.2 of the Act.

Permanent Partial Disability
Respondent shall pay Petitioner permanent partial disability benefits of $484.61 per week for 20 weeks, because the injuries sustained caused disfigurement of the head and face, as provided in Section 8(c) of the Act. Additionally, Petitioner is entitled to 10% loss of use of a person as a whole (50 weeks) for the subsequent emotional trauma after suffering a gunshot injury to face.

The Illinois State Treasurer, as ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under 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

10-31-19
Date

NOV - 1 2019

State of Illinois)
)
County of Cook)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Donald Maggiore, **Petitioner,**	)	
v.	)	**No. 13 WC 33809**
S & L Towing, Illinois State Treasurer As ex-officio custodian of the IWBF and Jesus Macias, **Respondents.**	)	

MEMORANDUM OF DECISION OF ARBITRATOR

The medical records submitted from West Suburban Hospital(PX 1) and the testimony from Petitioner establish the following in this case:

On August 25, 2013 Petitioner was employed as a tow truck driver. Petitioner testified that he worked for a sub-contractor whom had a contract with the City of Chicago to tow vehicles which needed to be impounded. In the early morning hours of 8/25/13, Petitioner and his partner were dispatched to tow two vehicles at the same location. While seated in his tow truck, Petitioner testified that an unknown offender pressed a gun against his head and demanded his phone and money. At some point, Petitioner testified that he turned his head and he heard the sound of a gun shot and passed out. Petitioner testified that the next thing he remembers is his partner speaking to him in the tow truck and feeling blood run down his face. Petitioner testified he was taken by ambulance to West Suburban Hospital.

The medical records from West Suburban Hospital establish that Petitioner, age 47, was admitted for a "graze wound to the face(PX 1)." The medical history provided states that: "PT is a tow truck driver, accosted at gun point. Perpetrator took a shot at patient, who turned his head to the left. The bullet grazed the bridge of his nose and the left eyebrow(PX # 1). Petitioner received 7 sutures in the eyebrow and 6 sutures for his nose(PX 1). Petitioner was discharged in "stable" condition(PX 1).

The Arbitrator finds the testimony of Petitioner as to this occurrence not only credible but also a vivid and harrowing account of a gunshot wound that occurred while in the course of his employment on 8/25/13. Petitioner testified that he spoke to his "boss" named Sam whom he referred to throughout his testimony as the owner of S & L Towing about this occurrence. Petitioner testified that he briefly went back to work as tow truck driver following this occurrence but that Sam eventually "let him go." Petitioner also testified that he is afraid to return to work as tow truck driver because of what happened to him during this incident. Petitioner admitted, however, that health problems pertaining to his diabetic condition have prevented him from returning to gainful employment.

Petitioner testified and the Arbitrator observed a scar of approximately two inches across the bridge of his nose. Petitioner also has a scar of similar length on his left eyelid but the scar is not visible unless the eyelid is closed. Although the Arbitrator finds Petitioner's emotional testimony credible and compelling as to the psychological trauma that this near death experience has and continues to have on Petitioner's mental well-being, there is no medical evidence submitted in this case to establish any diagnosis or treatment for any post-traumatic stress or other mental condition that can be associated with this occurrence. That being said, the Arbitrator does make findings on the following issues:

A. WAS RESPONDENT OPERATING UNDER AND SUBJECT TO THE ILLINOIS WORKERS' COMPENSATION OR OCCUPATIONAL DISEASE ACT?

Based upon the testimony presented, the Arbitrator finds that on 8/25/13 the Respondent, S & L Towing, was subject to the Illinois Workers' Compensation Act.

B. WAS THERE AN EMPOYEE-EMPLOYER RELATIONSHIP?

The Arbitrator finds that on 8/25/13 an employee-employer relationship existed between Petitioner and S & L Towing. Although Petitioner testified that he would usually receive his work assignments from a dispatcher employed by another tow tuck company, the greater weight of the evidence provided by Petitioner establishes that S & L Towing exercised a greater degree of control over Petitioner's work. Most importantly, S & L provided the tow truck that allowed Petitioner to perform his essential job duties(i.e. tow cars). Furthermore, Petitioner testified that he was paid by S & L, wore an S & L uniform and was provided a business cell phone by S & L. As such, the manifest weight of the evidence establishes that Respondent, S & L Towing, was in the best position to

control the means and manner of how Petitioner performed his job duties. **Wenholdt v. Industrial Comm'n, 95 Ill. 2d 76 (1983).**

C & D DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT WITH RESPONDENT? AND WHAT WAS THE DATE OF THE ACCIDENT?

Based upon the testimony and medical records submitted, the Arbitrator finds that on 8/25/13 Petitioner was involved in an accident that arose out of and in the course of his employment with S & L Towing.

E. WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT?

Based upon Petitioner's testimony that he spoke to his boss, Sam, at S & L Towing about this occurrence, the Arbitrator finds that timely notice was provided to Respondent.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

The Arbitrator finds that the scars displayed by Petitioner on his notice and Left eyebrow represent permanent disfigurements that are causally related to the injury sustained on 8/25/13. The medical records from West Suburban Medical Center(PX #1) document sutures applied to both these areas following Petitioner's facial injuries after receiving a graze wound (PX #1). The Arbitrator at hearing observed scars present at both of these locations. For reasons stated above, the Arbitrator finds that Petitioner has met his burden of proof both regarding disfigurement and emotional trauma.

G. WHAT WERE PETITIONER'S EARNING?

The credible testimony of Petitioner established that he was paid $15.00 per car that he towed and that he on average would tow 54 cars a week. Applying these numbers would produce an average weekly wage of $810.00. Here Petitioner is alleging an average weekly wage of $807.69 (Arbitrator Exhibit #1). Even though Petitioner's testimony as to earning was unrebutted, in the absence of tangible written evidence of earnings, the Arbitrator finds that the lower figure of $807.69 listed on the Request For Hearing form (Arbitrator's Exhibit #1) is determined to be Petitioner's average weekly wage in this case.

H & I. WHAT WAS PETITIONER'S AGE AT THE TIME OF THE ACCIDENT & WHAT WAS PETITIONER'S MARITAL STATUS A THE TIME OF ACCIDENT?

The Arbitrator finds that at the time of the accident Petitioner was 47 years old

and married based upon the medical records and testimony provided at hearing.

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 emergency room treatment provided Petitioner at West Suburban Hospital was reasonable and necessary to treat him for a graze gunshot wound. Petitioner's wounds to his face were cleaned, irrigated and sutures were applied to his nose and left eyebrow area(PX#1). The Arbitrator further finds that the charges incurred for this treatment in the amount of $1,570.00 from West Suburban Hospital shall be paid by Respondent pursuant to the fee schedule and pursuant to Sections 8(a) and 8.2 of the Act.

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

Taking into account the 8.1(b) PPD factors, the medical records submitted and the testimony by Petitioner which show that Petitioner received two laceration wounds from being grazed by a gunshot. The Arbitrator observed a scar across the bridge of Petitioner's nose of approximately two inches in length. There is also a scar present on Petitioner's left eyelid of almost the same length; however, the eyelid scar is not visible unless Petitioner closes his eye. While testifying about the scar, the Arbitrator observed Petitioner become quite emotional. Although there was no testimony or medical evidence that the scars result in any physical discomfort or embarrassment to Petitioner, it was apparent to the Arbitrator while observing Petitioner during the hearing that the scars due serve as emotional reminders to Petitioner of what happened to him on 8/25/13 and how a fortunate turn of the head prevented even greater injury or death. Based on the foregoing, the Arbitrator awards Petitioner permanent partial disability benefits of $484.61 per week for 20 weeks of disfigurement to the head and face, as provided in Section 8(c) of the Act. Additionally, the Arbitrator awards 10% loss of use of a person as whole for the emotional trauma Petitioner suffered because of the occurrence. Petitioner stated that he rarely went out of the house, nor did he work for two years.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC024069
Case Name	BROWN, EDITH v. TESTORS
Consolidated Cases	11WC047641
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0187
Number of Pages of Decision	18
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Jason Esmond
Respondent Attorney	Christopher Tomczyk

DATE FILED: 5/24/2022

/s/*Christopher Harris, 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

EDITH BROWN,

Petitioner,

vs. NO: 16 WC 24069

TESTORS,

Respondent.

DECISION AND OPINION ON REVIEW

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

This claim was consolidated with claim number 11 WC 47641 for purposes of Arbitration hearing and Review before the Commission. A separate Decision has been issued for claim 11 WC 47641. The Commission writes to clarify that there is only one bond comprising both claims in the amount of $75,000.00 as both claims share the same award.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 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 commencing on the second July 15th after the entry of this award, the Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that 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 $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.

May 24, 2022

CAH/tdm
O: 5/19/22
052

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

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

/s/*Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC024069
Case Name	BROWN, EDITH v. TESTORS
Consolidated Cases	No Consolidated Cases
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Paul Seal, Arbitrator

Petitioner Attorney	Jason Esmond
Respondent Attorney	Christopher Tomczyk

DATE FILED: 10/8/2021

THE INTEREST RATE FOR THE WEEK OF OCTOBER 5, 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

Edith Brown Case # **16 WC024069**
Employee/Petitioner
v.

Testors
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 **Paul Seal**, Arbitrator of the Commission, in the city of **Rockford**, on **September 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

FINDINGS

On the dates of accident, **August 1, 2011, and July 12, 2016,** Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On these dates, Petitioner did sustain accidents that arose out of and in the course of employment.

Timely notice of these accidents ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to her accidents.

In the year preceding the Petitioner's injuries, Petitioner's average weekly wage was **$405.06.**

On the date of accident of August 1, 2011, Petitioner was **38** years of age, ***married*** with **0** dependent children.

On the date of accident of July 12, 2016, Petitioner was **43** years of age, married, with **0** dependent children.

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

ORDER

- The Respondent shall pay the petitioner temporary total disability benefits of $ **270.04** /week for **180 & 2/7** weeks, from **November 1, 2011 through March 28, 2013 and from July 12, 2016 through July 31, 2018**, as provided in Section 8(b) of the Act.
- The Respondent is due a credit of **$19,790.07** in nonoccupational indemnity disability benefits paid for temporary total disability paid from November 1, 2011, through March 28, 2013.
- The Respondent shall pay $**12,566.51** for necessary medical services, as provided in Section 8(a) and 8.2 of the Act and consistent with the medical fee schedule.
- The Respondent shall pay the Petitioner the sum of $524.34 per week, the permanent total disability minimum as of July 12, 2016, for life, commencing on August 1, 2018, as provided in Section 8(f) of the Act.

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

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

Signature of Arbitrator

OCTOBER 8, 2021

STATEMENT OF FACTS

The parties appeared for hearing on September 15, 2021, before Arbitrator Seal under the Illinois Workers' Compensation Act. The parties stipulated that Petitioner was an employee of Respondent on August 1, 2011, and July 12, 2016. The parties stipulated that that timely notice of Petitioner's August 1, 2011, injury was provided, and that Petitioner sustained accidental injuries that arose out of and in the course of her employment by Respondent on August 1, 2011. The parties stipulated that Petitioner's average weekly wage relative to her injuries was $405.06. The parties further stipulated that Petitioner was 38 years of age, married, with 0 dependent children at the time of her August 1, 2011, injury and 43 years of age, married, with 0 dependent children at the time of her July 12, 2016 injury.

Petitioner testified through an interpreter, Rafael Arellano. She testified that she started working for Respondent in 2001. She worked since 2001 as a packer, typically on an assembly line. Petitioner described working 8-12 hour shifts, 60-72 hours a week. She would pack various products. On one line, she would pack small bottles of paint. On another, she packed bottles of glue. The glue would come down the line and she would have to grab the bottles and make sure the labels were even. She would grab 4-6 bottles in her hands at a time. She would inspect them and pack them in a box that had slots for each. Each box contained 288 bottles. Then, the box would be placed on a skid. This would be done all day long. She reported sometimes there were two people performing the job and sometimes she would be on her own. While other positions rotated throughout the day, the glue line position would be done all day when she was on that line. Another position required Petitioner to screw caps onto small bottles of paint. She would sit at a table and grab bottles that were coming down the line and screw on the caps. The Job Description for Petitioner's position, noted that it required using one's hands to handle, control, or feel objects, tools or controls 95% of the time. (Px. 1). Petitioner noted that everything had to be done fast. Products came down the line quickly and there was no time to take a break as the products did not stop coming.

Petitioner testified that with her job duties, she began to experience pain in her hands around August 1, 2011. She described pain in the palms of her hands that felt like she was being poked or stabbed. Her fingers were numb and she experienced shock-type pain in the palms and palm-side of her wrists. She testified she was having difficulty doing her job due to the pain and told her employer of her symptoms and was sent to Physician's Immediate Care.

When initially seen at Physician's Immediate Care on October 22, 2011, Petitioner described working on an assembly line, handling small bottles and cans, making sure their caps are on and that they are ready for production. She noted working for Respondent for approximately 10 years with pain in her wrists over the last few months, especially when she is at the line. (Px. 2). She described feeling numbness and tingling in her hands as well as pain in her wrists after a couple hours of working, noting that she was dropping bottles due to her symptoms. (Px. 2). Petitioner was diagnosed with bilateral wrist tendonitis, work-related, due to repetitive use of the wrists and was prescribed medication and use of splints. (Px. 2).

Petitioner returned to Physician's Immediate Care on October 31, 2011, noting that her pain had worsened. She was restricted to avoid strong gripping and to take a 15-20 minute break from the line every 2 hours. (Px. 2). As these restrictions could not be accommodated, Petitioner began receiving TTD benefits as of November 1, 2011.

Petitioner began physical therapy on November 7, 2011, with some improvement noted in the PIC records. Following an EMG due to ongoing symptoms, Petitioner was referred to an orthopedic for a second opinion on January 11, 2012. (Px. 2, 3).

Petitioner was initially seen by Dr. John Fernandez, Respondent's Section 12 examiner, on February 21, 2012. Regarding her described job duties, Dr. Fernandez noted that Petitioner placed products in boxes from a conveyor belt. The products were very small bottles of pain and she performed activities of picking up small pieces and pinching and grabbing for eight hours a day, five days a week. She described rotating jobs, but noted that each position was similar, including flexion and extension through the elbows as well as wrists. (Rx. 3). Dr. Fernandez diagnosed bilateral carpal tunnel syndrome, some cubital tunnel syndrome, myofascial pain, synovitis, and de Quervain's tenosynovitis. He opined that her complaints at that time were attributable to her generalized work activities and recommended an injection to the right thumb as well as consideration of carpal tunnel release and possible ulnar nerve release. (Rx. 3).

Petitioner was then seen by Dr. Bear at Ortho IL on June 5, 2012. (Px. 4). Dr. Bear noted that her EMG demonstrated moderately severe carpal tunnel syndrome on the right and moderate carpal tunnel syndrome on the left as well as moderate cubital tunnel syndrome on the right and mild to moderate cubital tunnel syndrome on the left. Surgery was suggested, starting with the right hand. (Px. 4).

Petitioner was seen by her primary care physician, Dr. Darland, on June 7, 2012. (Px. 5). Due to her ongoing symptoms, she was referred to Dr. McCarty for a second opinion. She was seen by Dr. McCarty on June 14, 2012. Dr. McCarty advised that surgery was the most reasonable choice to reduce her symptoms. (Px. 5).

Petitioner underwent the left carpal tunnel release procedure on September 10, 2012. She had physical therapy from September 26, 2012, through October 23, 2012. She then underwent the right carpal tunnel release on December 19, 2012. (Px. 5). Petitioner testified that she had relief of the numbness and paresthesia following her surgeries. She continued physical therapy with some improvement. Dr. McCarty recommended a functional capacity evaluation on March 14, 2013. (Px. 5).

Respondent had Petitioner examined by Dr. Fernandez again on March 21, 2013. (Rx. 3). Dr. Fernandez indicated that her current complaints appeared to be related to some type of myofascial pain syndrome and possibly lateral epicondylitis, unrelated to her work activities. He opined that those would require more forceful activities requiring significant gripping and rotation through the forearm. He found Petitioner was at maximum medical improvement relative to her carpal tunnel syndrome. (Rx. 3).

Petitioner returned to work around April 1, 2013. She returned to her regular job with no change in job duties.

Petitioner was initially seen by Dr. Jeffrey Coe, Petitioner's Section 12 examiner, on July 24, 2013. She described repetitive and forceful use of the upper extremities on an assembly line, involving pinch grip and fine manipulation of gaskets and o-rings in assembly of paint bottles. She also described packing assembled paint bottles into boxes, noting the work to be fast-paced and requiring use of both hands.

With the return to work, her symptoms returned and gradually increased. Petitioner testified that she advised human resources that she was having increased symptoms and was advised to ice her hands.

Petitioner was seen at Physician's Immediate Care on December 23, 2015, with pain in her hands since 2011. (Px. 2). She described 10/10 pain, improved with medication, worse with movement. She noted she had done the same job since her release from surgery and her symptoms had come back. An EMG was recommended. (Px. 2). An EMG was performed on January 27, 2016 that revealed worsening of the left median sensory neuropathy when compared to the December 27, 2011 study. She was assessed with left median nerve neuropathy and bilateral moderate cubital tunnel syndrome. (Px. 3).

Petitioner continued to work her regular job through July 12, 2016. On July 12, 2016, Petitioner was referred to Physician's Immediate Care by a new human resources person due to her continued complaints. She was seen for a fitness for duty evaluation at Physician's Immediate Care. (Px. 2). The records indicated that Petitioner had gradual recurrence of bilateral hand paresthesia with pain radiating to her elbows and to the right shoulder. She reported weakness and dropping items. Petitioner was referred to physical therapy and restricted from strong gripping and to limit repetitive motion. (Px. 2). The record also noted "this case would be considered work related." (Px. 2).

Petitioner provided the restrictions to Respondent and was advised there was not accommodating work available. She was not paid TTD benefits thereafter and never returned to work for Respondent.

On July 19, 2016, Petitioner was referred to an orthopedic by Physician's Immediate Care. (Px. 2). Petitioner was seen by Dr. Dannenmaier, at Lundholm Orthopedics, on September 1, 2016. (Px. 6). Dr. Dannenmaier noted her history noted that Petitioner had undergone carpal tunnel releases and that she worked an assembly line job where she lifts bottles of pain in her hands and stacks them. Elbow pain and hand numbness were documented. Dr. Dannenmaier opined that Petitioner had consequences of repetitive motion over a number of years including the pronator teres tightness, cubital tunnel syndrome with subluxation of both ulnar nerves, and carpal tunnel syndrome, which had worsened on the left comparing the recent and prior EMG's. He also diagnosed bilateral de'Quervain's syndrome. Initially, physical therapy and restrictions to avoid repetitive motion was recommended. (Px. 6).

On November 22, 2016, Dr. Dannenmaier noted that therapy had not significantly improved her symptoms. He recommended de'Quervain's release and right cubital tunnel release, keeping Petitioner off work. (Px. 6). On January 9, 2017, Petitioner underwent right ulnar nerve transposition and right de'Quervain's release. She followed up with Dr. Dannenmaier with improvement. On February 10, 2017, left carpal tunnel release was recommended. (Px. 6).

On May 8, 2017, Petitioner underwent left carpal tunnel release by Dr. Dannenmaier. She was prescribed post-op physical therapy on May 23, 2017. Petitioner testified that the surgeries did not resolve her symptoms. It did help with the numbness in her left hand, but her right elbow continued to be painful.

On June 29, 2017, Dr. Dannenmaier recommended she continue physical therapy due to pain in her wrists when she twists or grips with her hands. He noted she could return to work but must avoid repetitive motion with her hands. On August 10, 2017, Petitioner complained of severe, constant pain in her right hand. Dr. Dannenmaier opined that Petitioner could not go back to repetitive motion activity at that point. He stated that he believed repetitive motion would aggravate the problems and that the remaining neuropathy would be aggravated by doing so. Restrictions to avoid repetitive motion and lifting no more than 10 pounds was provided. (Px. 6).

On September 19, 2017, Dr. Dannenmaier noted Petitioner's continued complaints in her hands and right elbow. He noted that Respondent would not take her back with restrictions. She was seen in follow up on February 22, 2018. At that time, Dr. Dannenmaier reviewed repeat EMG and NCV studies that showed some improvement with some evidence of permanent nerve damage as well. He continued her restrictions. (Px. 6).

On June 29, 2018, Petitioner followed up with Dr. Dannenmaier. Dr. Dannenmaier recommended using bicycle gloves instead of splints on her hands and a Heelbo pad on the right. He again noted that he did not see returning to work as an option given the that she could not return to work with her restrictions. (Px. 6).

On July 28, 2018, Dr. Dannenmaier noted that Petitioner wanted to return to work. He noted that if she went back to assembly lien work, her symptoms would deteriorate. He noted that he did not feel he could safely release her back to repetitive motion with the upper extremities. (Px. 6).

Petitioner was seen for another examination with Dr. Coe, at her attorney's request, on July 23, 2019. Dr. Coe opined that Petitioner's diagnoses include status post right cubital tunnel release with residual symptoms, status post right carpal tunnel release, status post first dorsal compartment release, status post left carpal tunnel release (twice) and left cubital tunnel syndrome with findings also consistent with bilateral elbow epicondylitis. He noted that her symptoms, exam findings, and test results were consistent with a bilateral upper extremity overuse syndrome. Dr. Coe opined there is a causal relationship between her work activities for Respondent and her multiple upper extremity diagnoses. (Px. 8). Dr. Coe opined that Petitioner requires permanent restrictions, limiting any repetitive or forceful use of both upper extremities and to limit lifting to 10 pounds or less on an occasional basis. (Px. 8). Dr. Coe agreed that Petitioner's permanent restrictions are mainly the result of her residual pain from her conditions and procedures she's undergone. (Px. 8).

On January 7, 2020, Dr. Fernandez authored another addendum report at Respondent's request. Dr. Fernandez assessed Petitioner's current diagnosis to be myofascial pain syndrome. He noted she has a lot of pain complaints, including multiple levels in both hands and arms, including the hand and wrist areas, the elbow and even the upper shoulder and neck. He opined that Petitioner's current complaints are not related to her work activities, noting that she may have increased complaints of pain with exposure to any activities, including work activities, but that this is the manifestation of her underlying myofascial pain. Dr. Fernandez

stated his opinion that Petitioner's initial carpal tunnel releases, as well as the surgeries in January 2017 and May 2017, were work related. However, he opined that she requires no additional treatment, and that Petitioner could work full duty with regard to her diagnoses of carpal tunnel and/or cubital tunnel syndrome. He noted that any limitations or restrictions would be due to her myofascial pain. (Rx. 3).

Petitioner testified that she has not returned to work. She has sold Tupperware, typically over Facebook. Petitioner testified she did this for 11-12 years. She would post on Facebook and people would put in orders with her. She does this from her home, making from $100 to $300 a month. She noted she might spend 10 hours in a month on this activity. She has not looked for work elsewhere as she did not feel she would be able to due to her restrictions. Petitioner noted she was found disabled by Social Security and is not under any active treatment. Petitioner testified that she does not speak English, noting that her communication with doctors has been through her husband, a sister, or an interpreter.

Petitioner underwent a vocational evaluation with Certified Rehabilitation Counselor, Laura Belmonte, on December 29, 2020. Ms. Belmonte noted Petitioner's educational history, her vocational history, her age, language skills, and the restrictions from Dr. Dannenmaier and Dr. Coe. Ms. Belmonte noted that Petitioner had 8 years of education in Mexico before leaving at 14 years old. Ms. Belmonte noted that Petitioner has limited English language skills. Her vocational history was that with Respondent since 2001, with various jobs in cleaning, packing, and machine operation prior to work for Respondent. Ms. Belmonte noted that all of Petitioner's prior jobs required repetitive motions with the upper extremities. She noted that eliminating the ability to repetitive use the arms and hands is an extremely complicated vocational factor which significantly limits vocational options even to workers more skilled than Petitioner. Ms. Belmonte found that given the restrictions of Dr. Dannenmaier or Dr. Coe, that Petitioner has lost access to her previous line of work as those jobs require constant reaching, handling, and fingering. She noted that Petitioner has no marketable skillset that would transfer to other occupations when considering her physical restrictions. As such, Ms. Belmonte concluded that vocational options for Petitioner are virtually eliminated. (Px. 9).

Respondent provided a Labor Market Survey, providing a list of potential employers, should Dr. Fernandez' restrictions be accepted, that of full duty capacity. The survey concluded Petitioner would be capable of earning $11.00 - $16.75 per hour at various positions. The Labor Market Survey noted that if Dr. Dannenmaier's restrictions were accepted, Petitioner could work as a Greeter or a Driver, and could earn between $9.00 and $14.00 per hour. (Rx. 5).

At time of hearing, Petitioner complained of an ongoing, stabbing pain in her right elbow. She described the pain in her elbow as constant with radiation up her arm at times. She described ongoing pain in her hands, specifically in the fingers, palms, and palm side of the wrists. She described pain in her right elbow when she raises her arm with pain radiating into her shoulder. She described pain with activities such as cooking, doing dishes, or folding clothes. She indicated she gets help doing those activities as she has to take a break after approximately 20 minutes of any of those activities. After performing the activity, she requires a break of 30 to 60 minutes to ease her pain. She takes only over the counter medication that does not really help her pain. Petitioner continues to wear a wrap on her right elbow most of the time.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE DISPUTED ISSUES

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

The Arbitrator adopts the statement of facts detailed above and finds that Petitioner sustained repetitive trauma injuries to her upper extremities that arose out of an in the course of her employment through July 12, 2016. The Arbitrator notes that Respondent stipulated that Petitioner sustained accidental injuries that arose out of and in the course of her employment on August 1, 2011. In finding an additional injury with her work activities through July 12, 2016, the Arbitrator relies upon the records of the treating physicians, the opinions of Dr. Fernandez and Dr. Coe, as well as Petitioner's credible testimony.

It is clear from the medical records that Petitioner sustained repetitive trauma injuries through July 12, 2016. Respondent agreed that Petitioner sustained repetitive trauma injuries through August 1, 2011. After her treatment for the August 1, 2011, injury, Petitioner returned to work for Respondent as of April 1, 2013. According to her testimony and the medical records, she returned to the same position, performing the same job duties that she had performed prior to August 1, 2011, from April 1, 2013 through July 12, 2016. For over three years, Petitioner returned to the same assembly line packing jobs. She testified to constant use of the hands to sort, inspect, and package products for her entire work shift. The job description for Petitioner's position noted constant hand use. (Px. 1). On December 23, 2015, Petitioner reported the return of her symptoms with her return to the same job she had previously performed. Her repetitive job duties are well documented in the treatment records and to the examining physicians. Petitioner continued to perform those job duties through July 12, 2016, at which time she was taken off work as a result of a Fitness for Duty evaluation. (Px. 2) At that visit, it was noted that she was experiencing a gradual recurrence of bilateral hand paresthesia with pain radiating to the elbows and right shoulder, with weakness and frequent dropping of items. At that time, the physician noted her symptoms to be considered work related. As such, the Arbitrator finds that Petitioner sustained repetitive trauma injuries on August 1, 2011, and July 12, 2016, that arose out of and in the course of her employment with Respondent.

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

Respondent stipulated that timely notice was provided regarding Petitioner's August 1, 2011, injury. However, Respondent disputes that timely notice was provided of Petitioner's July 12, 2016, injury. The Arbitrator notes that Arbitrator's Exhibit #4, the Application for Adjustment of Claim relative to the July 12, 2016 filing, 16 WC 24069, was filed on August 5, 2016, well within the 45 day notice requirement. Further, Petitioner testified that she provided the restriction note from Physician's Immediate Care to Human Resources and was advised that work was not available within her restrictions. Petitioner was taken off work as of July 12, 2016, and she has not returned to work for Respondent since that time. Given Petitioner's undisputed testimony that she reported her injury and given that the Application for Adjustment of Claim was filed well within the 45-day requirement, the Arbitrator finds that timely notice of Petitioner's July 12, 2016, injury was provided.

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

The Arbitrator adopts the findings of fact stated above and incorporates them herein by this reference. The Arbitrator finds that Petitioner's current condition of ill-being is causally related to her work injuries of August 1, 2011, and July 12, 2016. The Arbitrator relied upon the opinions of Dr. Jeffrey Coe and Dr. Fernandez, as well Petitioner's treating records and her credible testimony.

The Arbitrator relies upon the well-established rules set forth by the Illinois Supreme Court that "the fact that an employee may have suffered from a preexisting condition will not preclude an award if the condition was aggravated or accelerated by the employment. The employee need not prove employment was the sole causative factor or even that it was the principal causative factor, but only that it was **a causative factor** in the resulting injury." Williams v. Industrial Com., 85 Ill. 2d 117, 122 (1981).

Petitioner's treatment records support a causal relationship between her current condition of ill-being of her upper extremities and her repetitive work activities through August 1, 2011, and July 12, 2016. Respondent's examining physician, Dr. Fernandez initially opined that Petitioner's bilateral carpal tunnel syndrome and de Quervain's tenosynovitis were attributable to her generalized work activities in February 2012. In March of 2013, Dr. Fernandez opined that Petitioner was at maximum medical improvement relative to her bilateral carpal tunnel syndrome and opined that her remaining issues were due to an unrelated myofascial pain syndrome. Dr. Coe, Petitioner's examining physician, also opined that Petitioner's bilateral carpal tunnel syndrome was causally related to her work activities through August 1, 2011. (Px. 7). Dr. Coe also opined that Petitioner's myofascial pain and epicondylitis were complications of her surgical procedures and were also causally related to her work activities for Respondent. (Px. 7).

Petitioner then returned to work for Respondent for approximately 3 years, from April 2013 through July 2016, performing the same job duties that had previously resulted in bilateral carpal tunnel syndrome. With these work activities, she testified to recurrent and gradual increase in symptoms in her hands. She was seen by Physician's Immediate care on December 23, 2015, with a report that her symptoms had come back. An EMG performed on January 27, 2016, revealed worsening of the left median sensory neuropathy. Petitioner continued working her regular job duties until July 12, 2016. At that time, she was sent to Physician's Immediate Care from Human Resources due to her continued complaints. The records noted gradual recurrence of bilateral upper extremity symptoms. The physician noted the conditions to be work related. (Px. 2).

Petitioner ultimately underwent right ulnar nerve transposition and right de' Quervain's release on January 9, 2017, and redo of left carpal tunnel release on May 8, 2017. (Px. 6). Following those procedures, Petitioner's treating surgeon, Dr. Dannenmaier, has continued to restrict Petitioner from a return to repetitive work she had performed with Respondent, noting that resumption of her job duties would result in deterioration of her conditions. (Px. 6).

Dr. Fernandez, Respondent's examining physician, authored another report on January 7, 2020. (Rx. 3). Dr. Fernandez opined that Petitioner's carpal tunnel releases from 2012, as well as her surgeries from January 2017 and May 2017, were related to her work activities. However, Dr. Fernandez opined that her current condition was that of unrelated myofascial pain syndrome. (Rx. 3).

Dr. Coe saw Petitioner again on July 23, 2019. He opined that Petitioner's current condition of ill-being relative to her upper extremities remained causally related to her work activities for Respondent. He opined that her diagnoses at that time, given the multiple surgical procedures, was now that of bilateral upper extremity overuse syndrome. He opined that Petitioner continued to require limitations restricting repetitive or forceful use due to the ongoing and residual pain from her conditions and the procedures she had undergone. (Px. 8).

Petitioner testified to ongoing symptoms in both hands and her right elbow. She noted the pain was constant in her right elbow with occasional radiation up her arm. She described ongoing pain in her hands, particular the fingers, her palms, and the palm side of her wrists. Her ongoing symptoms are consistently described in her treatment records as well as to Dr. Coe and Dr. Fernandez. The Arbitrator notes that while Dr. Fernandez opines that her current condition of ill-being is now related to myofascial pain syndrome, which he finds unrelated to her work activities, there is no evidence that Petitioner was treatment for myofascial pain syndrome prior to her work for Respondent, nor leading up to her surgeries. The Arbitrator finds much more convincing, the opinion of Dr. Coe that Petitioner's myofascial pain is a direct result of the surgical procedures she has undergone as a result of her repetitive trauma injuries. This opinion is supported by the history of the onset of Petitioner's symptoms as well as the continuation of her symptoms and limitations since she began treatment.

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to her work injuries of August 1, 2011, and July 12, 2016. Petitioner had sufficiently recovered from her August 1, 2011, injury to return to work on April 1, 2013. However, with her return to the same repetitive work activities for over 3 years, she sustained new repetitive trauma injuries through July 12, 2016, that resulted in the need for additional surgeries and permanent limitations. The Arbitrator notes that there is no opinion from any physician, including Dr. Fernandez, that the four surgeries Petitioner underwent were not related to her work activities. Her symptoms after the 2017 procedures were consistently documented by her treating surgeon, Dr. Dannenmaier. Dr. Dannenmaier repeatedly opined that due to her ongoing symptoms, she would not be capable of returning to her prior work for fear of further deterioration. As such, the Arbitrator also finds that Petitioner's current condition of ill-being is causally related to her August 1, 2011, and July 12, 2016, repetitive trauma injuries.

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

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary for the injuries she sustained as a result of her August 1, 2011, and July 12, 2016, injuries. The Arbitrator notes that the medical records, diagnoses, treatment carried out, and treatment recommendations are noted in the Statement of Facts. The Arbitrator finds that Petitioner's treatment described in the statement of facts,

including physical therapy, pain management, and surgeries to both the hands and right elbow were reasonable and necessary. For the reasons stated above and having found that Petitioner's current condition of ill-being to be related to her injuries, Petitioner's treatment has been reasonable and necessary.

As such, the Arbitrator finds that the Respondent is liable for the treatment provided, as set forth in Petitioner's Exhibit 10, pursuant to the medial fee schedule, as follows:

Respondent is responsible for the outstanding charges at OANI. Petitioner treated with Dr. McCarty at OANI, with Dr. McCarty having performed Petitioner's surgeries in September 2012 and December 2012. Having found that treatment causally related, Respondent is responsible for those outstanding charges, totaling $8,048.00 for treatment form July 6, 2012, through May 21, 2013. Respondent's medical payment ledger noted payments to OANI, but also noted payments were voided. As such, Respondent is responsible for those bills.

Respondent is responsible for the outstanding charges at Rockford Anesthesiologists Associated, totaling $1,800.00 for anesthesiology services provided on January 9, 2017, the date of Petitioner's ulnar nerve transposition procedure.

The Arbitrator does not award payment for the outstanding charges listed from Dr. Rozman at One Call medical. Petitioner noted $1,467.81 outstanding for treatment on December 27, 2011, the date Petitioner underwent an EMG. Respondent's medial payment ledger notes that payment was made to One Call Medical in the amount of $1,467.81 on March 26, 2012, for the December 27, 2011, date of service.

Respondent is responsible for the outstanding charges of $406.50 at Swedish American Medical Group relative to the EMG performed on July 10, 2018.

Respondent is responsible for the outstanding charges of $2,312.01 with Swedish American Hospital. The charges relate to treatment from September 22, 2016, through March 2, 2017, relative to Petitioner's physical therapy and her January 9, 2017, surgery.

The Arbitrator does not award payment for charges listed for Rockford Memorial Hospital, noted by Petitioner to total $7,247.86. The charges relative to Petitioner's 2011 and 2012 surgeries, was noted to have been paid in Respondent's medical payment ledger.

As such, Respondent is liable for charges as noted above, totalling $12,566.51, pursuant to the medical fee schedule.

K. What temporary benefits are in dispute?

The Arbitrator finds that Petitioner is owed Temporary Total Disability benefits from November 1, 2011, through March 28, 2013, and from July 12, 2016, through July 31, 2018.

The Supreme Court of Illinois has held that "the determinative inquiry for deciding entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. If the injured employee is able to show that he continues to be temporarily totally disabled as a result of his work-related injury, the employee is entitled to TTD benefits." Interstate Scaffolding v. Illinois Workers' Compensation Commission, 236 Ill. 2d 132 (2010).

"To establish entitlement to TTD benefits, a claimant must demonstrate not only that he or she did not work, but also that the claimant was unable to work. (Internal citation omitted). It is irrelevant whether the claimant could have looked for work. (Internal citation omitted). The dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement."

Mech. Devices v. Indus. Comm'n (Johnson), 344 Ill. App. 3d 752, 759 (4th Dist. 2003).

"The factors to be considered in determining whether a claimant has reached maximum medical improvement include: (1) a release to return to work; (2) the medical testimony concerning the claimant's injury; (3) the extent of the injury; and (4) "most importantly," whether the injury has stabilized."

Id. at 760.

Petitioner initially went off work on November 1, 2011, after having been given restrictions to avoid strong gripping and to take a break from the line every 15-20 minutes by Physician's Immediate Care on October 31, 2011. Respondent stipulated that Petitioner was owed TTD benefits from November 1, 2011, through March 28, 2013. After returning to work on approximately April 1, 2013, Petitioner worked for over three years until being provided restrictions again by Physician's Immediate Care on July 12, 2016. Having found Petitioner's treatment thereafter to be causally related to her work activities through July 12, 2016, the issue is when Petitioner's condition reached maximum medical improvement. As noted above, Dr. Fernandez and Dr. Coe both opined that Petitioner's January and May 2017 surgical procedures were causally related to her work activities for Respondent. After the surgical procedures, Dr. Dannenmaier prescribed physical therapy and EMG studies. Petitioner continued in treatment, attempting the physical therapy, various splints and wraps until July 31, 2018. As of July 31, 2018, Dr. Dannenmaier noted his opinion that if Petitioner returned to assembly line type of work, her symptoms would deteriorate. He noted at that time, that he did not believe he could safely release her to go back to repetitive motion. (Px. 6). Petitioner testified that she had not undergone additional treatment after July 31, 2018.

As such, the Arbitrator finds that Petitioner reached maximum medial improvement as of July 31, 2018. Therefore, Petitioner is awarded TTD benefits from November 1, 2011, through March 28, 2013, and from July 12, 2016 ,through July 31, 2018 at the rate of $270.04 per week. The Arbitrator notes that Respondent did pay TTD benefits from November 1, 2011, through March 28, 2013, pursuant to Respondent's TTD ledger. (Rx. 1).

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

The Arbitrator adopts the findings of fact stated above and incorporates them herein by this reference. In assessing the nature and extent of Petitioner's injury, the Arbitrator must consider the following five factors:

1) An impairment report prepared by a physician using the most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment." No impairment rating was offered by either party.

2) The occupation of the injured employee. Petitioner worked for Respondent for approximately 10 years before her August 1, 2011, injury and approximately 13 years in total. Petitioner worked that entire time as a packer, performing constant grasping, handling, and fingering with the upper extremities. She has been unable to return to that work since July 12, 2016. Dr. Dannenmaier, Petitioner's treating surgeon, has made clear his opinion that Petitioner cannot return to that work. That opinion was also supported by Dr. Coe.

3) The age of the employee at the time of the injury. Petitioner was 38 years old at the time of her initial injury on August 1, 2011, and she was 43 years old at the time of her July 12, 2016, injury.

4) The employee's future earning capacity. Petitioner has been unable to secure full-time employment since July 12, 2016, as a result of her injuries. Laura Belmonte, Certified Rehabilitation Counselor, provided her opinion that given Petitioner's age, education, and restrictions, that there is no stable labor market for Petitioner.

5) Evidence of disability corroborated by the treating medical records. Petitioner testified to ongoing pain in her right elbow and her hands. She reported difficulty cooking, doing dishes, or folding clothes. She indicates she gets help to perform these basic activities of daily living and must frequently take breaks to rest her hands and elbow. Petitioner's ongoing complaints are well documented throughout her treatment with Dr. Dannenmaier. Dr. Dannenmaier consistently notes his opinion regarding her limitations that have resulted from her conditions and the procedures she has undergone, noting she cannot return to work requiring repetitive use of the hands.

The Arbitrator finds that Petitioner is permanently and totally disabled given the opinions of Dr. Coe, Dr. Dannenmaier, and Laura Belmonte, the Certified Rehabilitation Counselor, as well as given Petitioner's credible testimony and the medical records supporting her ongoing symptoms.

Petitioner has not worked for the last five years. She testified that she was found disabled by the Social Security Administration. She does spend up to 10 hours a month selling Tupperware, typically over Facebook. She testified to earning only $100 to $300 a month performing this hobby and is assisted by her husband. The Arbitrator does not find that this activity, performed for 2-3 hours a week, reflects anything more than a hobby Petitioner has performed for 11-12 years.

Respondent provided a Labor Market Survey noting that if Dr. Dannenmaier's restrictions were accepted, Petitioner could work as a Greeter or a Driver, earning between $9.00 and $14.00 per hour. (Rx. 5). Given the significant pain described by Petitioner as well as the ongoing limitations regarding use of her upper extremities, particularly her hands, the Arbitrator does not find the opinion that Petitioner could work as a driver to be credible. With her clear issues using her hands, operating heavy and dangerous machinery, a car, as an occupation, is not reasonable. The only other occupation noted as being available under Dr. Dannenmaier's restrictions would be positions as a greeter for which the Survey noted 3 potential positions.

The Arbitrator finds the report and opinions of Ms. Belmonte more persuasive. Ms. Belmonte's reported indicated Petitioner's difficulty driving due to her pain. Ms. Belmonte noted that Petitioner has no formal education in the United States. She has limited English language skills. Her vocational history was that with Respondent since 2001, with various jobs in cleaning, packing, and machine operation prior to work for Respondent. Ms. Belmonte noted Petitioner's limited activity selling Tupperware as well. Ms. Belmonte noted that all of Petitioner's prior jobs required repetitive motions with the upper extremities. She noted that eliminating the ability to repetitive use the arms and hands is an extremely complicated vocational factor which significantly limits vocational options even to workers more skilled than Petitioner. When combined with her age, her limited education, and her limited English ability, Ms. Belmonte opined that her vocational options are virtually eliminated, and that Petitioner does not have access to any viable, stable labor market offering gainful employment in any sector of the economy. (Px. 9).

Having found Dr. Dannenmaier's opinions regarding Petitioner's restrictions to be credible and persuasive, and finding the opinions of Ms. Belmonte persuasive, the Arbitrator finds that Petitioner has established through credible and persuasive evidence that she is permanently and totally disabled as of August 1, 2018, when she reached maximum medical improvement. As such, Petitioner is entitled to weekly permanent and total disability benefits, in the amount of $524.34 per week, the permanent total disability minimum as of July 12, 2016, for life, commencing on August 1, 2018.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	11WC047641
Case Name	BROWN, EDITH v. TESTORS CORP
Consolidated Cases	16WC024069
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0188
Number of Pages of Decision	18
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Jason Esmond
Respondent Attorney	Christopher Tomczyk

DATE FILED: 5/24/2022

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

EDITH BROWN,

Petitioner,

vs. NO: 11 WC 47641

TESTORS,

Respondent.

DECISION AND OPINION ON REVIEW

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

This claim was consolidated with claim number 16 WC 24069 for purposes of Arbitration hearing and Review before the Commission. A separate Decision has been issued for claim 16 WC 24069. The Commission writes to clarify that there is only one bond comprising both claims in the amount of $75,000.00 as both claims share the same award.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 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 commencing on the second July 15th after the entry of this award, the Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that 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 $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.

May 24, 2022

CAH/tdm
O: 5/19/22
052

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

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

/s/*Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	11WC047641
Case Name	BROWN, EDITH v. TESTORS
Consolidated Cases	No Consolidated Cases
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Paul Seal, Arbitrator

Petitioner Attorney	Jason Esmond
Respondent Attorney	Christopher Tomczyk

DATE FILED: 10/8/2021

THE INTEREST RATE FOR THE WEEK OF OCTOBER 5, 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

Edith Brown Case # **11 WC 47641**
Employee/Petitioner
v.

Testors
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 **Paul Seal**, Arbitrator of the Commission, in the city of **Rockford**, on **September 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

FINDINGS

On the dates of accident, **August 1, 2011, and July 12, 2016,** Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On these dates, Petitioner did sustain accidents that arose out of and in the course of employment.

Timely notice of these accidents ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to her accidents.

In the year preceding the Petitioner's injuries, Petitioner's average weekly wage was **$405.06.**

On the date of accident of August 1, 2011, Petitioner was **38** years of age, ***married*** with **0** dependent children.

On the date of accident of July 12, 2016, Petitioner was **43** years of age, married, with **0** dependent children.

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

ORDER

- The Respondent shall pay the petitioner temporary total disability benefits of $ **270.04** /week for **180 & 2/7** weeks, from **November 1, 2011 through March 28, 2013 and from July 12, 2016 through July 31, 2018**, as provided in Section 8(b) of the Act.

- The Respondent is due a credit of **$19,790.07** in nonoccupational indemnity disability benefits paid for temporary total disability paid from November 1, 2011, through March 28, 2013.

- The Respondent shall pay $**12,566.51** for necessary medical services, as provided in Section 8(a) and 8.2 of the Act and consistent with the medical fee schedule.

- The Respondent shall pay the Petitioner the sum of $524.34 per week, the permanent total disability minimum as of July 12, 2016, for life, commencing on August 1, 2018, as provided in Section 8(f) of the Act.

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

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

Signature of Arbitrator

OCTOBER 8, 2021

STATEMENT OF FACTS

The parties appeared for hearing on September 15, 2021, before Arbitrator Seal under the Illinois Workers' Compensation Act. The parties stipulated that Petitioner was an employee of Respondent on August 1, 2011, and July 12, 2016. The parties stipulated that that timely notice of Petitioner's August 1, 2011, injury was provided, and that Petitioner sustained accidental injuries that arose out of and in the course of her employment by Respondent on August 1, 2011. The parties stipulated that Petitioner's average weekly wage relative to her injuries was $405.06. The parties further stipulated that Petitioner was 38 years of age, married, with 0 dependent children at the time of her August 1, 2011, injury and 43 years of age, married, with 0 dependent children at the time of her July 12, 2016 injury.

Petitioner testified through an interpreter, Rafael Arellano. She testified that she started working for Respondent in 2001. She worked since 2001 as a packer, typically on an assembly line. Petitioner described working 8-12 hour shifts, 60-72 hours a week. She would pack various products. On one line, she would pack small bottles of paint. On another, she packed bottles of glue. The glue would come down the line and she would have to grab the bottles and make sure the labels were even. She would grab 4-6 bottles in her hands at a time. She would inspect them and pack them in a box that had slots for each. Each box contained 288 bottles. Then, the box would be placed on a skid. This would be done all day long. She reported sometimes there were two people performing the job and sometimes she would be on her own. While other positions rotated throughout the day, the glue line position would be done all day when she was on that line. Another position required Petitioner to screw caps onto small bottles of paint. She would sit at a table and grab bottles that were coming down the line and screw on the caps. The Job Description for Petitioner's position, noted that it required using one's hands to handle, control, or feel objects, tools or controls 95% of the time. (Px. 1). Petitioner noted that everything had to be done fast. Products came down the line quickly and there was no time to take a break as the products did not stop coming.

Petitioner testified that with her job duties, she began to experience pain in her hands around August 1, 2011. She described pain in the palms of her hands that felt like she was being poked or stabbed. Her fingers were numb and she experienced shock-type pain in the palms and palm-side of her wrists. She testified she was having difficulty doing her job due to the pain and told her employer of her symptoms and was sent to Physician's Immediate Care.

When initially seen at Physician's Immediate Care on October 22, 2011, Petitioner described working on an assembly line, handling small bottles and cans, making sure their caps are on and that they are ready for production. She noted working for Respondent for approximately 10 years with pain in her wrists over the last few months, especially when she is at the line. (Px. 2). She described feeling numbness and tingling in her hands as well as pain in her wrists after a couple hours of working, noting that she was dropping bottles due to her symptoms. (Px. 2). Petitioner was diagnosed with bilateral wrist tendonitis, work-related, due to repetitive use of the wrists and was prescribed medication and use of splints. (Px. 2).

Petitioner returned to Physician's Immediate Care on October 31, 2011, noting that her pain had worsened. She was restricted to avoid strong gripping and to take a 15-20 minute break from the line every 2 hours. (Px. 2). As these restrictions could not be accommodated, Petitioner began receiving TTD benefits as of November 1, 2011.

Petitioner began physical therapy on November 7, 2011, with some improvement noted in the PIC records. Following an EMG due to ongoing symptoms, Petitioner was referred to an orthopedic for a second opinion on January 11, 2012. (Px. 2, 3).

Petitioner was initially seen by Dr. John Fernandez, Respondent's Section 12 examiner, on February 21, 2012. Regarding her described job duties, Dr. Fernandez noted that Petitioner placed products in boxes from a conveyor belt. The products were very small bottles of pain and she performed activities of picking up small pieces and pinching and grabbing for eight hours a day, five days a week. She described rotating jobs, but noted that each position was similar, including flexion and extension through the elbows as well as wrists. (Rx. 3). Dr. Fernandez diagnosed bilateral carpal tunnel syndrome, some cubital tunnel syndrome, myofascial pain, synovitis, and de Quervain's tenosynovitis. He opined that her complaints at that time were attributable to her generalized work activities and recommended an injection to the right thumb as well as consideration of carpal tunnel release and possible ulnar nerve release. (Rx. 3).

Petitioner was then seen by Dr. Bear at Ortho IL on June 5, 2012. (Px. 4). Dr. Bear noted that her EMG demonstrated moderately severe carpal tunnel syndrome on the right and moderate carpal tunnel syndrome on the left as well as moderate cubital tunnel syndrome on the right and mild to moderate cubital tunnel syndrome on the left. Surgery was suggested, starting with the right hand. (Px. 4).

Petitioner was seen by her primary care physician, Dr. Darland, on June 7, 2012. (Px. 5). Due to her ongoing symptoms, she was referred to Dr. McCarty for a second opinion. She was seen by Dr. McCarty on June 14, 2012. Dr. McCarty advised that surgery was the most reasonable choice to reduce her symptoms. (Px. 5).

Petitioner underwent the left carpal tunnel release procedure on September 10, 2012. She had physical therapy from September 26, 2012, through October 23, 2012. She then underwent the right carpal tunnel release on December 19, 2012. (Px. 5). Petitioner testified that she had relief of the numbness and paresthesia following her surgeries. She continued physical therapy with some improvement. Dr. McCarty recommended a functional capacity evaluation on March 14, 2013. (Px. 5).

Respondent had Petitioner examined by Dr. Fernandez again on March 21, 2013. (Rx. 3). Dr. Fernandez indicated that her current complaints appeared to be related to some type of myofascial pain syndrome and possibly lateral epicondylitis, unrelated to her work activities. He opined that those would require more forceful activities requiring significant gripping and rotation through the forearm. He found Petitioner was at maximum medical improvement relative to her carpal tunnel syndrome. (Rx. 3).

Petitioner returned to work around April 1, 2013. She returned to her regular job with no change in job duties.

Petitioner was initially seen by Dr. Jeffrey Coe, Petitioner's Section 12 examiner, on July 24, 2013. She described repetitive and forceful use of the upper extremities on an assembly line, involving pinch grip and fine manipulation of gaskets and o-rings in assembly of paint bottles. She also described packing assembled paint bottles into boxes, noting the work to be fast-paced and requiring use of both hands.

With the return to work, her symptoms returned and gradually increased. Petitioner testified that she advised human resources that she was having increased symptoms and was advised to ice her hands.

Petitioner was seen at Physician's Immediate Care on December 23, 2015, with pain in her hands since 2011. (Px. 2). She described 10/10 pain, improved with medication, worse with movement. She noted she had done the same job since her release from surgery and her symptoms had come back. An EMG was recommended. (Px. 2). An EMG was performed on January 27, 2016 that revealed worsening of the left median sensory neuropathy when compared to the December 27, 2011 study. She was assessed with left median nerve neuropathy and bilateral moderate cubital tunnel syndrome. (Px. 3).

Petitioner continued to work her regular job through July 12, 2016. On July 12, 2016, Petitioner was referred to Physician's Immediate Care by a new human resources person due to her continued complaints. She was seen for a fitness for duty evaluation at Physician's Immediate Care. (Px. 2). The records indicated that Petitioner had gradual recurrence of bilateral hand paresthesia with pain radiating to her elbows and to the right shoulder. She reported weakness and dropping items. Petitioner was referred to physical therapy and restricted from strong gripping and to limit repetitive motion. (Px. 2). The record also noted "this case would be considered work related." (Px. 2).

Petitioner provided the restrictions to Respondent and was advised there was not accommodating work available. She was not paid TTD benefits thereafter and never returned to work for Respondent.

On July 19, 2016, Petitioner was referred to an orthopedic by Physician's Immediate Care. (Px. 2). Petitioner was seen by Dr. Dannenmaier, at Lundholm Orthopedics, on September 1, 2016. (Px. 6). Dr. Dannenmaier noted her history noted that Petitioner had undergone carpal tunnel releases and that she worked an assembly line job where she lifts bottles of pain in her hands and stacks them. Elbow pain and hand numbness were documented. Dr. Dannenmaier opined that Petitioner had consequences of repetitive motion over a number of years including the pronator teres tightness, cubital tunnel syndrome with subluxation of both ulnar nerves, and carpal tunnel syndrome, which had worsened on the left comparing the recent and prior EMG's. He also diagnosed bilateral de'Quervain's syndrome. Initially, physical therapy and restrictions to avoid repetitive motion was recommended. (Px. 6).

On November 22, 2016, Dr. Dannenmaier noted that therapy had not significantly improved her symptoms. He recommended de'Quervain's release and right cubital tunnel release, keeping Petitioner off work. (Px. 6). On January 9, 2017, Petitioner underwent right ulnar nerve transposition and right de'Quervain's release. She followed up with Dr. Dannenmaier with improvement. On February 10, 2017, left carpal tunnel release was recommended. (Px. 6).

On May 8, 2017, Petitioner underwent left carpal tunnel release by Dr. Dannenmaier. She was prescribed post-op physical therapy on May 23, 2017. Petitioner testified that the surgeries did not resolve her symptoms. It did help with the numbness in her left hand, but her right elbow continued to be painful.

On June 29, 2017, Dr. Dannenmaier recommended she continue physical therapy due to pain in her wrists when she twists or grips with her hands. He noted she could return to work but must avoid repetitive motion with her hands. On August 10, 2017, Petitioner complained of severe, constant pain in her right hand. Dr. Dannenmaier opined that Petitioner could not go back to repetitive motion activity at that point. He stated that he believed repetitive motion would aggravate the problems and that the remaining neuropathy would be aggravated by doing so. Restrictions to avoid repetitive motion and lifting no more than 10 pounds was provided. (Px. 6).

On September 19, 2017, Dr. Dannenmaier noted Petitioner's continued complaints in her hands and right elbow. He noted that Respondent would not take her back with restrictions. She was seen in follow up on February 22, 2018. At that time, Dr. Dannenmaier reviewed repeat EMG and NCV studies that showed some improvement with some evidence of permanent nerve damage as well. He continued her restrictions. (Px. 6).

On June 29, 2018, Petitioner followed up with Dr. Dannenmaier. Dr. Dannenmaier recommended using bicycle gloves instead of splints on her hands and a Heelbo pad on the right. He again noted that he did not see returning to work as an option given the that she could not return to work with her restrictions. (Px. 6).

On July 28, 2018, Dr. Dannenmaier noted that Petitioner wanted to return to work. He noted that if she went back to assembly lien work, her symptoms would deteriorate. He noted that he did not feel he could safely release her back to repetitive motion with the upper extremities. (Px. 6).

Petitioner was seen for another examination with Dr. Coe, at her attorney's request, on July 23, 2019. Dr. Coe opined that Petitioner's diagnoses include status post right cubital tunnel release with residual symptoms, status post right carpal tunnel release, status post first dorsal compartment release, status post left carpal tunnel release (twice) and left cubital tunnel syndrome with findings also consistent with bilateral elbow epicondylitis. He noted that her symptoms, exam findings, and test results were consistent with a bilateral upper extremity overuse syndrome. Dr. Coe opined there is a causal relationship between her work activities for Respondent and her multiple upper extremity diagnoses. (Px. 8). Dr. Coe opined that Petitioner requires permanent restrictions, limiting any repetitive or forceful use of both upper extremities and to limit lifting to 10 pounds or less on an occasional basis. (Px. 8). Dr. Coe agreed that Petitioner's permanent restrictions are mainly the result of her residual pain from her conditions and procedures she's undergone. (Px. 8).

On January 7, 2020, Dr. Fernandez authored another addendum report at Respondent's request. Dr. Fernandez assessed Petitioner's current diagnosis to be myofascial pain syndrome. He noted she has a lot of pain complaints, including multiple levels in both hands and arms, including the hand and wrist areas, the elbow and even the upper shoulder and neck. He opined that Petitioner's current complaints are not related to her work activities, noting that she may have increased complaints of pain with exposure to any activities, including work activities, but that this is the manifestation of her underlying myofascial pain. Dr. Fernandez

stated his opinion that Petitioner's initial carpal tunnel releases, as well as the surgeries in January 2017 and May 2017, were work related. However, he opined that she requires no additional treatment, and that Petitioner could work full duty with regard to her diagnoses of carpal tunnel and/or cubital tunnel syndrome. He noted that any limitations or restrictions would be due to her myofascial pain. (Rx. 3).

Petitioner testified that she has not returned to work. She has sold Tupperware, typically over Facebook. Petitioner testified she did this for 11-12 years. She would post on Facebook and people would put in orders with her. She does this from her home, making from $100 to $300 a month. She noted she might spend 10 hours in a month on this activity. She has not looked for work elsewhere as she did not feel she would be able to due to her restrictions. Petitioner noted she was found disabled by Social Security and is not under any active treatment. Petitioner testified that she does not speak English, noting that her communication with doctors has been through her husband, a sister, or an interpreter.

Petitioner underwent a vocational evaluation with Certified Rehabilitation Counselor, Laura Belmonte, on December 29, 2020. Ms. Belmonte noted Petitioner's educational history, her vocational history, her age, language skills, and the restrictions from Dr. Dannenmaier and Dr. Coe. Ms. Belmonte noted that Petitioner had 8 years of education in Mexico before leaving at 14 years old. Ms. Belmonte noted that Petitioner has limited English language skills. Her vocational history was that with Respondent since 2001, with various jobs in cleaning, packing, and machine operation prior to work for Respondent. Ms. Belmonte noted that all of Petitioner's prior jobs required repetitive motions with the upper extremities. She noted that eliminating the ability to repetitive use the arms and hands is an extremely complicated vocational factor which significantly limits vocational options even to workers more skilled than Petitioner. Ms. Belmonte found that given the restrictions of Dr. Dannenmaier or Dr. Coe, that Petitioner has lost access to her previous line of work as those jobs require constant reaching, handling, and fingering. She noted that Petitioner has no marketable skillset that would transfer to other occupations when considering her physical restrictions. As such, Ms. Belmonte concluded that vocational options for Petitioner are virtually eliminated. (Px. 9).

Respondent provided a Labor Market Survey, providing a list of potential employers, should Dr. Fernandez' restrictions be accepted, that of full duty capacity. The survey concluded Petitioner would be capable of earning $11.00 - $16.75 per hour at various positions. The Labor Market Survey noted that if Dr. Dannenmaier's restrictions were accepted, Petitioner could work as a Greeter or a Driver, and could earn between $9.00 and $14.00 per hour. (Rx. 5).

At time of hearing, Petitioner complained of an ongoing, stabbing pain in her right elbow. She described the pain in her elbow as constant with radiation up her arm at times. She described ongoing pain in her hands, specifically in the fingers, palms, and palm side of the wrists. She described pain in her right elbow when she raises her arm with pain radiating into her shoulder. She described pain with activities such as cooking, doing dishes, or folding clothes. She indicated she gets help doing those activities as she has to take a break after approximately 20 minutes of any of those activities. After performing the activity, she requires a break of 30 to 60 minutes to ease her pain. She takes only over the counter medication that does not really help her pain. Petitioner continues to wear a wrap on her right elbow most of the time.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE DISPUTED ISSUES

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

The Arbitrator adopts the statement of facts detailed above and finds that Petitioner sustained repetitive trauma injuries to her upper extremities that arose out of an in the course of her employment through July 12, 2016. The Arbitrator notes that Respondent stipulated that Petitioner sustained accidental injuries that arose out of and in the course of her employment on August 1, 2011. In finding an additional injury with her work activities through July 12, 2016, the Arbitrator relies upon the records of the treating physicians, the opinions of Dr. Fernandez and Dr. Coe, as well as Petitioner's credible testimony.

It is clear from the medical records that Petitioner sustained repetitive trauma injuries through July 12, 2016. Respondent agreed that Petitioner sustained repetitive trauma injuries through August 1, 2011. After her treatment for the August 1, 2011, injury, Petitioner returned to work for Respondent as of April 1, 2013. According to her testimony and the medical records, she returned to the same position, performing the same job duties that she had performed prior to August 1, 2011, from April 1, 2013 through July 12, 2016. For over three years, Petitioner returned to the same assembly line packing jobs. She testified to constant use of the hands to sort, inspect, and package products for her entire work shift. The job description for Petitioner's position noted constant hand use. (Px. 1). On December 23, 2015, Petitioner reported the return of her symptoms with her return to the same job she had previously performed. Her repetitive job duties are well documented in the treatment records and to the examining physicians. Petitioner continued to perform those job duties through July 12, 2016, at which time she was taken off work as a result of a Fitness for Duty evaluation. (Px. 2) At that visit, it was noted that she was experiencing a gradual recurrence of bilateral hand paresthesia with pain radiating to the elbows and right shoulder, with weakness and frequent dropping of items. At that time, the physician noted her symptoms to be considered work related. As such, the Arbitrator finds that Petitioner sustained repetitive trauma injuries on August 1, 2011, and July 12, 2016, that arose out of and in the course of her employment with Respondent.

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

Respondent stipulated that timely notice was provided regarding Petitioner's August 1, 2011, injury. However, Respondent disputes that timely notice was provided of Petitioner's July 12, 2016, injury. The Arbitrator notes that Arbitrator's Exhibit #4, the Application for Adjustment of Claim relative to the July 12, 2016 filing, 16 WC 24069, was filed on August 5, 2016, well within the 45 day notice requirement. Further, Petitioner testified that she provided the restriction note from Physician's Immediate Care to Human Resources and was advised that work was not available within her restrictions. Petitioner was taken off work as of July 12, 2016, and she has not returned to work for Respondent since that time. Given Petitioner's undisputed testimony that she reported her injury and given that the Application for Adjustment of Claim was filed well within the 45-day requirement, the Arbitrator finds that timely notice of Petitioner's July 12, 2016, injury was provided.

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

The Arbitrator adopts the findings of fact stated above and incorporates them herein by this reference. The Arbitrator finds that Petitioner's current condition of ill-being is causally related to her work injuries of August 1, 2011, and July 12, 2016. The Arbitrator relied upon the opinions of Dr. Jeffrey Coe and Dr. Fernandez, as well Petitioner's treating records and her credible testimony.

The Arbitrator relies upon the well-established rules set forth by the Illinois Supreme Court that "the fact that an employee may have suffered from a preexisting condition will not preclude an award if the condition was aggravated or accelerated by the employment. The employee need not prove employment was the sole causative factor or even that it was the principal causative factor, but only that it was **a causative factor** in the resulting injury." Williams v. Industrial Com., 85 Ill. 2d 117, 122 (1981).

Petitioner's treatment records support a causal relationship between her current condition of ill-being of her upper extremities and her repetitive work activities through August 1, 2011, and July 12, 2016. Respondent's examining physician, Dr. Fernandez initially opined that Petitioner's bilateral carpal tunnel syndrome and de Quervain's tenosynovitis were attributable to her generalized work activities in February 2012. In March of 2013, Dr. Fernandez opined that Petitioner was at maximum medical improvement relative to her bilateral carpal tunnel syndrome and opined that her remaining issues were due to an unrelated myofascial pain syndrome. Dr. Coe, Petitioner's examining physician, also opined that Petitioner's bilateral carpal tunnel syndrome was causally related to her work activities through August 1, 2011. (Px. 7). Dr. Coe also opined that Petitioner's myofascial pain and epicondylitis were complications of her surgical procedures and were also causally related to her work activities for Respondent. (Px. 7).

Petitioner then returned to work for Respondent for approximately 3 years, from April 2013 through July 2016, performing the same job duties that had previously resulted in bilateral carpal tunnel syndrome. With these work activities, she testified to recurrent and gradual increase in symptoms in her hands. She was seen by Physician's Immediate care on December 23, 2015, with a report that her symptoms had come back. An EMG performed on January 27, 2016, revealed worsening of the left median sensory neuropathy. Petitioner continued working her regular job duties until July 12, 2016. At that time, she was sent to Physician's Immediate Care from Human Resources due to her continued complaints. The records noted gradual recurrence of bilateral upper extremity symptoms. The physician noted the conditions to be work related. (Px. 2).

Petitioner ultimately underwent right ulnar nerve transposition and right de' Quervain's release on January 9, 2017, and redo of left carpal tunnel release on May 8, 2017. (Px. 6). Following those procedures, Petitioner's treating surgeon, Dr. Dannenmaier, has continued to restrict Petitioner from a return to repetitive work she had performed with Respondent, noting that resumption of her job duties would result in deterioration of her conditions. (Px. 6).

Dr. Fernandez, Respondent's examining physician, authored another report on January 7, 2020. (Rx. 3). Dr. Fernandez opined that Petitioner's carpal tunnel releases from 2012, as well as her surgeries from January 2017 and May 2017, were related to her work activities. However, Dr. Fernandez opined that her current condition was that of unrelated myofascial pain syndrome. (Rx. 3).

Dr. Coe saw Petitioner again on July 23, 2019. He opined that Petitioner's current condition of ill-being relative to her upper extremities remained causally related to her work activities for Respondent. He opined that her diagnoses at that time, given the multiple surgical procedures, was now that of bilateral upper extremity overuse syndrome. He opined that Petitioner continued to require limitations restricting repetitive or forceful use due to the ongoing and residual pain from her conditions and the procedures she had undergone. (Px. 8).

Petitioner testified to ongoing symptoms in both hands and her right elbow. She noted the pain was constant in her right elbow with occasional radiation up her arm. She described ongoing pain in her hands, particular the fingers, her palms, and the palm side of her wrists. Her ongoing symptoms are consistently described in her treatment records as well as to Dr. Coe and Dr. Fernandez. The Arbitrator notes that while Dr. Fernandez opines that her current condition of ill-being is now related to myofascial pain syndrome, which he finds unrelated to her work activities, there is no evidence that Petitioner was treatment for myofascial pain syndrome prior to her work for Respondent, nor leading up to her surgeries. The Arbitrator finds much more convincing, the opinion of Dr. Coe that Petitioner's myofascial pain is a direct result of the surgical procedures she has undergone as a result of her repetitive trauma injuries. This opinion is supported by the history of the onset of Petitioner's symptoms as well as the continuation of her symptoms and limitations since she began treatment.

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to her work injuries of August 1, 2011, and July 12, 2016. Petitioner had sufficiently recovered from her August 1, 2011, injury to return to work on April 1, 2013. However, with her return to the same repetitive work activities for over 3 years, she sustained new repetitive trauma injuries through July 12, 2016, that resulted in the need for additional surgeries and permanent limitations. The Arbitrator notes that there is no opinion from any physician, including Dr. Fernandez, that the four surgeries Petitioner underwent were not related to her work activities. Her symptoms after the 2017 procedures were consistently documented by her treating surgeon, Dr. Dannenmaier. Dr. Dannenmaier repeatedly opined that due to her ongoing symptoms, she would not be capable of returning to her prior work for fear of further deterioration. As such, the Arbitrator also finds that Petitioner's current condition of ill-being is causally related to her August 1, 2011, and July 12, 2016, repetitive trauma injuries.

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

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary for the injuries she sustained as a result of her August 1, 2011, and July 12, 2016, injuries. The Arbitrator notes that the medical records, diagnoses, treatment carried out, and treatment recommendations are noted in the Statement of Facts. The Arbitrator finds that Petitioner's treatment described in the statement of facts,

including physical therapy, pain management, and surgeries to both the hands and right elbow were reasonable and necessary. For the reasons stated above and having found that Petitioner's current condition of ill-being to be related to her injuries, Petitioner's treatment has been reasonable and necessary.

As such, the Arbitrator finds that the Respondent is liable for the treatment provided, as set forth in Petitioner's Exhibit 10, pursuant to the medial fee schedule, as follows:

Respondent is responsible for the outstanding charges at OANI. Petitioner treated with Dr. McCarty at OANI, with Dr. McCarty having performed Petitioner's surgeries in September 2012 and December 2012. Having found that treatment causally related, Respondent is responsible for those outstanding charges, totaling $8,048.00 for treatment form July 6, 2012, through May 21, 2013. Respondent's medical payment ledger noted payments to OANI, but also noted payments were voided. As such, Respondent is responsible for those bills.

Respondent is responsible for the outstanding charges at Rockford Anesthesiologists Associated, totaling $1,800.00 for anesthesiology services provided on January 9, 2017, the date of Petitioner's ulnar nerve transposition procedure.

The Arbitrator does not award payment for the outstanding charges listed from Dr. Rozman at One Call medical. Petitioner noted $1,467.81 outstanding for treatment on December 27, 2011, the date Petitioner underwent an EMG. Respondent's medial payment ledger notes that payment was made to One Call Medical in the amount of $1,467.81 on March 26, 2012, for the December 27, 2011, date of service.

Respondent is responsible for the outstanding charges of $406.50 at Swedish American Medical Group relative to the EMG performed on July 10, 2018.

Respondent is responsible for the outstanding charges of $2,312.01 with Swedish American Hospital. The charges relate to treatment from September 22, 2016, through March 2, 2017, relative to Petitioner's physical therapy and her January 9, 2017, surgery.

The Arbitrator does not award payment for charges listed for Rockford Memorial Hospital, noted by Petitioner to total $7,247.86. The charges relative to Petitioner's 2011 and 2012 surgeries, was noted to have been paid in Respondent's medical payment ledger.

As such, Respondent is liable for charges as noted above, totalling $12,566.51, pursuant to the medical fee schedule.

K. What temporary benefits are in dispute?

The Arbitrator finds that Petitioner is owed Temporary Total Disability benefits from November 1, 2011, through March 28, 2013, and from July 12, 2016, through July 31, 2018.

The Supreme Court of Illinois has held that "the determinative inquiry for deciding entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. If the injured employee is able to show that he continues to be temporarily totally disabled as a result of his work-related injury, the employee is entitled to TTD benefits." Interstate Scaffolding v. Illinois Workers' Compensation Commission, 236 Ill. 2d 132 (2010).

“To establish entitlement to TTD benefits, a claimant must demonstrate not only that he or she did not work, but also that the claimant was unable to work. (Internal citation omitted). It is irrelevant whether the claimant could have looked for work. (Internal citation omitted). The dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement.”

Mech. Devices v. Indus. Comm'n (Johnson), 344 Ill. App. 3d 752, 759 (4th Dist. 2003).

“The factors to be considered in determining whether a claimant has reached maximum medical improvement include: (1) a release to return to work; (2) the medical testimony concerning the claimant’s injury; (3) the extent of the injury; and (4) “most importantly,” whether the injury has stabilized.”

Id. at 760.

Petitioner initially went off work on November 1, 2011, after having been given restrictions to avoid strong gripping and to take a break from the line every 15-20 minutes by Physician’s Immediate Care on October 31, 2011. Respondent stipulated that Petitioner was owed TTD benefits from November 1, 2011, through March 28, 2013. After returning to work on approximately April 1, 2013, Petitioner worked for over three years until being provided restrictions again by Physician’s Immediate Care on July 12, 2016. Having found Petitioner’s treatment thereafter to be causally related to her work activities through July 12, 2016, the issue is when Petitioner’s condition reached maximum medical improvement. As noted above, Dr. Fernandez and Dr. Coe both opined that Petitioner’s January and May 2017 surgical procedures were causally related to her work activities for Respondent. After the surgical procedures, Dr. Dannenmaier prescribed physical therapy and EMG studies. Petitioner continued in treatment, attempting the physical therapy, various splints and wraps until July 31, 2018. As of July 31, 2018, Dr. Dannenmaier noted his opinion that if Petitioner returned to assembly line type of work, her symptoms would deteriorate. He noted at that time, that he did not believe he could safely release her to go back to repetitive motion. (Px. 6). Petitioner testified that she had not undergone additional treatment after July 31, 2018.

As such, the Arbitrator finds that Petitioner reached maximum medial improvement as of July 31, 2018. Therefore, Petitioner is awarded TTD benefits from November 1, 2011, through March 28, 2013, and from July 12, 2016 ,through July 31, 2018 at the rate of $270.04 per week. The Arbitrator notes that Respondent did pay TTD benefits from November 1, 2011, through March 28, 2013, pursuant to Respondent’s TTD ledger. (Rx. 1).

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

The Arbitrator adopts the findings of fact stated above and incorporates them herein by this reference. In assessing the nature and extent of Petitioner's injury, the Arbitrator must consider the following five factors:

1) An impairment report prepared by a physician using the most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment." No impairment rating was offered by either party.

2) The occupation of the injured employee. Petitioner worked for Respondent for approximately 10 years before her August 1, 2011, injury and approximately 13 years in total. Petitioner worked that entire time as a packer, performing constant grasping, handling, and fingering with the upper extremities. She has been unable to return to that work since July 12, 2016. Dr. Dannenmaier, Petitioner's treating surgeon, has made clear his opinion that Petitioner cannot return to that work. That opinion was also supported by Dr. Coe.

3) The age of the employee at the time of the injury. Petitioner was 38 years old at the time of her initial injury on August 1, 2011, and she was 43 years old at the time of her July 12, 2016, injury.

4) The employee's future earning capacity. Petitioner has been unable to secure full-time employment since July 12, 2016, as a result of her injuries. Laura Belmonte, Certified Rehabilitation Counselor, provided her opinion that given Petitioner's age, education, and restrictions, that there is no stable labor market for Petitioner.

5) Evidence of disability corroborated by the treating medical records. Petitioner testified to ongoing pain in her right elbow and her hands. She reported difficulty cooking, doing dishes, or folding clothes. She indicates she gets help to perform these basic activities of daily living and must frequently take breaks to rest her hands and elbow. Petitioner's ongoing complaints are well documented throughout her treatment with Dr. Dannenmaier. Dr. Dannenmaier consistently notes his opinion regarding her limitations that have resulted from her conditions and the procedures she has undergone, noting she cannot return to work requiring repetitive use of the hands.

The Arbitrator finds that Petitioner is permanently and totally disabled given the opinions of Dr. Coe, Dr. Dannenmaier, and Laura Belmonte, the Certified Rehabilitation Counselor, as well as given Petitioner's credible testimony and the medical records supporting her ongoing symptoms.

Petitioner has not worked for the last five years. She testified that she was found disabled by the Social Security Administration. She does spend up to 10 hours a month selling Tupperware, typically over Facebook. She testified to earning only $100 to $300 a month performing this hobby and is assisted by her husband. The Arbitrator does not find that this activity, performed for 2-3 hours a week, reflects anything more than a hobby Petitioner has performed for 11-12 years.

Respondent provided a Labor Market Survey noting that if Dr. Dannenmaier's restrictions were accepted, Petitioner could work as a Greeter or a Driver, earning between $9.00 and $14.00 per hour. (Rx. 5). Given the significant pain described by Petitioner as well as the ongoing limitations regarding use of her upper extremities, particularly her hands, the Arbitrator does not find the opinion that Petitioner could work as a driver to be credible. With her clear issues using her hands, operating heavy and dangerous machinery, a car, as an occupation, is not reasonable. The only other occupation noted as being available under Dr. Dannenmaier's restrictions would be positions as a greeter for which the Survey noted 3 potential positions.

The Arbitrator finds the report and opinions of Ms. Belmonte more persuasive. Ms. Belmonte's reported indicated Petitioner's difficulty driving due to her pain. Ms. Belmonte noted that Petitioner has no formal education in the United States. She has limited English language skills. Her vocational history was that with Respondent since 2001, with various jobs in cleaning, packing, and machine operation prior to work for Respondent. Ms. Belmonte noted Petitioner's limited activity selling Tupperware as well. Ms. Belmonte noted that all of Petitioner's prior jobs required repetitive motions with the upper extremities. She noted that eliminating the ability to repetitive use the arms and hands is an extremely complicated vocational factor which significantly limits vocational options even to workers more skilled than Petitioner. When combined with her age, her limited education, and her limited English ability, Ms. Belmonte opined that her vocational options are virtually eliminated, and that Petitioner does not have access to any viable, stable labor market offering gainful employment in any sector of the economy. (Px. 9).

Having found Dr. Dannenmaier's opinions regarding Petitioner's restrictions to be credible and persuasive, and finding the opinions of Ms. Belmonte persuasive, the Arbitrator finds that Petitioner has established through credible and persuasive evidence that she is permanently and totally disabled as of August 1, 2018, when she reached maximum medical improvement. As such, Petitioner is entitled to weekly permanent and total disability benefits, in the amount of $524.34 per week, the permanent total disability minimum as of July 12, 2016, for life, commencing on August 1, 2018.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC021265
Case Name	KING, GERLONDA v. CHICAGO TRANSIT AUTHORITY
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0189
Number of Pages of Decision	14
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Adam Scholl
Respondent Attorney	Argy Koutsikos

DATE FILED: 5/24/2022

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS	)
	) SS.
COUNTY OF COOK	)

[X] 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	[X] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GERLONDA KING,

Petitioner,

vs. NO: 20 WC 21265

CHICAGO TRANSIT AUTHORITY,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 15, 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 $15,900.00. 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.

May 24, 2022
o: 5/19/2022
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	20WC021265
Case Name	KING, GERLONDA v. CHICAGO TRANSIT AUTHORITY
Consolidated Cases	No Consolidated Cases
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Jeffrey Huebsch, Arbitrator

Petitioner Attorney	Adam Scholl
Respondent Attorney	Argy Koutsikos

DATE FILED: 10/15/2021

THE INTEREST RATE FOR THE WEEK OF OCTOBER 13, 2021 0.05%

/s/ *Jeffrey Huebsch, Arbitrator*
Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

GERLONDA KING
Employee/Petitioner
v.
CHICAGO TRANSIT AUTHORITY
Employer/Respondent

Case # **20** WC **021265**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **6/15/21**. 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

K. [ ] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

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

N. [ ] Is Respondent due any credit?

O. [ ] Other ______

FINDINGS

On the date of accident, **8/6/21**, 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 $**28,556.13**; the average weekly wage was $**571.12**.

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 credit0 of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and **$0** for other benefits, for a total credit of $**0**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $386.67week for 40-6/7 weeks, commencing 9/3/2020 through 6/15/2021, as provided in Section 8(b) of the Act.

Petitioner's claim for Penalties and Attorney's Fees 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.

/S/ Jeffrey Huebsch

Signature of Arbitrator

OCTOBER 15, 2021

ICArbDec19(b)

FINDINGS OF FACT

Petitioner was employed by Respondent as a Customer Service Assistant ("CSA"). Her job entailed assisting customers at her assigned train station. She would assist customers with the vending machines and regardingroutes for travel. At the station, there is a kiosk, but she is expected to be outside of the kiosk when assisting customers. She stated that she works alone at the train stations. She is a part-time employee. Her date of hire was July 14, 2014. She is a union member.

The location of her assigned station is based on seniority and is done by a pick every six months. Based on the pick that covered the spring and summer of 2020, Petitioner was assigned the Noyes location on Mondays (4:20am to 12:20pm) and worked at the Howard North station from Tuesday through Thursday, 1:00 p.m. to 9:00 p.m. Prior to that pick, she worked at the Howard North station only one day per week (Tuesday, 1:00pm to 9pm).

Petitioner testified that her claimed injury occurred at the Howard North station, when she was accosted by an individual. Prior to August 6, 2020, Petitioner experienced harassment from male customers, contact with drug dealers and there was a shooting with the victim dying in the station. Petitioner identified two reports that were submitted to her manager on May 22, 2020 and June 9, 2020. (PX 1) In the May 22, 2020 report, Petitioner informed her manager that she did not feel safe at the Howard North location. She stated that she was harassed, there were drug sales going on in the area, and there was a recent drive-by shooting. Petitioner requested a change to a courier position due to her fears. The report was submitted to Manager Ramsey, who passed it on to the General Manager, Ms. Williams. Petitioner testified that management did not take any action regarding the May 22 report.

Petitioner testified that a clerk unofficially assisted her and moved her to the courier position. She did that job for two weeks but had to stop as the position was not given to her consistent with the CBA. Petitioner returned back to her prior position at the Howard North station as a Customer Service Assistant. On June 9, 2020, Petitioner filled out a second report, on June 9, 2020, which essentially reiterated the same concerns that she expressed in her May 22, 2020 submission. (PX 1) No management action was taken regarding this second submission.

Petitioner testified that one individual in particular was harassing her at the Howard North station. This person is referred to as "the offender". Petitioner first encountered the offender in December of 2019. At that time, he was a rider in need of assistance with the Ventra vending machine. As time progressed, she began seeing him more frequently and he made himself known to her. Conversations with him were initially friendly but, as time went on, he began to become more aggressive with his choice of words. Petitioner was friendly because she had a customer service job. The offender began telling her how attractive she was and how he enjoyed coming to the station to see her. His language then became more sexually explicit. It was on or about this time when Petitioner submitted the first report to management regarding her safety concerns. Petitioner verbally told her supervisors about the offender and once told her supervisor, Al Sawyer, in July of 2020, that if anything should happen to her it was likely going to be the responsibility of the offender.

Petitioner testified that she tried to avoid the offender by being on the platform longer than usual rather than being at the kiosk. She would also stay in the employee terminal longer to avoid contact with the offender. Eventually, Petitioner was instructed to be at the vending machines and near the kiosk more.

Petitioner testified that she continued to have encounters with the offender, and he began to become angrier. The offender said that he did not appreciate that she was not accepting of his gestures. He objected to Petitioner refusing his offers to buy her lunch. He told her that he loved her, and she was not being friendly anymore to him.

On August 5, 2020, Petitioner took a 20-minute lunch break at 4:10 p.m. Petitioner left the station to go to a restaurant to pick up a food order she had placed. The offender followed her out of the station. Petitioner tried to ignore him, but he became more upset with her. He followed her all the way into the restaurant talking to her and expressing that he loved her and wanted to buy her lunch. The offender eventually walked away. At the end of her shift that day at 9:00 p.m., she gathered her possessions and, as she opened the door to leave the station, someone reached his hand over and opened the door. The someone was the offender, who then followed her out towards her car. Petitioner kept walking and did not engage the offender. At some point, the offender's hand brushed up against her buttocks. After some local boys yelled out to her, the offender turned around and went the opposite way.

On August 6, 2020, Petitioner returned to her job, working 1:00 to 9:00. Two hours into her shift, the offender came into the station, looked at her and walked out. Petitioner testified that she locked herself in the kiosk. Two minutes later, the offender came back into the station and was talking while she was in the kiosk. The kiosk has glass on all sides. Petitioner deliberately avoided eye contact him when he talked. The offender then told her that she was upsetting him and that "I could have had you last night". Petitioner stated that she looked up after that comment and saw the offender staring at her with his penis in his hand and he was masturbating. Petitioner stated that she was "more angry at first" and almost fell off her chair. She called Control. A manager and supervisor arrived and an ambulance and the police were called.

Petitioner stated that the police came and interviewed her. An incident report was filled out by the police department. (PX 3) Afterwards Petitioner was taken to Amita St. Francis Hospital, via ambulance. At the hospital, she presented with shortness of breath, post encounter with a stalker. (PX 5, p.7) She provided a history of being flashed by an individual that was stalking her. She was very tearful. She was diagnosed with shortness of breath and anxiety. She was instructed to follow-up with her primary care physician and was prescribed medication for sleep. There is no mention of work status. (PX 5)

After being released by the hospital, Petitioner was taken back to the Howard station office and she filled out an Employee Report of Injury. (PX 2) The report is consistent with Petitioner's testimony.

On August 12, 2020, Petitioner was seen by her primary care physician, Linda Nguyen, D.O. Petitioner gave a history of being flashed by a man and having a panic attack. She stated that she had seen the individual multiple times and reported him to her manager. Petitioner described shortness of breath and mild chest

tightness that prompted the ER visit. She had one subsequent event of heart racing (thinking that she saw the offender again) and had complaints of trouble staying asleep and falling asleep due to anxious, racing thoughts. (PX 6, p. 85) Dr. Nguyen diagnosed Petitioner with a stress and adjustment reaction. (Id. at 88) Dr. Nguyen recommended psychological counseling. (Id.)

Petitioner was seen by a licensed counselor, Naomi Effort, MA, LCPC at Genesis Therapy Center on August 14, 2020. Petitioner provided a history of a customer continuously stalking her at work. She stated that she made several reports to her managers, and nothing was done. She further gave a consistent history of the occurrence on August 6, 2020. She stated that since the incident, she experienced flashbacks, difficulty sleeping, constant worry, restlessness, hypervigilance, and inability to focus or concentrate. Ms. Effort charted a diagnosis of posttraumatic stress syndrome. Individual weekly treatment was recommended. (PX 7)

Petitioner had a virtual visit with Dr. Nguyen on August 20, 2020. (PX 6, p.78) She reported difficulty sleeping and advised Dr. Nguyen that she was seen by a therapist. Petitioner was prescribed Clonazepam for her sleep issues and was advised to continue with counseling. (Id. at 81)

Petitioner returned to Ms. Effort on August 27, 2020. She shared her continued trauma symptoms of the difficulty of leaving her home, difficulty being left home alone, insomnia, and constant worry. (PX 7) The therapist worked on ways that Petitioner could deal with the stress.

On September 3, 2020, Petitioner returned to Dr. Nguyen. She was tearful, stressed and still having visions. (PX 6, p.70) She was advised to continue with therapy, she was given a new prescription for Clonazepam, and she was given an off work note until November 1, 2020. (Id. at 74)

On September 4, 2020, Petitioner was seen by Sarah Whalen, B.A. and Angela Casper, LCSW at Advocate Behavioral Health. (PX 8) At that visit, she expressed an openness to an outpatient medical group. Petitioner testified on cross that she participated in a program run by a psychiatrist, Dr. Maleeha Ahsan. The group sessions were on Zoom and the program was 5 days per week for 5 weeks.

Petitioner testified that on September 9, 2020, she saw the offender outside of her home. Her home was 8 miles away from the Howard North station. Petitioner stated that at the urgence of her father, she filed a police report with the Chicago Police on September 14, 2020. (PX 4)

Petitioner mentioned the incident of seeing the offender at her October 3, 2020 office visit with Ms. Effort. She informed her therapist that the offender was arrested and that gave her some sense of relief. (PX 6, p.7)

Between October 3, 2020 and February 5, 2021, Petitioner received care from Dr. Nguyen, Ms. Effort, and Sara Whalen of Advocate Behavioral Health. (PX6, PX7) The care from Ms. Effort was in person, the care of Dr. Nguyen was a combination of Zoom and in person, and the care with Sarah Whalen was all on Zoom. All

of the care was directed to helping Petitioner with her anxiety and depression and teaching her to cope with the multiple issues stemming from the assault.

Petitioner discontinued her visits with Sarah Whalen on February 5, 2021, due to health insurance issues. She has continued seeing Dr. Nguyen and Naomi Effort. (PX 7)

On February 16, 2021, Petitioner had a virtual visit with Dr. Deepa Nadella, a psychiatrist. Petitioner reported that since the incident, she reported feeling anxiety, depression, recurrent nightmares, intrusive thoughts, and detachment with her children. (PX6, p.10) She was given the diagnoses of episodic paroxysmal anxiety (panic disorder) and major depressive disorder with single episode. (Id. at 14). Petitioner was prescribed Paroxetine, Prazosin, Sertraline, ad Hydroxyzine by Dr. Nadella. (Id.) She was further advised to continue therapy.

Petitioner thereafter continued therapy with Naomi Effort and follow-up visits with Dr. Nguyen up to the date of hearing. Petitioner stated that Ms. Effort helps her control and understand her PTSD and anxiety and how to cope with it. She is learning to take back her power and strength and to realize that the incident was not her fault. She testified that Dr. Nadella still checks in with her and monitors her medications.

Petitioner stated that Dr. Nguyen and Naomi Effort provided MCE forms regarding her work status which she emails to her manager, Ms. English, at the Howard North station after each visit. Petitioner stated that she still does not feel capable of returning back to her position with Respondent. She stated that she relives the incident almost every day trying to figure out how she could have prevented it. The incident has affected her and her children. She has not been able to be a mom and she has been overwhelmed by the financial toll this event has taken on her.

On cross-examination, Petitioner confirmed she was a CSA or Customer Service Assistant which is a part-time position. She affirmed that she did try to go through her union to get relocated from the Howard North Station. She stated she initiated the procedure by submitting the first report to her manager. She was told by her union that her manager could only approve a trade. Petitioner acknowledged that when she filled out the reports to her manager, she did not specifically reference the particular offender, but rather discussed being harassed in general.

Petitioner stated that the offender often used the transit system. She said as time progressed, he would sometimes stand in the station without going through the turnstile. Petitioner has not returned to the Howard North station since August 6, 2020. Petitioner stated that she pointed out the offender to management and to her supervisors multiple times before the incident of August 6, 2020.

Petitioner testified that through therapy, she has noticed improvement. She knows the incident was not her fault. She is learning how to cope with her PTSD and anxiety so that she does not have to rely on medications for the rest of her life. She stated that she currently takes Lorazepam, Klonopin, and another medication that started with an H.

Petitioner described her offender as being in his late 30s/early 40's, he wore braids, was muscular, and was about 5 feet 8 inches tall. Petitioner stated that the offender appeared during her shifts at different times of the day. He would not always communicate to her when she saw him. Petitioner testified that she was informed as of a month earlier that the offender was still in jail.

On re-direct examination, Petitioner identified Manager Ramsey, Manager Green, and Supervisor Alfred Sawyer as the individuals she informed about her concerns regarding the offender. She estimated she discussed the issue with Manager Ramsey 6 to 7 different times. She would tell him that she was scared of the offender and that he harassed her in every way one could think of. She stated that she had similar conversation with Manager Green 4 to 5 times. Lastly, she told Supervisor Sawyer about the offender almost every other day beginning the end of June.

CONCLUSIONS OF LAW

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

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d).

To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of her claim O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980), including that there is some causal relationship between her employment and her injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)

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

The Arbitrator finds Petitioner to have been very credible and genuine throughout her testimony. It was apparent at the hearing that she has was significantly adversely affected by the incident of August 6, 2020.

Did Petitioner sustain an accidental injury that arose out of an in the course of employment?

Petitioner claims a psychological injury sustained from harassment by a customer of Respondent that culminated on August 6, 2020, when the offender pulled out his penis and masturbated before her while Petitioner was on duty as a CSA at Respondent's Howard North station. As a result of this incident, Petitioner claims a mental-mental injury precipitated by an uncommon event of significantly greater proportion or dimension than that to which the employee would otherwise be subjected in the normal course of employment. *General Motors Parts Division v. Industrial Comm'n*, 168 Ill. App. 3d 678 at 687 (1988), *Pathfinder Co. v. Industrial Comm'n*, 62 Ill. 2d 556 (1976)

Given that the reported and uncontroverted incident happened on Respondent's property while Petitioner was engaged in performing the duties of her employment, the Arbitrator finds thatPetitioner's injury arose in the course of her employment by Respondent.

The remaining question that needs to be answered is whether the accident/injury arose out of Petitioner's employment by Respondent. The recent Illinois Supreme Court decision, *McAllister v. Illinois Workers' Compensation Commission,* 2020 IL 124828, clearly defines the risk analysis to be used in assessing whether an injury arose out of the course of employment. The Court stated that there are three categories of injury risks recognized by the case law: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics.

In considering the facts of this matter and the circumstances leading up to the occurrence on August 6, 2020, it is apparent that risk of an assault or other wrongful contact with Petitioner by the offender or stalker, arguably fell into the personal risk category, however, when Respondent ignored Petitioner's pleas to relocate and her expressed concerns for her safety from the offender, the personal risk became an employment risk. Personal risks include nonoccupational diseases, injuries caused by personal infirmities such as a trick knee, and injuries caused by personal enemies and are generally non compensable." *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 162-63 (2000); See also: *Illinois Consolidated Telephone Co. v. Industrial Comm'n*, 314 Ill. App. 3d 347, 352, (2000) An exception to this rule exists when the workplace conditions significantly contribute to the injury or expose the employee to an added or increased risk of injury." *Rodin v. Industrial Comm'n*, 316 Ill. App. 3d 1224, 1229 (2000)

Neutral risks include stray bullets, dog bites, lunatic attacks, lightening strikes, bombings and hurricanes. Compensation for neutral risks depends on whether a claimant was exposed to a risk of injury to an extent greater than to which the general public is exposed. *Illinois Institute of Technology Research Institute v. Industrial Commission,* 314 Ill. App. 3d 149, 163 (2000)

Based on the nature of Petitioner's CSA position, she was openly available to contact by the customers of Respondent. In fact, it was her job to interact with the customers and assist them with issues of transit. Ordinarily, it would not be expected that she would be exposed to a known employment risk based on her described job duties, however, Petitioner, provided notice to Respondent in both written form and verbally that she had concerns about her safety, regarding both the crime in the station area and from the harassment she received from customers, particularly from the offender. Petitioner acknowledged that her submitted written reports were more generalized concerning the harassment and did not mention any particular individual. However, Petitioner credibly testified that she verbally notified her managers and her supervisor on numerous occasions about a particular harassing customer, the offender, who was aggressive and inappropriate towards her. She even told Manager Sawyer that if anything ever happened to her, the offender would be the guy who would have done it. Petitioner's testimony was unrebutted on this issue and was credible.

The risk of injury to Petitioner from an event such as what occurred is related to her employment and not just that she was present at work on Respondent's premises when it occurred. In this instance, it is uncontroverted that Respondent was notified multiple times by Petitioner of the harassing offender as well as her concerns about her safety. Because Respondent did nothing on Petitioner's behalf despite her pleas for help,

Respondent created an increased risk of injury related to her employment greater than any such risk incident to the public at large. Additionally, if the actions of the offender can be considered analogous to a "lunatic attack" (there is a dearth of reported Illinois decisions on such events), the risk of injury to Petitioner as a CSA (public contact, being outside the kiosk when people are in the station, being trapped in the kiosk when the offender enters the station, obviously not being free to flee when the offender approaches because she would be abandoning her job and not be able to assist other riders) to an event/injury such as what occurred to Petitioner is greater than the risk of injury from such an event that the public at large has.

Accordingly, Petitioner sustained accidental injuries which arose out of and in the course of her employment by Respondent on August 6, 2020.

Is Petitioner's current condition of ill-being causally connected to her injury?

Causation in this matter is supported by a chain of events analysis. "Medical evidence is not an essential ingredient to support the conclusion of the * * * Commission that an industrial accident caused the [claimant's] disability." *International Harvester v. Industrial Comm'n*, 93 Ill.2d 59, 63, (1982); See also: *Pulliam Masonry v. Industrial Comm'n*, 77 Ill.2d 469, 471 (1979) "It is not necessary to establish a causal connection by medical testimony. A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester*, 93 Ill.2d at 63–64 (1982)

In this claim, Petitioner had no known mental health issues prior to the encounters with the offender. After the August 6, 2020 incident, she needed to be taken to the emergency room with a finding of shortness of breath and anxiety. She thereafter sought treatment with her primary physician, psychiatrists, and mental health counselors. Petitioner's diagnoses from the various medical providers have included post-traumatic stress syndrome, episodic paroxysmal anxiety (panic disorder), and major depressive disorder with single episode. The medical records establish that Petitioner still requires care for these conditions.

Given the described incident with the offender and Petitioner's immediate reaction and continued psychosis, the Arbitrator finds that there exists a causal relationship between Petitioners' current condition of ill-being and the work-related injury that occurred on August 6, 2020. This finding is also based upon the credible testimony of Petitioner and the medical records.

Is Petitioner entitled to temporary total disability benefits?

The medical records of Petitioner's medical providers Naomi Effort, Sarah Whalen, Linda Nguyen, M.D., and Deepa Nadella, M.D. reflect that she sustained a significant trauma as a result of the August 6, 2020 incident which resulted in anxiety, post-traumatic stress syndrome, sleep issues, and depression. The medical records contain only one specific reference regarding Petitioner's off work status. On September 3, 2020, Dr. Nguyen charted that Petitioner was to be off of work until November 1, 2020. (PX 6, p.74) There is no further

reference in the Record regarding Petitioner's work status including any references to a provider releasing her back to her job duties.

Petitioner testified that Dr. Nguyen and Naomi Effort have provided work status forms or MCE forms during the course of their treatment that she turns into her manager, Ms. English. Petitioner stated that the forms are sent by email to Ms. English after each visit. Petitioner's testimony was unrebutted.

Based on the medical records and Petitioner's testimony, it is the Arbitrator's finding that Petitioner was disabled from performing her job duties as a Customer Service Assistant for Respondent from September 3, 2020 to June 15, 2021 to assist her in coping with the incident, so that she can return to work, which she seems to desire to do.

Accordingly, Respondent shall pay Petitioners temporary total disability benefits from September 3, 2020 (date of first documented medical authorization off work) to June 15, 2021 or 40-6/7 weeks at the TTD rate of $386.67 per week (Statutory Minimum with 3 dependents).

Is Petitioner entitled to penalties/attorneys' fees under Sections 19(k), 19(l) and 16?

The Arbitrator finds that Petitioner is not entitled to Penalties or Fees and the claim for same is denied.

As stated above, there is not much (if any) Illinois authority on lunatic attacks such that an arising out of defense can be considered proper, given the facts of this case. Respondent's disputes are found to be in good faith and do not merit an award of Penalties or Fees at the Arbitration level.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC016284
Case Name	SAUCEDO, DANEY v. ZARA
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0190
Number of Pages of Decision	17
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Edward Czapla
Respondent Attorney	Miles Cahill

DATE FILED: 5/24/2022

/s/*Maria Portela, Commissioner*
Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DANEY SAUCEDO,

Petitioner,

vs. NO: 18 WC 16284

ZARA USA, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, benefit rate, temporary total disability, medical expenses and nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Regarding the medical award, Respondent argues the Decision failed to acknowledge the parties' stipulation regarding credit for medical bills that were already paid. On the Request for Hearing form, Respondent's attorney made no claim for credit under §8(j) of the Act but wrote, "Respondent has paid all bills previously received." At the hearing, Respondent's attorney stated, "I believe we have a stipulation that all bills previously paid we would receive credit for and that any bills which the Court might award pursuant to the decision would be subject to fee schedule or negotiated rate, whichever is less…" *T.6.* Petitioner's attorney did not dispute that there was such a stipulation and both attorneys indicated that this would be addressed in their proposed decisions. *T.7.* It is unclear whether the parties addressed the amount of Respondent's credit in their proposed decisions, but it is true that the Arbitration Decision does not give Respondent credit for any bills already paid. Although we affirm the Arbitrator's medical award, we hereby modify the Decision to reflect the parties' stipulation and grant Respondent credit for all payments made.

Next, we modify the analysis of the five permanency factors under §8.1b(b) of the Act as follows:

(i) We agree that no weight is given to this factor since an impairment rating was not submitted. However, we correct a clerical error and replace the phrase "can't give no weight" to "can't give any weight."

(ii) We agree with the Arbitrator and give "some" weight to Petitioner's occupation as a visual merchandiser. However, we strike the sentence, "The job also required Petitioner to bend[,] stoop and reach." While this statement may be true, these activities are not relevant considerations under this factor because the Functional Capacity Evaluation (FCE) specifically found that Petitioner is capable of frequent "bend/stoop." Further, there is no evidence that Petitioner had any difficulty reaching and, even if there was such evidence, this would have nothing to do with Petitioner's lumbar condition. Regarding Petitioner's permanent restrictions, we find that on April 11, 2019, Dr. Szczodry wrote Petitioner "continues to do relatively well, however, she is clearly limited as far as ability to return to full duty. I believe [the] recent FCE gives us [a] realistic assessment of her restrictions." *Px4*. This record also indicates that a "work status report" was given but we were unable to locate that in evidence. However, Petitioner's attorney referenced those restrictions ("lifting restrictions of 25#, sit for 5 hours, stand for 5 hours, walk 4-5 hours") in his April 12, 2019 email to Respondent's attorney asking if Respondent would accommodate those restrictions. *Px16*. Petitioner also testified that these were her restrictions, and that Respondent has been accommodating her. *T.41-42, 50*. Finally, Respondent did not dispute that those are the permanent restrictions that Dr. Szczodry prescribed. Therefore, even though the final "work status report" is not in evidence, we believe there is sufficient evidence to find that those are Petitioner's permanent restrictions as given by Dr. Szczodry, which are based on a valid FCE and his long history of treating Petitioner. We find these restrictions more persuasive than the full-duty return to work recommended by Dr. Zelby who only examined Petitioner one time.

(iii) Regarding Petitioner's age, we strike the Arbitrator's statement that Petitioner "has a statistical life expectancy of approximately 62 years" since there is no evidence of this in the record. Nevertheless, we agree that Petitioner, who was 23 years old at the time of her accident, will suffer the effects of her injury for a very long time and assign this factor great weight.

(iv) Regarding Petitioner's Future Earning Capacity, we modify the decision to give this very little weight. Initially, we note that we previously considered Petitioner's restrictions under the occupation factor. Also, there is no evidence that Petitioner's future earning capacity has been diminished. Respondent's attorney attempted to inquire about Petitioner's current earnings, but Petitioner's attorney objected based on relevance. *T.72*. Respondent's attorney offered to withdraw the question with the understanding that Petitioner was not claiming a wage differential and the Arbitrator ultimately sustained the objection. *T.73*. However, we note that Petitioner's post-accident earnings are highly relevant in the consideration of this permanency factor under §8.1b(b) of the Act. In any event, Petitioner has the burden to prove a diminishment in her earning capacity and we find that she has failed to do so. Therefore, we give this very little weight.

(v) We affirm the Arbitrator's decision to assign great weight to this factor and add that, at Petitioner's last visit with Dr. Szczodry on June 13, 2019, he wrote that she was working within her restrictions, had a mildly positive straight-leg-raise test on the right and had residual right lower extremity pain that feels different than before surgery but gets worse when she tries to lift the right lower extremity. We also note Petitioner's testimony that she has good days and bad days, but she is not taking any medication. *T.82*.

After thorough review of the evidence and consideration of the five permanency factors above, we reduce the permanency award from 25% to 22.5% of the person as a whole under §8(d)2 of the Act.

Finally, we correct two clerical errors. In the first paragraph of the Order section, the phrase "in accord" is hereby replaced with "in accordance with." Also, in the last sentence of the second full paragraph on page nine, we change the words "with the" to "without."

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $485.66 per week for a period of 54-2/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $437.09 per week for a period of 112.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 22.5% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical expenses identified in the Arbitration Decision under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

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

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

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.

May 24, 2022

/s/ *Maria E. Portela*

SE/
O: 3/29/22
49

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SAUCEDO, DANEY Case# **18WC016284**
Employee/Petitioner

ZARA USA INC
Employer/Respondent

On 3/5/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.01% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1876 CZAPLA LAW
EDWARD ADAM CZAPLA
1821 WALDEN OFFICE SQ #400
SCHAUMBURG, IL 60173

1872 SPIEGEL & CAHILL PC
PHILLIP JOHSON
15 SPINNING WHEEL RD #107
HINSDALE, IL 60521

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

Daney Saucedo
Employee/Petitioner

Case # **18 WC 016284**

v.

Consolidated cases: **None**

Zara USA, Inc.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **August 23, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. ☐ What was the date of the accident?

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

F. ☒ 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 **03/25/2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$37,881.61**; the average weekly wage was **$728.49**.

On the date of accident, Petitioner was **23** 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 **$19,347.03** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$19,347.03**.

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

ORDER

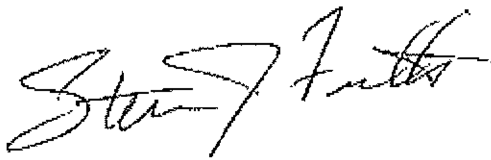
Respondent shall pay Petitioner medical expenses incurred as set forth in Petitioner's Exhibits # 1, 2, 3, 4 Vol II, 5 Vol I, 6, and 7, to August 23, 2019, to be adjusted in accord the medical fee schedule provided in §8.2 of the Act

Respondent shall pay Petitioner Temporary Total Disability benefits of $485.66/week, for period of 17 & 3/7 weeks, commencing March 29, 2018 through July 28, 2018 and 36 & 6/7 weeks, weeks, commencing July 31, 2018 through April 14, 2019, as provided in §8.(b) of the Act.

Respondent shall pay Petitioner compensation that has accrued from March 18, 2018 through August 23, 2019, and shall pay the remainder due of the award, if any, in weekly benefits.

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

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



Signature of Arbitrator

March 5, 2020
Date

MAR 5 - 2020

Daney Saucedo v. Zara USA, Inc.
18 WC 16284

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?; ***G:*** What were Petitioner's earnings?; ***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, and Respondent disputes, that she is entitled to TTD benefits from March 29, 2018 through July 28, 2018, 17 & 3/7 weeks, and from July 31, 2018 through April 4, 2019, 36 & 6/7 weeks.

The parties have stipulated that the Petitioner was paid TTD benefits between April 2, 2018 and July 28, 2018.

It is agreed that Respondent is entitled to a credit of $19,347.03 for TTD benefits paid.

FINDINGS OF FACT

Petitioner Daney Saucedo worked full-time for Respondent Zara USA, INC. Petitioner was responsible for preparing the store floor for merchandising (clothes). Petitioner folded and displayed clothes on various racks and shelves throughout the store.

Petitioner injured her back on Sunday, March 25, 2018, while reaching up putting a knit sweater onto a top shelf. Petitioner felt an immediate sharp pain in her lower back. The injury occurred around 11:00 a.m. Petitioner had a 1-hour lunch break at 2:00 p.m. Following the break, Petitioner felt low back pain radiating down to the bottom of both feet. Petitioner notified her supervisor, Priscilla, that she injured her back at work.

Petitioner returned to work on Tuesday, March 27, 2018 and experienced bilateral leg pain. On March 29, 2018, Petitioner saw Dr. Joyce at Joyce Family Chiropractic complaining of low back pain with stabbing shooting pain into the right hip/buttocks (PX #1). The history also noted, "She is being helped by two people to walk. She notes that she hurt her back at work earlier in the week and it has gotten progressively worse." The intake form completed by Petitioner noted a March 25, 2018 date of injury, with a pain level of 10.

Dr. Joyce diagnosed segmental and somatic dysfunction of the lumbar region, segmental and somatic dysfunction of the pelvic region, and segmental and somatic dysfunction of lower extremity. Dr. Joyce noted "no work status." Dr. Joyce performed

subluxation adjustments and manipulation along with electrical stimulation. Dr. Joyce treated Petitioner from March 29 through April 23, 2018, and took her off work during this time. Dr. Joyce's treatment did not relieve Petitioner's pain. She continued to experience low back pain radiating into the right hip. On April 23, 2018, Dr. Joyce referred Petitioner to Midwest Orthopedic Consultants.

On May 2, 2018, Petitioner saw Dr. Szczodry at Midwest Orthopedic Consultants complaining of low back pain radiating to the bilateral extremities (PX #2). Petitioner's history noted symptoms present since March 25, 2018 when injured at work and that she felt sudden back pain when she bent forward to put clothing on the shelf. The pain quickly started to radiate to her bilateral lower extremities. The patient describes sharp, stabbing, burning and shooting pain, with 10/10 pain localized across her lower back and radiates to the bilateral buttocks, posterior right thigh and leg. Dr. Szczodry prescribed a Medrol Dosepak and lumbar MRI. Petitioner was restricted from work.

A May 7, 2018 lumbar MRI revealed spinal stenosis at L3-4, a broad-based posterior disc protrusion with moderate spinal and lateral recess stenosis with mild bilateral neural foraminal stenosis at L4-5, and mild left foraminal stenosis at L5-S1.

Dr. Szczodry diagnosed low back pain radiating to the bilateral lower extremities with an L4-5 disc herniation. A lumbar epidural steroid injection was ordered along with a course of physical therapy. Petitioner remained restricted from all work.

Petitioner received a right S1 epidural steroid injection (ESI) from Dr. Kim at Palos Surgi-Center on May 23, 2018 (PX #2). Petitioner received some improvement with the injection and Dr. Szczodry ordered a second lumbar ESI, which was not authorized. Petitioner remained restricted from work.

On June 18, 2018, Petitioner was examined by Dr. Daniel Troy pursuant to §12 of the Act. Petitioner offered Dr. Troy's IME report in evidence as her Exhibit #8. The exhibit was rejected on hearsay grounds

On July 16, 2018, Dr. Szczodry ordered additional physical therapy and restricted Petitioner from all work activity. At Respondent's request, Petitioner returned to work on July 29, 2018 with a 10-pound lifting restriction. However, Petitioner was given full duty assignments. On July 30, Petitioner aggravated her back opening boxes and removing clothes on "shipment day".

Petitioner saw Dr. Szczodry following work on July 30, 2018, reporting increased pain and return of her radicular symptoms. Dr. Szczodry noted all conservative methods were exhausted and recommended a L4-L5 microdiscectomy.

Petitioner was examined for a second §12 IME Dr. Troy on September 10, 2018. pursuant to Section 12 of the Act. Petitioner offered Dr. Troy's IME report in evidence as

her Exhibit #9. The exhibit was rejected on hearsay grounds. The surgery recommended by Dr. Szczodry was then approved.

A September 19, 2018 a lumbar MRI ordered by Dr. Szczodry revealed a 1.5 mm broad-based posterior disc protrusion effaces the ventral thecal sac without central canal or neural foraminal stenosis at L3-4; an annular tear with a .5 mm broad-based posterior disc protrusion and bilateral ligamentum flavum hypertrophy causes central canal stenosis, bilateral lateral recess stenosis and abuts the bilateral traversing L5 neve roots at L4-5; and a 1.5 mm broad-based posterior disc protrusion.

Dr. Szczodry diagnosed an L4-5 disc herniation and performed a L4-L5 microdiscectomy at Advocate Christ Medical Center on September 27, 2018 (PX #2 & PX #5).

Petitioner followed up on Dr. Szczodry post-operatively on October 5, 2018. A Medrol Dosepak was prescribed for pain and Petitioner remained restricted from all work activity. On October 19, 2018, Dr. Szczodry recommended a course of physical therapy for Petitioner's residual right lower extremity pain.

An initial physical therapy evaluation was performed at Midwest Orthopedic Consultants. Petitioner completed 45 physical therapy sessions, from October 31, 2018 through February 15, 2019 (PX #4, Vol. II).

On November 15, 2018, Dr. Szczodry recommended continued physical therapy for Petitioner's residual right leg pain. Sedentary work restrictions with a 1-pound lifting restriction were issued, which Respondent did not accommodate. On December 13, 2018, Dr. Szczodry ordered an updated lumbar MRI study for Petitioner's residual right leg pain.

A lumbar MRI without contrast performed on December 19, 2018, revealed 4 new small modules in the anterior aspect of the spinal canal (PX #2). An 8 mm lesion was present at T11. There was a 7 mm lesion at L1. A new punctate lesion in the right anterior paracentral spine at L2 measured 2 mm. A fourth new lesion at L3 measured 3.5 mm. The radiologist noted that the new lesions "all appeared in the 3 months since the last MRI study. The differential diagnosis includes lesions possibly related to recent surgery." The 4 nodular lesions noted to be intradural.

Lumbar MRIs with and without contrast were performed December 28, 2018. The findings were essentially unchanged from the previous scan.

Dr. Szczodry discussed the MRI findings with Petitioner on January 3, 2019. He noted the lordotic changes in the lumbar spine and advised Petitioner to follow up with her PCP regarding the MRI findings. Another course of physical therapy was prescribed along with Gabapentin for the residual right leg pain.

Petitioner returned to Dr. Szczodry on February 14, 2019, and reported sharp pain throughout her back at physical therapy on February 11, 2019. Petitioner noted since then she had shooting pain throughout her entire back radiating to the right buttock. A course of work conditioning was prescribed, and sedentary work restrictions continued.

On February 20, 2019, Petitioner began a 2-week course of work conditioning at ATI Physical Therapy (PX #6). Petitioner completed the work conditioning March 6, 2019. On March 7, 2019, Dr. Szczodry prescribed a H-wave stimulator and FCE. Petitioner remained restricted to sedentary duty.

Petitioner completed a valid FCE at ATI Physical Therapy on March 12, 2019. Petitioner demonstrated the ability to work at a LIGHT to MEDIUM physical demand level (PX #6).

Dr. Szczodry discussed the FCE results with Petitioner on April 11, 2019. He continued to document Petitioner's residual right lower extremity pain. His examination revealed a mildly positive straight-leg raise test on the right. Dr. Szczodry noted that "she is clearly limited as far as ability to return to full duty." He noted that Petitioner had reached MMI and believed the FCE presented a "realistic assessment of her restrictions."

On February 13, 2019, board-certified neurosurgeon Dr. Andrew Zelby performed a §12 IME. Dr. Zelby testified at an evidence deposition May 22, 2019 (RX #1). He refreshed his memory from his notes.

Dr. Zelby testified that at the examination, Petitioner complained of intermittent but daily pain in the back of the right lower extremity. She further told Dr. Zelby that she experienced pain and cramping in the bottom of her right foot and right thigh. Petitioner reported that she can sit for about three hours without pain. She could only stand for an hour without pain and could only walk two blocks without pain. Petitioner described her pain at 7 to 8/10.

Following taking the history, Dr. Zelby completed an examination. Dr. Zelby testified that Petitioner reported tenderness to palpation in the lower lumbar and upper gluteal region even with non-physiological light touch. Dr. Zelby found range of motion of the lumbar spine normal, squatting was normal, lying straight leg raising was positive on the right in the back, but sitting straight leg raising was negative. Toe walking and heel walking were normal, Patrick's test was normal, gait was normal, tandem gait was normal, posture is normal. There was no evidence of paraspinal muscle spasm. Strength in the extremities was normal, sensation was normal, vibratory sensation in the extremities was normal, deep tendon reflexes and extremities were diminished but symmetrical throughout which was normal.

Dr. Zelby reviewed the operative report of the microdiscectomy on September 27, 2018. Dr. Zelby also reviewed Petitioner's MRIs on May 7, 2018, December 18, 2018, and

December 27, 2018. He did not find any pathology on the December 18 or the December 27 scans which explained Petitioner's current complaints. He added that the lesions noted on the December 27 scan did not explain Petitioner's complaints either.

Dr. Zelby opined that Petitioner had lumbar spondylosis without radiculopathy. He noted that Petitioner did not report a specific traumatic event or a particular inciting event. He added that Petitioner's condition was degenerative and not a repetitive trauma.

Dr. Zelby opined that, based upon the objective medical findings, Petitioner could safely return to all of her usual vocational or avocational activities without restrictions. He further opined that she could return to her regular job duties with the restriction and was at no increased risk for an injury with a return to her regular job.

Petitioner's counsel objected to questioning related to whether Petitioner should continue taking Gabapentin on *Ghere* grounds of an opinion not disclosed in Dr. Zelby's narrative IME report. Dr. Zelby's report was not admitted in evidence or identified at the deposition. Therefore, the Arbitrator could not rule on the sufficiency of the objection.

On cross-examination Dr. Zelby acknowledged that he did not review Petitioner's records from Dr. Joyce and that he reviewed Dr. Szczodry' s records for September, October, and November 2018. He had not reviewed any of Petitioner's medical records from before March 25, 2018.

Dr. Zelby acknowledged that Petitioner was working full time without restriction before March 25, 2018. He had not been provided with medical records indicating that Petitioner complained of a sudden onset of pain at work on March 25, 2018. He testified that had not read Dr. Troy's September 2018 report and did not recall whether Petitioner gave a history of a sudden onset of pain when bending forward at work on March 25, 2018. He further acknowledged that he did not review Dr. Joyce's Patient Information Form or Dr. Szczodry's May 2, 2018 notes. Dr. Zelby admitted that those records note Petitioner's history of sudden onset of back pain at work. He also admitted that he did not review Petitioner's post-operative therapy or work-hardening records or Dr. Szczodry's clinical notes from 2019 and was therefore unaware of her continuing complaints and symptoms. Dr. Zelby did not review Petitioner's ATI FCE on March 12, 2019.

On re-direct examination Dr. Zelby repeated that Petitioner's subjective complaints could not be corroborated with the objective medical findings. He also repeated that an FCE was not necessary because of Petitioner's lack of objective findings on exam. However, he noted that there was nothing about Petitioner's job that would rule out work at LIGHT to MEDIUM Demand level.

On re-cross-examination Dr. Zelby denied that Petitioner had objective radiculopathy

Petitioner last saw Dr. Szczodry June 13, 2019. Petitioner continued to perform home therapy exercises and noted her residual right leg pain. Dr. Szczodry released Petitioner to work with the permanent light to medium work restrictions noted in the FCE.

CONCLUSIONS OF LAW

F: Is Petitioner's current condition of ill-being causally related to the accident?

Petitioner testified credibly that she injured her low back at work on March 25, 2018, while reaching up to put a knit sweater onto a display shelf. She was able to finish her shift but experienced low back pain with radiating leg pain down to both feet. Petitioner testified credibly that she had no prior low back injury and had not received any prior medical treatment to her low back. Petitioner was working full-duty and full-time without any physical restrictions prior to her injury at work. She gave a consistent history to her treating physicians, Drs. Joyce and Szczodry, that she had a sudden onset of low back pain that radiating into her legs while engaged in work activities.

Respondent had Petitioner examined three times pursuant to §16, twice by Dr. Troy and once by Dr. Zelby. Dr. Troy's reports were not admitted in evidence and he was not deposed. Dr. Zelby testified at evidence deposition. He acknowledged that he had not reviewed a substantial body of petitioner's medical records. He had not reviewed Petitioner's records from Dr. Joyce, the chiropractor, or from post-operative physical therapy. He had not reviewed the entirety of Dr. Szczodry's records.

The Arbitrator finds that Dr. Zelby is not persuasive. Although he conducted an apparently thorough clinical IME he did not conduct a thorough review of Petitioner's medical history. In fact, he could not review records he was not provided. There is a genuine lack of foundation for his opinions. Therefore, the Arbitrator finds that Petitioner proved that her condition of ill-being was causally related to her workplace accident on March 25, 2018.

G: What were Petitioner's earnings?

Petitioner's earnings and average weekly wage were not genuinely disputed. Petitioner is a salaried employee who worked a 40-hour work week. Petitioner's wage statement was introduced into evidence, which reflected that Petitioner earned $37,881.61 in the one-year period prior to the March 25, 2018 injury at work. Therefore, pursuant to §10 of the Act, Petitioner's average weekly wage is $728.49.

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?

As noted above, the Arbitrator finds that Petitioner's lumbar injury is casually related to her March 25, 2018 injury at work. Respondent did not offer any evidence rebutting the reasonableness or necessity of the medical treatment or bills. Therefore, the Arbitrator finds that the Respondent shall pay to Petitioner the medical services identified in PX #1, PX #2, PX #3, PX #4 Vol. II, PX #5 Vol. I, PX #6, and PX #7, pursuant to §8(a)of the Act and adjusted in accord with the Medical Fee Schedule provided in §8.2 of the Act.

K: What temporary benefits are in dispute? TTD

Petitioner was restricted from work by Dr. Joyce on March 29, 2018. Petitioner remained off work until July 29, 2018, when she returned to work at Respondent's request. Petitioner aggravated her back at work on July 30, 2018. Thereafter, Dr. Szczodry restricted Petitioner from all work activity. Following surgery, Petitioner completed a course of physical therapy and work conditioning. Petitioner completed an FCE March 12, 2019 and was released to return to light to medium duty work by Dr. Szczodry on April 11, 2019.

Petitioner contacted her supervisor, Laura Coughlin, and H.R. manager, Iona Barkins, multiple times regarding her return to sedentary work. Respondent did not accommodate Petitioner's sedentary work restrictions. Petitioner reached MMI on April 11, 2019 and was released to return to light to medium duty work. Petitioner returned to work on April 15, 2019. Respondent has accommodated Petitioner's work restrictions.

When an employee seeks TTD benefits, the dispositive inquiry is whether their condition has stabilized, meaning whether they had reached MMI. An employee is no longer eligible for TTD benefits once they have reached MMI. Here, the evidence showed that Petitioner achieved MMI on April 14, 2019.

Therefore, the Arbitrator finds that Petitioner is entitled to TTD benefits of $485.66/week for 17 & 3/7 weeks, commencing March 29, 2018 through July 28, 2018 and 36 & 6/7 weeks, commencing July 31, 2018 through April 14, 2019.

L: What is the nature and extent of the injury?

Petitioner's permanent partial disability was assessed in accord with§8.1b of the Act:

(i) no AMA impairment rating was admitted in evidence. Therefore, the Arbitrator can't give no weight to this factor.

(ii) Petitioner worked as a visual merchandizer for a clothing store. Petitioner's job required her to fold, stack and display clothes throughout the store. The job also required Petitioner to bend stoop and reach. Petitioner has worked the last 3 years in that capacity. The Arbitrator gives some weight on this factor.

(iii) Petitioner was 23 years old at the time of her injury. She has a statistical life expectancy of approximately 62 years. In light of Petitioner's injury, the

surgery required, and Petitioner's continuing complaints and restrictions, it is likely Petitioner will suffer the effects of her injury for a very long time. The Arbitrator gives great weight to this factor.

(iv) Petitioner was able to return to her former position with Respondent but with restrictions. It is likely that Petitioner's work restrictions will adversely affect her future earning capacity. The Arbitrator give great weight to this factor.

(v) Dr. Szczodry performed a L4-5 microdiscectomy. Post-operatively Petitioner continued to experience residual right leg radicular pain. Petitioner completed post-operative physical therapy and a 2-week course of work conditioning followed by a valid FCE, in which Petitioner demonstrated the ability to work at the light to medium duty level. The Arbitrator notes that Dr. Zelby did not review the FCE, which detracted from the persuasiveness of his opinions. The Arbitrator gives great weight to this factor.

Based on the evidence taken as a whole, including the above five factors, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% loss of a person-as-a-whole, 125 weeks, pursuant to §8(d)(2) of the Act.

March 5, 2020

Steven J. Fruth, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC013808
Case Name	HARRIS, ENA v. COOK COUNTY HEALTH & HOSPITAL SYSTEMS
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0191
Number of Pages of Decision	14
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Steven Saks
Respondent Attorney	G. Steven Murdock

DATE FILED: 5/24/2022

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ENA HARRIS,

Petitioner,

vs. NO: 20 WC 13808

COOK COUNTY HEALTH & HOSPITAL SYSTEMS,

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 her employment, whether her current cervical spine condition of ill-being remains causally related to the work injury, entitlement to temporary disability benefits, and entitlement to incurred medical expenses as well as prospective medical care, and being advised of the facts and law, reverses the Decision of the Arbitrator. The Commission finds Petitioner sustained an accidental injury arising out of and occurring in the course of her employment on April 24, 2020 and her condition of ill-being is 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).

PROCEDURAL HISTORY

The matter was originally assigned to Arbitrator McLaughlin; however, due to unforeseen circumstances, the parties agreed to proceed with the §19(b) hearing before then-Arbitrator Christopher Harris on October 29, 2020. Prior to issuing a decision, Arb. Harris was appointed Commissioner and the case was transferred to Arbitrator Fruth. Rather than re-arbitrate the matter

before Arb. Fruth, the parties elected to have Arb. Fruth render a decision based on his review of the October 29, 2020 transcript.

FINDINGS OF FACT

Petitioner is a registered nurse at Provident Hospital, which is one of Respondent's facilities. T. 9. Petitioner was first licensed in January 2011, and she has been working in Respondent's hospitals since 2016. T. 9-11. As of April 2020, Petitioner was working on Three North; she explained this is a Medical Surgical/ICU with five or six patients who are ventilator dependent and bedridden. T. 11. Petitioner's job duties were "to pass medication, to also perform any bedside needs, such as changing a patient, turning the patient. All of these patients are on ventilators. So we have to suction the patients." T. 12. Petitioner testified there were no certified nurse's assistants assigned to that unit, and the number of nurses assigned depended on how many were available. T. 12.

Petitioner acknowledged she has a prior history of neck problems. T. 12. In 2013, she was evaluated at Advocate Medical Group and the diagnostic workup included X-rays and a cervical spine MRI. T. 39-40. The Advocate Medical Group records include the 2013 MRI report; the radiologist's impression was "At C5-C6, right paramedian disc herniation causes moderate right central stenosis, compresses right lateral recess, causes mild posterior displacement of right ventral cord. No foraminal disc [*sic*]." Pet.'s Ex. 1. Petitioner testified she underwent conservative treatment and her complaints improved: "…I took medicine and I was fine." T. 40.

Petitioner explained she next sought treatment for neck pain in 2019. T. 13. She was again evaluated at Advocate Medical Group, and after a repeat cervical spine MRI was obtained, Petitioner was diagnosed with a herniated cervical disc and underwent a series of three epidural steroid injections. T. 38, 40, 43. The Advocate Medical Group records reflect the scan was completed on April 20, 2019, and it revealed: 1) Right paracentral and foraminal disc protrusion at C5-C6 results in moderate to severe right foraminal narrowing. Please correlate for right C6 radicular symptoms. 2) Straightening of normal cervical lordosis. 3) Mild inflammatory changes in the visualized paranasal sinuses including the sphenoid sinuses. Pet.'s Ex. 1. The records further reflect cervical epidural steroid injections were performed on June 3, 2019; June 19, 2019; and July 25, 2019. Pet.'s Ex. 1. Petitioner testified she felt "fine" after the injection series; when she was released, she was under no restrictions and over the next eight months, she performed all of her job duties without issue. T. 13-14, 43.

Petitioner alleges she sustained a work-related neck injury on April 24, 2020. Arb.'s Ex. 1. Her shift that day was from 11:00 p.m. on April 23 to 7:00 a.m. on April 24, and the injury occurred around 4:00 or 5:00 a.m. T. 18. Petitioner described the incident:

> That particular morning I worked with two other nurses. I was the charge nurse. What I was doing, I was doing morning rounds to see if anyone, to see who needed to be changed so we can gather our supplies. Because it was only three of us and I think we had four complete patients. So I went into the room. I think it was bed three. This patient, he is contracted. He has like a traumatic brain injury. So I went in and I attempted to pull his knees apart. Because that is how - - He always has his

> knees tight. So I went to pull his knees apart to check to see if he had any stool. At that time, that's when he pulled, kind of jerked back. That's when I felt the sharp pain and the burning pain in my neck…It was a sharp pain first and then it was a burning pain…It went kind of like down my arm to maybe right here (indicating)…Halfway, halfway down my shoulder. T. 15-16.

Petitioner worked the remainder of her shift: "I was having pain, but I pushed through." T. 18. After her shift, she went home, took Advil, and laid down. T. 20. Later that morning, Petitioner phoned Respondent's Employee Health to report the incident: "I called and told them that I had been injured pulling a patient." T. 23. Petitioner then phoned her primary care physician, Dr. Girma Assefa, and scheduled an appointment for later that day. T. 24. Petitioner's phone bill demonstrates these two phone calls occurred at 9:20 a.m. and 9:31 a.m. Pet.'s Ex. 3.

Petitioner testified the pain she experienced on April 24, 2020 was different than what she had experienced in the past. She explained that in 2013 and 2019, her pain was "[m]ore like achy, just an aching pain," but after the April 24, 2020 incident, the "pain was a sharp pain. Then the pain, it wouldn't go away. It was just constant." T. 17.

The record reflects that on the afternoon of April 24, 2020, Petitioner had a telehealth visit with Dr. Assefa; the office note indicates, "Due to COVID-19 ACTION PLAN, the patient's office visit was converted to a phone visit." Pet.'s Ex. 1. The note further mentions Petitioner's last in-office visit was two months prior. Petitioner reported a chief complaint of neck pain and shoulder pain, and Dr. Assefa memorialized her history as follows:

> 43 yr old female with [hypertension] and known right sided cervical disc herniation. She [complains of] right sided neck pain, radiating to right elbow area, affecting her job as RN. She had steroid epidural injections x 3 last Fal [*sic*], with modest relief. She needs rx [*sic*] and work restrictions, until we can arrange for spine/neurosurgery consultation. Pet.'s Ex. 1.

Diagnosing osteoarthritis of spine with radiculopathy, cervical region, and protrusion of cervical intervertebral disc, Dr. Assefa prescribed Prednisone and Baclofen and imposed work restrictions of "no pull, push or lift over 20 lbs. until further notice." Pet.'s Ex. 1, Pet.'s Ex. 5.

Petitioner testified she did not receive a written copy of the work status report until a few days after she spoke with Dr. Assefa. T. 26. Petitioner then phoned her manager, Nikiru Okolo, who advised Petitioner to email her a copy of the work restrictions. T. 26-27. Petitioner's Exhibit 4 is the April 29, 2020 email Petitioner sent to Okolo. Petitioner testified she remained off work and did not return to an accommodated position. T. 27. Despite the activity reduction, her pain did not improve. T. 27.

On May 5, 2020, Petitioner phoned Dr. Assefa for a follow-up telehealth visit, and she again reported neck pain radiating to her right arm. Petitioner's history is recorded as follows:

> This patient has osteoarthritis of the spine with radiculopathy of the cervical region with protrusion of the cervical intervertebral disc as confirmed by MRI of the

> cervical spine done on 04/20/19…We have treated her with muscle relaxants and steroids in the past. She is a registered nurse and she has been treating herself with Biofreeze, a TENS unit, warm compress of that nature. The pain is such that it is interfering with her nursing duties and with her quality of life, so she is willing to explore other options. Pet.'s Ex. 1.

Dr. Assefa ordered an updated MRI, referred Petitioner to the pain management and neurosurgery teams, and prescribed Acetaminophen, Prednisone and Baclofen to be used alternatively. Pet.'s Ex. 1. Petitioner testified Dr. Assefa maintained her modified duty status; when she submitted the note to Respondent, she was directed to complete an incident report, which she did. T. 27-28.

The recommended MRI was done on May 14, 2020, and the report indicates the images were compared to the April 20, 2019 scan. The radiologist's impression was, "Spondylosis with foraminal stenosis particularly at the level of C5-C6 but relatively unchanged." Pet.'s Ex. 1. The specific findings at C5-C6 included "Broad spondylosis with uncovertebral joint and facet arthropathy. Severe right foraminal stenosis. Preservation of the left neuroforamen. No significant canal stenosis." Pet.'s Ex. 1.

On May 21, 2020, Petitioner underwent a neurosurgical evaluation with Dr. Ryan Trombly; this was an in-person examination. T. 29. Dr. Trombly documented that Petitioner had a prior history of cervical spine pain and was reporting a recurrence after a lifting incident at work:

> …presents for evaluation neck and right arm pain and weakness that has been severe since work injury when she was lifting a patient and since then she has had right arm pain and weakness; MRI cervical taken in May 2020 confirmed C56 [*sic*] disc osteophyte with right sided foraminal stenosis and C6 nerve root compression and she has pain in the forearm with weakness in right wrist extension and therefore she is here for surgical evaluation. She had prior episodes of right arm pain in 2019 and 2013; over time MRI findings have been showing consistent finding of C56 [*sic*] disc bulge that is now more prominent in 2020 after her recent work injury. Pet.'s Ex 1, Pet's Ex. 2A.

Dr. Trombly's physical examination findings included painful right shoulder range of motion as well as decreased strength with right wrist extension and to the right biceps. The doctor also reviewed the reports from the 2013 and 2020 MRIs. Dr. Trombly concluded surgery was necessary to address the work-related aggravation of Petitioner's pre-existing cervical disc protrusion: "Work injury that exacerbated C56 [*sic*] disc injury now has right wrist weakness and right arm pain needs C56 [*sic*] disc replacement. Work injury has created significant contribution to the loss of neurologic function and the need for surgical intervention." Pet.'s Ex. 1, Pet.'s Ex. 2A.

Because of the ongoing COVID-19 pandemic, Dr. Trombly could not perform the recommended surgery until the prohibition on elective surgery was lifted. T. 29. Petitioner remained under activity restrictions for the next two months until surgery was ultimately scheduled in August. T. 29-30.

On July 29, 2020, Petitioner underwent a cervical spine CT scan. The scan revealed multilevel degenerative changes without significant spinal canal narrowing as well as severe right neural foraminal narrowing at C5-6 and moderate right neural foraminal narrowing at C3-4 and C4-5. Pet.'s Ex. 1. On August 6, 2020, Dr. Assefa examined Petitioner and medically cleared her for surgery. Pet.'s Ex. 1, Pet's Ex. 2.

On August 11, 2020, Petitioner was admitted to Advocate Christ Hospital. Dr. Trombly noted a pre-operative history as follows:

> The patient with neck pain and arm pain with cervical spondylosis at C5-6, right-sided disk herniation. She has pain in her right arm, forearm, thumb and index finger consistent with C6 radiculopathy. She has mild weakness in right wrist extension. She has MRI confirming disk herniation on the right at C5-C6 and she has worsening pain despite months of medical therapy and activity modification, now presents for surgical decompression with arthroplasty. Pet.'s Ex. 1, Pet.'s Ex. 2A.

Dr. Trombly performed application of skull fixation and anterior cervical discectomy for decompression of spinal cord and nerve roots at C5-C6 with application of interbody mechanical device using Medtronic prestige LP, 6 mm x 14 mm cervical arthroplasty. The postoperative diagnosis was cervical spondylosis C5-C6, cervical disc herniation, and right cervical radiculopathy. Petitioner was hospitalized overnight and discharged on August 12, 2020. The discharge summary reflects Petitioner was "drowsy able to provide a limited history," so Petitioner's husband provided "most of the patient's history." Pet.'s Ex. 1, Pet.'s Ex. 2A. According to Petitioner's husband, Petitioner "has been suffering from chronic right-sided neck pain and arm pain for several years," Petitioner was not following up with the pain doctor or getting steroid injections, but had been taking muscle relaxers for pain. Petitioner was discharged home with an Aspen collar in place; prescriptions for Baclofen, Diazepam, Tylenol, and Percocet; instructions to follow-up with Dr. Trombly and Dr. Assefa; and an activity restriction of no lifting over 10 pounds. Pet.'s Ex. 1, Pet.'s Ex. 2A.

On August 19, 2020, Petitioner presented to Dr. Assefa for a hospital discharge follow-up. Dr. Assefa noted Petitioner was "very pleased" with the surgery and reported the numbness and tingling and right arm weakness had resolved. Dr. Assefa further noted Petitioner was "doing just fine" and confident she would be able to resume nursing: "She is a registered nurse and she was worried that her career [*sic*], but now she knows she can get back to her profession." Pet.'s Ex. 1. Noting Petitioner would thereafter follow-up with Dr. Trombly, Dr. Assefa indicated he would resume three-month monitoring of her underlying hypertension and obesity. Pet.'s Ex. 1.

On August 25, 2020, Petitioner followed up with Dr. Trombly. Dr. Trombly documented that Petitioner was status post disc replacement "now without dysphagia and improved strength and sensation in right arm, needs further time to make a full recovery but currently in good spirits and much improved." Pet.'s Ex. 1. Examination revealed full strength and normal range of motion of the right hand and right arm. Dr. Trombly concluded Petitioner was doing well but would require approximately eight weeks to make a full recovery. Pet.'s Ex. 1.

On September 2, 2020, Dr. Andrew Zelby performed a record review at Respondent's request. Resp.'s Ex. 1. Dr. Zelby's report indicates he was provided with the following medical records: Dr. Assefa's April 24, 2020 and May 5, 2020 office notes; Dr. Trombly's May 21, 2020 office note; and the April 20, 2019 and May 14, 2020 MRI reports. Dr. Zelby was additionally provided with an Employee's Accident Report dated May 7, 2020, wherein Petitioner "reported lifting and turning a contracted patient who was on a trach collar…She was attempting to clean him of feces with the help of a turn sheet. As Ms. Harris-Stewart was doing this, she felt pain shoot down her neck"; as well as Petitioner's Application for Adjustment of Claim filed on June 17, 2020. Resp.' s Ex. 1. Upon reviewing these documents, Dr. Zelby noted Petitioner had a known herniated C5-6 disc and opined her condition was "an ongoing manifestation of her pre-existing and already symptomatic degenerative condition." Resp.'s Ex. 1. Dr. Zelby emphasized that the reports of the telehealth visits with Dr. Assefa do not mention a work injury, and instead a work injury is first mentioned in the May 7, 2020 accident report, and documented by a medical provider for the first time by Dr. Trombly on May 21, 2020. Dr. Zelby then opined there is no evidence of any acute abnormality or any progression of pathology when comparing her 2019 and 2020 MRIs. Dr. Zelby further asserted Dr. Trombly did not indicate the medical evidence that led him to believe Petitioner's work injury exacerbated the C5-6 disc injury, and opined Dr. Trombly's May 21, 2020 office note contradicts his subsequent opinion that her condition is related to her reported injury at work. Dr. Zelby ultimately concluded as follows:

> Based on the records that I reviewed, all of Ms. Harris-Stewart's complaints related to her cervical spine, all of her treatment, any prescription medications and any absence from work or any work restrictions are all exclusively related to the ongoing manifestations of her pre-existing and already symptomatic degenerative cervical condition. There is no medical evidence that this condition was caused, exacerbated, aggravated, accelerated or made more symptomatic because of her reported injury at work. There is no medical basis to suggest that her complaints and any treatment for those complaints would be necessary or more likely to have become necessary because of any work activities or any work injury. Resp.'s Ex. 1.

On September 10, 2020, Petitioner was re-evaluated by Dr. Trombly; this was her last visit prior to arbitration. Petitioner reported her right arm pain was improved, though she had some muscular discomfort in her right shoulder. Examination findings included full range of motion and good strength in the arms and hands. Dr. Trombly indicated Petitioner was doing well, and would need three months to recover before resuming work in November 2020. Pet.'s Ex. 1.

Petitioner is still under Dr. Trombly's care and has not been released to return to work. Petitioner explained Dr. Trombly had planned for her to return to work on November 11, 2020, but on October 27, 2020, two days before the hearing, the doctor had sent her for an X-ray and she had not heard from him yet to discuss the results. T. 32. Petitioner testified the surgery resolved her numbness and radicular pain, but she has some persistent pain. T. 31.

Petitioner did not receive any workers' compensation benefits while she was off work. T. 33. She applied for disability through her union but was advised the union will not provide disability benefits while there is an open workers' compensation claim. T. 33. Petitioner's medical bills were paid by her group health insurance. T. 34.

On cross-examination, Petitioner confirmed she has a 16-year-old son who is disabled. T. 35. Petitioner testified her son is not wheelchair-bound; he primarily uses a rolling walker and she does not need to help him with transfers: "I have to assist him sometimes in getting dressed and things like that. But for the most part, he can transfer and cruise on his own." T. 36. Her son is 5'5" and 115 pounds. T. 36.

Petitioner agreed part of her job duties includes taking patient histories. T. 36. She agreed it is important to document details in the patient's chart. T. 37. Petitioner also confirmed Dr. Assefa is her primary care physician. T. 39. She testified he has been her doctor for approximately two years. T. 39.

CONCLUSIONS OF LAW

I. Accident

In finding Petitioner failed to prove she sustained an accidental injury arising out of and occurring in the course of her employment, the Arbitrator made an adverse credibility determination. In particular, the Arbitrator found Petitioner lacked credibility with respect to her history of cervical spine treatment and symptomatology. The Commission views the evidence differently.

Initially, the Commission disagrees with several negative inferences in the Decision of the Arbitrator. For instance, the Arbitrator found "Petitioner's failure to testify about her consultation with Dr. Assefa two months prior to her claimed accident raises an inference of withholding relevant evidence." Arb.'s Dec., p. 10. The Commission observes there are two problems with this. First, in order to make a negative inference from the failure to provide evidence, the foundational requirement that the evidence was not equally available to the opposing party must be met. See *Reo Movers, Inc. v. Industrial Commission*, 226 Ill. App. 3d 216, 223 (1st Dist. 1992) (The missing evidence rule holds where a party fails to produce evidence in its control, a presumption arises that evidence would be adverse to that party. The presumption is not applicable, however, where evidence shows a reasonable excuse for failure to produce evidence and that missing evidence was equally available to other side.) Given that Respondent had the same ability to subpoena Petitioner's medical records, including any pre-accident treatment, the foundational threshold for the missing evidence presumption was not met. Second, Dr. Assefa is Petitioner's primary care physician and we observe it is equally, if not more, likely that the last pre-accident visit mentioned in the April 24, 2020 telehealth note was not relevant to her cervical spine condition. See *First Cash Financial Services v. Industrial Commission*, 367 Ill. App. 3d 102, 106 (1st Dist. 2006) (Where the evidence allows for the inference of the nonexistence of a fact to be just as probable as its existence, the conclusion that the fact exists is a matter of speculation, surmise, and conjecture, and the inference cannot reasonably be drawn.) Therefore, a negative inference against Petitioner based on these facts is not permissible.

The Commission further finds the negative inference based on Petitioner's lack of specificity regarding how she was able to complete the remaining two or three hours of her shift on the date of accident was similarly improper. Implicit in the finding that Petitioner failed to

provide detailed testimony is the notion that Petitioner was specifically asked to provide those details. We observe, however, that is not the case. On direct examination, there was only one question posed as to how Petitioner's neck felt during the remainder of her shift before Counsel began a new line of questioning:

> Q. Did you continue working that morning?
> A. Yes, I did.
>
> Q. How did your neck feel while you were working?
> A. I was having pain, but I pushed through.
>
> Q. Had you ever made a Workers' Compensation claim before?
> A. No.
>
> Q. Were you familiar with that process?
> A. No. T. 18.

On cross-examination, no further questions were posed regarding the specifics of how Petitioner completed her shift. Therefore, while Petitioner "offered no testimony" detailing the last two to three hours of her shift, she was also not asked any questions to elicit those details. The Commission finds a negative inference predicated on a person's failure to respond to unasked questions is impermissible.

Our analysis then turns to the evidence specific to the accident issue. Petitioner testified she was the charge nurse and working with two other nurses on the night in question. T. 15. During morning rounds, Petitioner checked the Unit's patients to determine who would need to be changed. The individual in bed three had suffered a traumatic brain injury and was contracted, so Petitioner had to physically move his legs. As Petitioner pried the patient's knees apart, "that's when he pulled, kind of jerked back. That's when I felt the sharp pain and the burning pain in my neck." T. 16. Petitioner testified that upon getting home from work, she phoned Employee Health to report the injury and Dr. Assefa to make an appointment. T. 19, 23-24.

Later that same day, Petitioner consulted with Dr. Girma Assefa, her primary care physician. The Commission notes that because of the developing COVID-19 pandemic, an in-person evaluation was not possible and instead Dr. Assefa spoke with Petitioner on the phone. The doctor's April 24, 2020 note memorializes Petitioner's prior history of a "known right sided cervical disc herniation" and while there is no specific mention of a work injury, Dr. Assefa documented that Petitioner reported symptoms which impacted her ability to perform her job: "She [complains of] right sided neck pain, radiating to right elbow area, <u>affecting her job as RN.</u>" Pet.'s Ex. 1 (Emphasis added). Dr. Assefa concluded Petitioner's symptoms necessitated a 20-pound work restriction "until we can arrange for spine/neurosurgery consultation." Pet.'s Ex. 1.

Petitioner's work restrictions prohibited her from performing her regular duties, and Petitioner's supervisor had Petitioner complete an injury report on May 7, 2020. Respondent provided Petitioner's May 7, 2020 report to Dr. Zelby for inclusion in his §12 record review. The Commission observes the accident description as summarized by Dr. Zelby is consistent with

Petitioner's testimony: "Ms. Harris-Stewart reported lifting and turning a contracted patient who was on a trach collar on April 23, 2020 [*sic*] while working as an RN. She was attempting to clean him of feces with the help of a turn sheet. As Ms. Harris-Stewart was doing this, she felt pain shoot down her neck." Resp.'s Ex. 1.

On May 21, 2020, Petitioner was evaluated by Dr. Ryan Trombly. The Commission emphasizes this was the first opportunity Petitioner had for an in-person discussion, consultation, and physical examination by a physician, and she conveyed specifics regarding her prior history as well as the work incident. The record reflects Petitioner gave a history of "prior episodes of right arm pain in 2019 and 2013," and described an acute onset of not only pain, but also arm weakness after a lifting incident at work: "…presents for evaluation neck and right arm pain and weakness that has been severe since work injury when she was lifting a patient and since then she has had right arm pain and weakness…." Pet.'s Ex. 1, Pet.'s Ex. 2A. Upon examining Petitioner and reviewing her 2020 and 2013 MRI reports, Dr. Trombly concluded the work injury "created significant contribution to the loss of neurologic function and the need for surgical intervention." Pet.'s Ex. 1, Pet.'s Ex. 2A.

The Commission finds Petitioner was credible. In making this finding, we emphasize the medical records must be considered in the context of the developing COVID-19 pandemic. Specifically, because of safety protocols, there was no in-person consultation or examination with Dr. Assefa; as such, the ability to obtain a detailed history was affected. However, by mid-May, the precautions had eased such that Petitioner was able to meet with Dr. Trombly in-person and more easily communicate the details of the lifting injury. Moreover, we observe that within a couple weeks of the accident, Petitioner authored a written account of the incident which includes a detailed description that is wholly consistent with her testimony. The Commission further notes Petitioner readily acknowledged having undergone prior cervical spine workup and treatment, and while she had difficulty remembering doctors' names, she confirmed the relevant details of the diagnoses and treatment. In the Commission's view, the medical records support Petitioner's credible testimony. See *R & D Thiel v. Illinois Workers' Compensation Commission*, 398 Ill. App. 3d 858, 866 (1st Dist. 2010) (When evaluating whether the Commission's credibility findings which are contrary to those of the arbitrator are against the manifest weight of the evidence, "resolution of the question can only rest upon the reasons given by the Commission for the variance.")

"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. "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*. Here, Petitioner alleges she sustained an accidental injury on April 24, 2020: she was checking patients during morning rounds, *i.e.*, performing her assigned job duty, and as she shifted the legs of a contracted individual, he jerked his legs, which caused an acute onset of pain shooting from her neck down her right arm. The Commission finds Petitioner established by the preponderance of the credible evidence that she sustained an accidental injury arising out of and occurring in the course of her employment on April 24, 2020.

II. Causal Connection

Petitioner's claim rests on whether her April 24, 2020 work accident aggravated her pre-existing cervical spine condition. As such, we begin our analysis with a review of the applicable legal standard.

It is well established that an accident need not be the sole or primary cause—as long as employment is a cause—of a claimant's condition. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 205 (2003). Furthermore, an employer takes its employees as it finds them (*St. Elizabeth's Hospital v. Illinois Workers' Compensation Commission*, 371 Ill. App. 3d 882, 888 (5th Dist. 2007)), and a claimant with a pre-existing condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d 30, 36 (1982). As the Appellate Court held in *Schroeder v. Illinois Workers' Compensation Commission*, 2017 IL App (4th) 160192WC, the inquiry focuses on whether there has been a deterioration in the claimant's condition:

> That is, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been. *Schroeder* at ¶ 28.

With this standard in mind, we turn to consideration of the competing causation opinions of Dr. Ryan Trombly and Dr. Andrew Zelby.

Dr. Trombly concluded the April 24, 2020 work accident exacerbated Petitioner's underlying cervical spine condition. Dr. Trombly evaluated Petitioner on May 21, 2020. The Commission observes Dr. Trombly is the only physician to meet with and physically examine Petitioner. During that consultation, Petitioner gave a history of prior episodes of cervical spine symptoms then described a new onset of significant neck and right arm pain as well as weakness following a work injury while lifting a patient. Pet.'s Ex. 1, Pet.'s Ex. 2A. Upon examining Petitioner, Dr. Trombly noted the presence of neurological deficits; specifically, Dr. Trombly observed decreased strength with right wrist extension as well as in the right biceps. In addition to his physical examination, Dr. Trombly reviewed the reports from Petitioner's 2013 and 2020 MRIs; his impression was that "over time MRI findings have been showing consistent finding of C56 [*sic*] disc bulge that is now more prominent in 2020 after her recent work injury." Pet.'s Ex. 1, Pet.'s Ex. 2A. Ultimately, Dr. Trombly concluded Petitioner's work-related lifting accident resulted in new symptoms and deficits which required surgery: "Work injury has created significant contribution to the loss of neurologic function and the need for surgical intervention." Pet.'s Ex. 1, Pet.'s Ex. 2A.

Dr. Zelby, in turn, concluded the April 24, 2020 work accident in no way impacted Petitioner's "pre-existing and already symptomatic degenerative condition." Resp.'s Ex. 1. Dr. Zelby did not have the benefit of examining Petitioner, and instead formed his opinion based on his review of post-accident records. Dr. Zelby first noted a work injury is not mentioned in the

medical records until Dr. Trombly's May 21, 2020 evaluation. Regarding the imaging reports, Dr. Zelby concluded as follows: "Her cervical MRI from May 2020 also clearly indicates no evidence for any acute abnormality, or any progression compared to her April 2019 cervical MRI." Resp.'s Ex. 1. Dr. Zelby then opined Dr. Trombly's opinion is flawed, as the doctor did not identify the medical evidence that led him to believe Petitioner's work injury exacerbated the C5-6 disc injury: "the reports he reviewed and even included in his office note specifically comment that the findings of the May 2020 MRI are relatively unchanged compared to April 2019. The biggest difference is a more chronic appearing change at C5-6 in May 2020 with a disc/osteophyte, compared to the description of a disc herniation in the April 2019 study." Resp.'s Ex. 1. Dr. Zelby ultimately concluded Petitioner's complaints "are all exclusively related to the ongoing manifestations of her pre-existing and already symptomatic degenerative cervical condition. There is no medical evidence that this condition was caused, exacerbated, aggravated, accelerated or made more symptomatic because of her reported injury at work." Resp.'s Ex. 1.

In the Commission's view, Dr. Trombly's opinion is persuasive and supported by the medical records. While Dr. Zelby emphasized the 2020 MRI findings were "relatively unchanged" as compared to 2019, the Commission observes the findings noted at C5-6 had progressed from "moderate to severe foraminal narrowing" in 2019 to "Severe right foraminal stenosis" in 2020. Pet.'s Ex. 1. This may appear a minor distinction at first blush; however, when considered in the context of Petitioner's post-accident loss of neurologic function, the Commission finds it to be significant. To be clear, while Petitioner had prior episodes of neck and arm pain, it was not until after the work accident that she lost strength in her right arm. The Commission adopts Dr. Trombly's conclusion that the April 24, 2020 work accident exacerbated Petitioner's pre-existing pathology and resulted in the loss of neurologic function. Pet.'s Ex. 1, Pet.'s Ex. 2A.

The Commission further observes the evidence reflects there was a significant deterioration in Petitioner's condition following the work accident. Prior to the April 24, 2020 incident, Petitioner was working full, unrestricted duty, and was able to perform all of her job duties. Immediately after the injury, however, Dr. Assefa imposed a 20-pound work restriction pending evaluation by a neurosurgeon. Within a month of the accident, Dr. Trombly examined Petitioner and concluded her symptom level, specifically her newly developed neurologic deficits, warranted surgical intervention. Moreover, despite the two-plus months that Petitioner was under activity modification and medication management while awaiting the moratorium on elective surgery to end, she never returned to her pre-accident baseline. As such, the work accident is *a* factor in Petitioner's current cervical spine condition. The Commission finds Petitioner's condition of ill-being remains causally related to the work accident.

III. Temporary Disability

The disputed period of temporary total disability is April 25, 2020 through October 29, 2020, the date of the arbitration hearing. Arb.'s Ex. 1. The Commission observes that on April 24, 2020, Dr. Assefa imposed a 20-pound maximum weight work restriction "until we can arrange for spine/neurosurgery consultation." Pet.'s Ex. 1, Pet.'s Ex. 5. Petitioner submitted the modified duty restriction to Respondent, however no accommodated position was provided. T. 26-27, Pet.'s Ex. 4. Petitioner thereafter came under the care of neurosurgeon Dr. Ryan Trombly and ultimately underwent surgery. Pet.'s Ex. 4. Post-operatively, Dr. Trombly imposed a ten-pound activity

restriction, and as of the October 29, 2020 hearing, the doctor had not released Petitioner to full duty. As such, the Commission finds Petitioner proved entitlement to the disputed Temporary Total Disability benefits.

The parties stipulated Petitioner's average weekly wage is $1,492.38. Arb's. Ex. 1. This yields a Temporary Total Disability rate of $994.92. Therefore, the Commission finds Petitioner entitled to Temporary Total Disability benefits of $994.92 per week for a period of 26 6/7 weeks.

IV. Incurred Medical Expenses and Prospective Treatment

Petitioner offered into evidence medical bills for charges incurred at Advocate Medical Group (Pet.'s Ex. 1) and Advocate Christ Hospital (Pet.'s Ex. 2). The Commission finds these charges were incurred for treatment that was reasonable, necessary, and causally related to the April 24, 2020 work accident, and Respondent is liable for same. Further, as Petitioner has yet to reach maximum medical improvement, the Commission orders Respondent to provide and pay for continuing post-operative treatment, including physical therapy, injections, and medication, as recommended by Dr. Trombly.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 30, 2021 is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $994.92 per week for a period of 26 6/7 weeks, representing April 25, 2020 through October 29, 2020, 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 detailed in Petitioner's Exhibit 1 and Petitioner's Exhibit 2, as provided in §8(a), subject to §8.2 of the Act. Respondent shall have a credit of $63,234.00 for medical benefits already paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Responent shall provide and pay for continuing post-operative care as recommended by Dr. Trombly as provided in §8(a) of the Act.

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

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

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

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

May 24, 2022

/s/ *Deborah J. Baker*

DJB/mck

O: 3/30/22

/s/ *Stephen J. Mathis*

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/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC036459
Case Name	DOBBELS, JOSHUA L v. BRICE R. WEBER AND KELLY J. WEBER DBA ALPHA FEED MILL
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0192
Number of Pages of Decision	5
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Gregory Szul
Respondent Attorney	Brett Kolditz

DATE FILED: 5/25/2022

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS	)		
	) SS.		
COUNTY OF LA SALLE	)		

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Joshua L. Dobbels,

Petitioner,

vs. No. 19 WC 36459

Brice R. Weber and Kelly J. Weber,
d/b/a Alpha Feed Mill, and Michael
W. Frerichs, State Treasurer and ex-
Officio Custodian of the IWBF,

Respondents.

DECISION AND OPINION UNDER SECTION 4(d)

This matter comes before the Commission on Petitioner's petition pursuant to section 4(d) of the Workers' Compensation Act (the Act) (820 ILCS 305/4(d) (West 2018)). For the reasons that follow, the Commission grants the petition.

Petitioner filed a petition for immediate hearing pursuant to section 19(b) of the Act on July 1, 2021, alleging that he sustained injuries to his back, both upper extremities and both lower extremities on September 4, 2019, while working for Respondents Brice and Kelly Weber, d/b/a Alpha Feed Mill. On August 6, 2021, Petitioner filed his petition pursuant to section 4(d) of the Act, requesting that the Commission find that Respondents knowingly failed to comply with its legal obligation to carry workers' compensation insurance and declare that Respondents shall not be entitled to the benefits of this Act during the period of noncompliance, but shall be liable in an action under any other applicable law of this State. On May 10, 2022, Commissioner Carolyn M. Doherty held a hearing, with proper notice given.[1] Petitioner and the Injured Workers Benefit Fund were represented by counsel, and a record was made.

[1] See Petitioner's Exhibits 10, 11, and 12.

I. Findings of Fact

Petitioner testified that in September 2019, he was a little over 19 years old. Tr. 7. He stated that he understood that Respondent Alpha Feed Mill was owned by Respondents Brice Weber and Kelly Weber. Tr. 8-9. Petitioner submitted into evidence Petitioner's Exhibit 4, the results of a search executed on the Secretary of State's website indicating that Brice Weber and Kelly Weber were the President and Secretary, respectively, of Alpha Feed Mill, Inc. He also submitted Petitioner's Exhibit 5, a Warning Letter issued on March 5, 2019 retrieved from the website of the Food and Drug Administration (FDA), in which the agency identifies Brice Weber and Kelly Weber as co-owners, as well as the President and Secretary, respectively, of Alpha Feed Mill, Inc. Petitioner described Respondent Alpha Feed Mill as a feed storage warehouse. Tr. 10. He also testified that Respondents used "a forklift, all kinds of tractors, feed trucks and more" in the operation of the business. Tr. 10.

Petitioner further testified that he obtained a job with Respondents on September 3, 2019, at which time a woman named Mary employed by Respondents took his Social Security and driver's license information and made a time card for him. Tr. 10-12, 14. Petitioner submitted his time card, stamped for September 3, 2019, as Petitioner's Exhibit 13. He testified that he was going to be paid on an hourly basis, which is why he was given a time card. Tr. 11, 15. Petitioner did not know the exact pay rate, but a co-worker named Zach had mentioned that he was making approximately $11.00 or $12.00 per hour. See Tr. 13, 15. He testified that his brother had previously worked for Respondents and had received a check weekly or bi-weekly. Tr. 16. According to Petitioner, Mary had taken his Social Security information so they could withhold taxes and intended to hold his first check for a week. Tr. 17.

Petitioner stated that Kelly Weber showed him around the facility before he started working that day. Tr. 10-11. Petitioner testified that on his first work day, he did a lot of cleaning and organizing the warehouse, sweeping up, and moving around pallets. Tr. 12. He added that there were at least two other employees working at the facility aside from the Webers. Tr. 13. He later stated that he had received no payment from Respondents for his work. Tr. 24.

Petitioner testified that on the afternoon of September 4, 2019, Kelly Weber told him, Zach and a co-worker named Blake to clear the warehouse because a semi-trailer truck was coming in. He stated that Kelly ordered Zach to instruct him on how to switch grain bins because the current bin was full and the truck was going to be unloading grain. Tr. 18. According to Petitioner, Zach showed him how to switch bins, which involved using a "manlift," which he described as similar to a rope-operated grain elevator within the facility. Tr. 18-19. Petitioner estimated the manlift as being 40 feet in height. Tr. 18-19. He testified that after Zach showed him how to switch bins, he and Zach were headed down, but the manlift collapsed when he entered it by himself. Tr. 18-19.

Petitioner stated that he suffered numerous injuries as a result of the 40-foot fall. Tr. 20. He testified that he broke his left arm, had two rods in his back, and a rod in his left leg. Tr. 21. According to Petitioner, both of his heels were shattered and repaired. Tr. 21. He added that his Achilles tendon was surgically removed. Tr. 21. He stated that he has not worked since his fall and has received no workers' compensation benefits from Respondents or affiliated insurers. Tr. 21-22.

Jennifer Dobbels, Petitioner's mother, also testified that Petitioner's brother, James Dobbels, had worked for Respondents a year or two before Petitioner's injury. Tr. 25-26. Ms. Dobbels recalled that James was paid an hourly wage, though she did not recall the rate. Tr. 26. She also recalled that James received a check bi-weekly and that Respondent withheld taxes. Tr. 26. She testified that she contacted Kelly about obtaining the name of Respondents' workers' compensation carrier or adjustor, but never received an answer. Tr. 26-27, 29. Ms. Dobbels testified that she never received any workers' compensation benefits on behalf of Petitioner. Tr. 28.

Petitioner further submitted into evidence Petitioner's Exhibit 6, an affidavit from Zack Milner, an employee of the National Council on Compensation Insurance (NCCI), the Commission's agent for the purpose of collecting proof of insurance information on Illinois employers who have purchased workers' compensation insurance from carriers. Millner stated that his search of business records for the period of May 30, 2012 through December 15, 2020 produced no policy information showing proof of workers' compensation insurance for Alpha Feed Mill for the period from April 5, 2020 through December 15, 2020. Petitioner additionally submitted the results of searches executed on the Commission's Employer Insurance Coverage Search web page, which provides information regarding: (1) employers that have bought a workers' compensation insurance policy, based on the NCCI database; and (2) employers (parent companies and their subsidiaries) that have obtained Commission approval to self-insure. Petitioner's Exhibit 1, Exhibit A indicates that no results were found for Brice Weber, Kelly Weber, or any employer containing the terms Alpha Feed for the coverage date of September 4, 2019.

II. Conclusions of Law

Pursuant to section 4(a) of the Act, all employers who come within the auspices of the Act are required to provide workers' compensation insurance. See 820 ILCS 305/4(a) (West 2018). Section 4(d) of the Act provides in part that "[e]mployers who are subject to and who knowingly fail to comply with this Section shall not be entitled to the benefits of this Act during the period of noncompliance, but shall be liable in an action under any other applicable law of this State." 820 ILCS 305/4(d) (West 2018). Accordingly, in order for the Commission to grant a motion pursuant to section 4(d) of the Act, Petitioner must establish that: Respondents were subject to the Act; Petitioner was an employee of Respondents on September 4, 2019; and Respondents knowingly failed to provide workers' compensation insurance which would have covered the injuries Petitioner sustained when the manlift collapsed.

The Commission finds that Respondents were engaged in the operation of a warehouse or general or terminal storehouse, as well as a business or enterprise in which electric, gasoline or other power-driven equipment is used in the operation thereof, and therefore were subject to the Act and required to provide workers' compensation insurance to their employees. See 820 ILCS 305/3(4),(15) (West 2018).

The Commission also finds that Petitioner was an employee of Respondents on September 4, 2019. Based on the testimony from Petitioner and his mother, including reasonable inferences

to be drawn from the prior employment of Petitioner's brother, Respondents controlled the manner in which Petitioner was to work (*e.g.*, having ordered a co-worker to instruct him on switching grain bins), provided a time card from which he was to be paid hourly, and obtained his Social Security information in order to withhold taxes—evidencing an employer-employee relationship under the *Roberson*[2] test.

Finally, an employer is presumed to be aware of the laws to which it is subject. *E.g.*, *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 157 (2000). Respondents are thus presumed to have known of their obligations under section 4 of the Act. Petitioner submitted an NCCI affidavit and search results from the Commission's web site which found no results which would indicate proof that Respondents carried workers' compensation insurance for September 4, 2019. There is no evidence in this record indicating that Respondents were operating under the mistaken belief that they were maintaining workers' compensation insurance on the accident date or any other date. Accordingly, the Commission concludes that Respondents knowingly failed to provide workers' compensation insurance which would have covered the injuries Petitioner sustained while employed by Respondents on September 4, 2019. As such, Respondents "are no longer entitled to the benefits and protections of the Act and may be sued in civil court." See *Keating v. 68th and Paxton L.L.C.*, 401 Ill. App. 3d 456, 466 (2010).

IT IS THREFORE FOUND THAT Respondents knowingly failed to comply with Section 4(d) of the Act and therefore Respondents shall not be entitled to the benefits of this Act during the period of noncompliance, including September 4, 2019, but shall be liable in an action under any other applicable law of this State.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's petition pursuant to section 4(d) of the Act is granted.

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.

May 25, 2022
r: 5/11/22
CMD/kcb
045

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

/s/ *Marc Parker*
Marc Parker

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

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[2] *Roberson v. Industrial Comm'n*, 225 Ill. 2d 159, 174-75 (2007).

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC008638
Case Name	ARENAS, ASAM v. PRESENCE SAINTS MARY & ELIZABETH MEDICAL CENTER
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0193
Number of Pages of Decision	18
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Donna Zadeikis
Respondent Attorney	Surbhi Goyal

DATE FILED: 5/25/2022

/s/Deborah Baker, 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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ASAM ARENAS,

Petitioner,

vs. NO: 16 WC 08638

PRESENCE SAINTS MARY AND ELIZABETH
MEDICAL 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 whether Petitioner's current condition of ill-being is causally related to his accident, Petitioner's entitlement to medical expenses and whether he exceeded his choice of physicians under the Act, Petitioner's entitlement to temporary total disability benefits, Petitioner's entitlement to permanent partial disability benefits and being advised of the facts and law, corrects the Decision of the Arbitrator as set forth below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission hereby incorporates by reference the findings of fact and conclusions of law contained in the Decision of the Arbitrator, which delineate the relevant facts and analyses. However, as it pertains to temporary total disability, the Commission corrects the Decision of the Arbitrator. In the "Order" section of the Decision of the Arbitrator, Petitioner was awarded temporary total disability benefits, commencing February 12, 2016 through May 18, 2016, November 28, 2016 through December 11, 2016 and January 23, 2017 through September 22, 2017. However, evidence disclosed at arbitration indicated that Respondent accommodated Petitioner's modified duty restrictions on February 24th and 25th of 2016, and also from May 19, 2016 through November 25, 2016. Accordingly, the Commission finds that temporary total disability benefits should not have been awarded for February 24th and 25th of 2016, but should have been awarded for November 26th and November 27th of 2016. The Commission hereby awards temporary total disability benefits for the following dates:

-February 12, 2016 through February 23, 2016;
-February 26, 2016 through May 18, 2016;
-November 26, 2016 through December 11, 2016; and
-January 23, 2017 through September 22, 2017.

The Commission calculates that this time period equates to 50 & 4/7ths weeks. The Commission corrects the "Order" section of the Decision of the Arbitrator to reflect these changes.

All else is affirmed.

IT IS THEREFORE FOUND BY THE COMMISSION that the Decision of the Arbitrator filed January 12, 2021, as corrected above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $408.00 per week for a period of 50 & 4/7ths weeks, from February 12, 2016 through February 23, 2016, February 26, 2016 through May 18, 2016, November 26, 2016 through December 11, 2016, and January 23, 2017 through September 22, 2017, these being the periods of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services of $40,032.10, as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $367.20 per week for a period of 41.75 weeks, as provided in §8(e)(11) of the Act, for the reason that the injuries sustained caused the 25% loss of use of the left foot.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the compensation benefits that have accrued from February 10, 2016 through September 14, 2020 and shall pay the remainder of the award, if any, in weekly payments.

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.

May 25, 2022

O: 3/30/22
DJB/wde
043

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

/s/*Stephen Mathis*
Stephen Mathis

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

ILLINOIS WORKERS' COMPENSATION COMMISSION 22IWCC0193
NOTICE OF ARBITRATOR DECISION

ARENAS, ASAM Case# **16WC008638**
Employee/Petitioner

PRESENCE SAINTS MARY AND ELIZABETH MEDICAL CENTER
Employer/Respondent

On 1/12/2021, 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:

0233 DEPAOLO & ZADEIKIS
DONNA ZADEIKIS
309 W WASHINGTON ST SUITE 550
CHICAGO, IL 60606

1120 BRADY CONNOLLY & MASUDA PC
SURBHI SARASWAT GOYAL
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ASAM ARENAS
Employee/Petitioner
v.
PRESENCE SAINTS MARY AND ELIZABETH MEDICAL CENTER
Employer/Respondent

Case # **16** WC **08638**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **February 14, 2020 and September 14, 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 **Choice of doctors/PPP compliance**

A.Arenas v. Presence Sts. Mary, etc., 16 WC 08638

FINDINGS

On **February 10, 2016**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**31,824.00**; the average weekly wage was $**612.00**.

On the date of accident, Petitioner was **44** years of age, *single* with **1** dependent children.

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

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

Respondent shall be given a credit of $**7,459.99** for TTD, $**0** for TPD, $**0** for maintenance, and $**3,840.00** for other benefits (PPD advance), for a total credit of $**11,299.99**.

Respondent is entitled to a credit of $**13,694.57** for medical expenses and **$8,739.54** for lost time benefits under Section 8(j) of the Act, as is set forth below.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $408.00 per week for 50-6/7 weeks, commencing 2/12/2016 through 5/18/2016; and 11/28/2016 through 12/11/2016; and 1/23/2017 through 9/22/2017, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $40,032.10, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $367.20 per week for 41.75 weeks, because the injuries sustained caused the 25% loss of use of the left foot, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner the compensation benefits that have accrued from 2/10/2016 through 9/14/2020 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

January 10, 2021
Date

JAN 12 2021

FINDINGS OF FACT

Petitioner was employed by Respondent as a security guard. He had been so employed for 8 years. His job duties were to make sure that the facility was safe and protect hospital staff, patients and visitors.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on February 10, 2016. Petitioner was escorting an unruly patient from the Saint Mary of Nazareth Hospital ER and the patient lunged at a doctor. Petitioner grabbed the unruly patient and they fell to the ground. Petitioner's left ankle twisted during the fall and the unruly patient fell on Petitioner's left ankle. When Petitioner got up, he felt immediate pain in his left ankle and fell backwards.

Petitioner received emergency care at the ER. X-rays were said to be suspicious for a nondisplaced malleolus fracture. Medication, crutches and a short leg splint were dispensed. Petitioner was given a referral to Nicholas Frisch, MD, an orthopedic surgeon at Presence Orthopedics. (PX 1)

Petitioner testified that follow-up care was set up by the employee nurse at Respondent, Cheryl Dusenbery. Petitioner testified that Dusenbery set up an appointment with Dr. Randon Johnson at Presence Orthopedics (PMG Ortho Western). The first visit with Dr. Johnson was on February 12, 2016. The history was of an injury sustained during an altercation with a patient. The physical exam showed mild bruising and swelling over the anterolateral aspect of the ankle with tenderness to palpation over the anterolateral ankle and ATFL and mild tenderness over the posterior aspect of the ankle. The diagnosis was left ankle pain, with the possible fracture being noted and the pain complaints being consistent with a sprain in the anterolateral ankle. A CAM walker was prescribed and a CT of the ankle was ordered. (PX 2)

The CT was done on February 13, 2016 and demonstrated a vertically oriented fracture of the posterior malleolus and extensive circumferential subcutaneous edema in the ankle joint. (PX 2)

Petitioner testified that he had no further contact with Dr. Johnson after the CT, but PMG Ortho records show that Petitioner was seen for a final visit with Dr. Johnson on February 23, 2016 (note dictated 3/1/2016). Petitioner was full weight bearing with the CAM boot. Tenderness was noted to the anterolateral and posterior aspects of the ankle. The CT and current x-rays showed a nondisplaced malleolus fracture. Petitioner was instructed to continue weightbearing with the CAM boot, begin PT and to follow up in 3 weeks. He was given work restrictions of seated duty only. (PX 2)

Petitioner began PT Presence St. Mary and Elizabeth Hospital on February 23, 2016, per an order from Dr. Johnson. The therapy (2-3x/week for 4 weeks) was authorized by Cheryl Dusenberry at Respondent on 2/23/2016. Petitioner had only one further PT visit at St. Mary, on February 25, 2016. (PX 1)

Petitioner testified that he did not continue treatment with Dr. Johnson because he did not have confidence in him. According to Petitioner, Dr. Johnson did not examine him. Dr. Johnson merely stood at the door and talked to Petitioner.

Petitioner then began treatment with a chiropractor, Dr. Jao, at La Clinica. Petitioner testified that he chose Dr. Jao on a referral by his brother. The first visit with Dr. Jao was on February 29, 2016. Dr. Jao recommended PT and excused Petitioner from all work. The diagnosis was left leg fracture. Petitioner was later referred by Dr. Jao to Dr. Gregory Primus, an orthopedic surgeon at Chicago Center for Sports Medicine & Orthopedic Surgery. (PX 3)

On March 9, 2016, Petitioner had a follow up examination with Adrian Zaragoza, D.C. Chiropractor Zargoza diagnosed Petitioner with a left malleolus fracture, recommended an MRI of the left ankle to rule out ligamentous or tendon tear, and continued to take Petitioner off of work until he presented for an orthopedic consult. (PX 3)

On March 15, 2016, Petitioner underwent an MRI of the left ankle. The MRI demonstrated a nondisplaced fracture of the posterior malleolus extending into the posterior aspect of the distal tibiofibular syndesmosis, a ruptured ATFL and possible calcaneofibular ligament tear, along with some chronic findings. (PX 4)

On March 21, 2016, Petitioner presented for a consultation of left ankle pain before Gregory Primus, M.D. Petitioner underwent brace fitting and inspection. The diagnosis was "unspecified closed fracture of ankle and syndesmosis injury based on fracture pattern and "tenerness" along the lateral side." Petitioner was instructed to continue physical therapy and to follow up in four weeks. Petitioner's work status remained off work until his re-evaluation at follow up. (PX 4)

On April 18, 2016, Petitioner presented for a follow up examination of his left ankle pain with Dr. Primus. Dr. Primus found that Petitioner's condition had moderately improved. Dr. Primus recommended continued physical therapy and that Petitioner remain excused from work. (PX 4)

On May 16, 2016, Petitioner was seen by Dr. Primus for follow up. Dr. Primus issued work restrictions placing Petitioner on modified duty, allowing for sedentary duty with 10 pound lifting/carrying restrictions, no use of stairs, no use of ladders, no squatting, no kneeling, and no crawling. These restrictions also limited Petitioner's bending, stooping, pushing, and pulling. It is noted that Dr. Primus had not yet reviewed the MRI scan and Petitioner was encouraged to track it down. (PX 4)

Petitioner testified that Respondent accommodated the sedentary work restrictions on May 16, 2016, with a position at the information desk. Petitioner remained employed with Respondent until the end of November, 25 2016.

Respondent sent Petitioner for a §12 independent medical examination on May 17, 2016, by George Holmes Jr., M.D. (RX 6) Dr. Holmes reviewed the left ankle CT scan and found that it showed a vertical non-displaced posterior malleolar fracture. Dr. Holmes endorsed causal connection and noted no evidence of any chronic degenerative changes. He recommended progressing to weight bearing as tolerated, and with physical therapy. Dr. Holmes opined that Petitioner would be at maximum medical improvement and could return to work without restrictions within the next month or two. Dr. Holmes further opined that Petitioner could work light duty, sedentary, or semi-sedentary jobs. (RX 6)

On July 15, 2016, Petitioner presented to Dr. Primus for follow up regarding his left ankle. Petitioner reported that he continued to use topical cream for ankle pain that he rated one to eight out of ten (generally 1 to 3 and characterized as "mild" by Dr. Primus. Dr. Primus ordered a new MRI to determine if there was bone healing or whether there was any new chondral damage from the injury. Petitioner was placed on sedentary duty with 10 pound lifting/carrying restrictions, restricted to performing limited stairs, ladders, squatting, kneeling crawling, bending, stopping, pushing and pulling. Apparently, the prior MRI was reviewed and Dr. Primus thought it showed increased bone signal along the posterior malleolus with a residual fracture line. (PX 4)

On August 9, 2016, Petitioner presented to American Diagnostic MRI. Petitioner underwent an MRI of the left ankle that showed the posterior malleolus fracture with interval resolution of the previously seen

marrow edema. The fracture line was less well defined, suggesting a component of interval healing. X-Ray correlation was recommended. A torn lateral ligament complex was re-demonstrated, along with mild posterior tibial tenosynovitis. (PX 6)

On August 12, 2016, Petitioner was seen by Dr. Primus, who diagnosed a non-displaced ankle fracture with syndesmosis injury with anterior talofibular ligament tear and posterior tendonitis. Dr. Primus recommended Petitioner undergo an ankle arthroscopy with possible anterior talofibular reconstruction. It was noted that Petitioner continued to wear an ankle brace and also uses a cane for support. Petitioner's work restrictions remained in place. (PX 4)

On September 9, 2016, Petitioner followed up with Dr. Primus. Petitioner reported his symptoms were weakness, swelling and mild stiffness in the back of the leg. He was wearing an ankle brace and using a cane for support and comfort. There was no gross instability, and muscle strength was five out of five. There was no focal deficit, pain was noted with stress on the flexor tendons and stress of tibialis posterior tendon. Dr. Primus charted that Petitioner was still limited, with MRI evidence of inflammation in the lateral gutter. Petitioner's work restrictions remained in place. (PX 4)

Petitioner was seen for another IME by Dr. Holmes on September 28, 2016. (RX 7) Dr. Holmes diagnosed Petitioner with possibly healed tibia fracture. Dr. Holmes noted a vertical appearing fracture that is non-displaced in the posterior aspect of the tibia. He did not recommend exploratory surgery or ankle reconstruction. He noted that there were no objective findings on the clinical examination or on the first MRI that would require reconstructive surgery. Petitioner was not at MMI. Dr. Holmes wanted to review the recent MRI, or another study was warranted. Dr. Holmes opined that Petitioner could continue working light duty. (RX 7)

On September 30, 2016, Petitioner presented to Dr. Primus and complained of a sharp pain sensation about the ankle joint with occasional radiation to the posterior mid-calf. Dr. Primus continued to recommend surgery and continued to keep Petitioner's work restrictions in place. (PX 4)

On October 28, 2016, Petitioner followed up with Dr. Primus and reported that his symptoms remained the same. Dr. Primus diagnosed Petitioner with unspecified closed fracture of ankle and stress fracture. Dr. Primus noted findings consistent with an ankle fracture and thought that there may be microinstability of an ankle ligament. Petitioner was advised to use bracing throughout therapy. The recommendation was for surgery to address gutter syndrome with debridement, chondroplasty and possible ligament reconstruction if instability was noted under visualization. The work restrictions remained in place. (PX 4)

On November 25, 2016, Petitioner presented to Dr. Primus and reported that his pain had worsened. Petitioner rated his pain an eight out of ten. Dr. Primus reiterated his recommendation for surgery and ordered Petitioner to remain off work. (PX 4)

Petitioner received temporary total disability benefit payments from November 26, 2016 through December 13, 2016. Petitioner's benefits were paid in biweekly checks of $816.00. (RX 2)

Dr. Holmes issued an addendum report on December 14, 2016. (RX 9) Dr. Holmes reviewed the MRI of the ankle and opined that it showed some resolution of the fracture site. There was a small posterior lip that's probably less than a few mm in triangular pattern. There is also some mild fluid at the area of the fracture site but it appears to be outside of the fracture zone. Petitioner was reporting paralyzing pain, 2 to 3 times a day and some residual lateral pain, but this could not be corroborated with the objective findings. Other than this, there was no overt symptom magnification. Based on the MRI there should not be any significant ongoing pain as it

relates to the tibia fracture. The paralyzing pain that occurs 2-3 times a day does not appear to be related to the work injury. He did not believe the proposed surgery was required and ongoing PT was also not needed. He felt Petitioner's current residual swelling symptoms are related to the injury and Petitioner should continue to use supportive stockings for that. Treatment recommendations included discontinuation of PT and likely proceeding with a work conditioning or work hardening program. He has more likely than not reached maximum medical improvement. After completion of work conditioning, he should be able to return to work without any restrictions. Dr. Holmes anticipated 2 to 3 weeks of work conditioning and then a release to full duty work. (RX 9)

Petitioner followed up with Dr. Primus on December 23, 2016. Dr. Primus noted that Petitioner was awaiting WMC approval for surgery, still. Petitioner reported worse ankle pain and had to use brace more often. He was still using pain cream. Associated symptoms were weakness, swelling and stiffness in the back of the leg. He denied any new injury. Petitioner was ordered to remain off work. (PX 4, part 2)

On January 20, 2017, Petitioner presented to Dr. Primus for follow up. The diagnosis remained the same and he remained ordered off of work. Subsequently, Petitioner followed up with Dr. Primus on February 17, 2017. Petitioner reported that his pain was getting worse. He was diagnosed with unspecified closed fracture of the ankle and stress fracture of the left ankle, syndesmosis injury based on fracture pattern and tenderness along the lateral side. Surgery continued to be recommended. (PX 4, part2)

Petitioner followed up with Dr. Primus on March 17, 2017 and reported no change in his overall condition and was still using a cane. Dr. Primus noted there was concern that he may have micro-instability of syndesmosis. Petitioner ordered to remain off work and surgery was recommended. (PX 4)

Surgery was performed by Dr. Primus on April 10, 2017 at Mercy Hospital. (PX 9) The procedure was: 1.) Left ankle arthroscopic extensive debridement with removal of a large third body that appeared plica or ligamentous-like in the anterior neck of the talus along with extensive debridement of ligamentous tissue in the medial and lateral gutters; 2.) extensive arthroscopic synovectomy; 3.) abrasion chondroplasty in the medial anterior talar neck dome junction; and 4.) syndesmotic ligament fixation. (PX 9)

Petitioner testified that he had constant pain in his ankle before the surgery and that pain was gone after the surgery.

Petitioner testified that following his surgery, Dr. Primus issued work restrictions taking him off of work. Petitioner was paid group disability benefits before and after the surgery. (RX 4)

On April 21, 2017, Petitioner presented to Dr. Primus for post-operative care. Petitioner reported his symptoms significantly improved, with his pain mostly controlled. He was ordered to wear a brace and physical therapy and a home exercise program was recommended. Petitioner was ordered to remain non weight bearing for another three weeks and not to return to work. Dr. Primus continued these recommendations and restrictions on April 28, 2017. (PX 4)

Petitioner followed up with Dr. Primus on May 26, 2017. Petitioner reported that he was no longer wearing the CAM boot and that his pain had reached a rating of three out of ten. Dr. Primus noted that Petitioner's symptoms were stable and consistent with post Achilles tendon repair. Dr. Primus recommended continued conservative care of therapy. Petitioner was ordered to remain off work. (PX 4)

Petitioner received PT at La Clinica from May 30, 2017 through August 29, 2017. (PX 3)

On June 30, 2017, Petitioner presented to Dr. Primus and reported that he continued to have pain mostly at night and in the morning. Petitioner further reported that he experienced an increase in range of motion since beginning physical therapy. Petitioner was advised to wean off the crutch over next week or so and continue HEP. He was ordered not to return to work. (PX 4)

Petitioner presented for follow up with Dr. Primus on July 28, 2017. Petitioner's condition remained the same. Petitioner was released to sedentary duty work with a 10 pound lifting and carrying restriction and was restricted to limited stairs, squatting, kneeling, crawling, bending, stooping, pushing and pulling. He was not able to use ladders. (PX 4)

On August 25, 2017, Petitioner presented to Dr. Primus, four and a half months post left ankle surgery. His symptoms have significantly improved. Petitioner reported that he had been attending physical therapy for three months. Dr. Primus recommended that Petitioner continue physical therapy and conservative care. He was placed on modified duty restrictions of 20 pound lifting/carrying, occasional stairs, pushing, and pulling, able to perform limited ladders, squatting, kneeling, crawling, bending and stooping. (PX 4)

On September 22, 2017, Petitioner was last seen by Dr. Primus regarding his left foot injury. He reported he was able to increase physical activities with less soreness and pain. He was more mobile and was able to squat down without difficulty. He no longer required pain medication. Petitioner continued to be diagnosed with unspecified pain in ankle and joints, spontaneous rupture of other tendons, chondromalacia of left ankle and joints of left foot, sprain of tibiofibular ligament of left ankle. Dr. Primus released Petitioner to return to work at full duty and requested that he follow up in four weeks. (PX 4)

Petitioner did not return to work at Respondent, as his employment had been terminated two weeks after the surgery. Petitioner had no further visits with Dr. Primus.

Petitioner testified that he received long-term disability benefits from February 23, 2017 through September 22, 2017. (RX 4)

Petitioner testified that he began working as a temp at the Chicago Tribune prior to September 2019, through his employer Labor Temps. He subsequently received full time employment with the Tribune. Petitioner testified that his current position in the packaging room for the Chicago Tribune requires that he stand in front of a computer and he fixes things when they break. He is paid $13.50 per hour. Petitioner testified that he currently experiences pain during long periods of walking, long periods of standing, and with the weather. He also experiences swelling, although he did not testify about swelling when first questioned about what he currently notices about his injured foot.
While Petitioner was not using a brace during his final examination with Dr. Primus, he testified at trial that he uses a brace, but provided no basis for the new-found need for a brace. Petitioner testified that due to standing required in his new job, he takes Aleve daily. Dr. Primus had noted that Petitioner was not talking pain medication at the last visit of September 22, 2017. (PX 4)

Regarding lost time, Petitioner testified that he was paid TTD at the rate of $408.00 per week from February 12, 2016 through May 8, 2016, August 11, 2016 through August 31, 2016 and November 26, 2016 through December 13, 2016. He received non-occupational disability benefits from February 23, 2017 to September 22, 2017, paid by UNUM ($8,739.54). (RX 4) Respondent paid $7,459.99 in TTD benefits and $3,840.00 in a PPD advance. The covered time periods were: 2/12/2016 - 5/19/2016; 8/11/2016 – 8/22/2016; and 11/26/2016 – 12/13/2016. (RX 2) Respondent submitted a Time Detail for Petitioner from 2/1/2016 – July 31, 2017. It appears Petitioner was off work (workers' comp) due to the injury from February 12, 2016 through

May 18, 2016, November 28, 2016 through December 11, 2016 and January 23, 2017 through February 3, 2017. (RX 3)

Respondent submitted a retrospective UR regarding the ankle surgery, dated 1/31/2020. The surgery was found to be not medically necessary, as proposed. (RX 9) Respondent also submitted a retrospective UR regarding PT ordered July 26, 2017, dated 2/4/2020. The requested PT was noncertified. (RX 10)

Respondent has a Preferred Provider Program ("PPP") to provide medical care for its employees who are injured at work. Gina Koenig, Manager of Associate and Occupational Health and Workers' Compensation for the hospital group that Respondent is a part of, testified at Respondent's request at the first hearing. One of the reasons for the PPP was to "assure our associates will get good care." Koenig also testified about Respondent's modified duty program, whereby work restrictions are accommodated for 6 months.

Respondent submitted the testimony of Carla Casia, Regional Manager of Health & Safety for AMITA Health (successor to Respondent's hospital group, Presence) at the second hearing. She has been employed by the hospital groups for 40 years. In February of 2016, Casia was Director of Associates' Health and Worker (sic) Compensation for Presence. Casia was involved in setting up Respondent's PPP program before 2014. The PPP is facilitated via an agreement with HFN. (RX 11) HFN has a website where approved physicians are listed, apparently to provide this information to employers and injured workers. At the time of the rollout of the PPP for Respondent a large effort was made to educate employees regarding the PPP.

Casia was familiar with Randon Johnson, MD, an orthopedic physician on Staff at St. Mary and Elizabeth. The EOB documents for Dr. Johnson's two days of treatment of Petitioner (2/12/2016 and 2/23/2016) (subsequently confirmed to be a "HFN Repricing Statement") were admitted as RX 16. The bills were re-priced, as Dr. Johnson was not in the PPP. If Respondent wanted Dr. Johnson on the PPP list, they could recommend it, but PPP designation was ultimately HFN's call.

Cheryl Dusenbery was called as a witness by Respondent at the second hearing. She is employed by AMITA Resurrection Medical as "Associate in occupational health nurse" (Associate and Occupational Health Nurse?).

The Arbitrator notes that there may have been mask testimony issues at the second hearing, which took place on September 14, 2020. We all did our best.

Dusenbery has been employed by AMITA and its predecessors for 25 years. In 2016, Dusenbery was an employee health nurse, with worker comp intake and case management responsibilities. She communicated information about the PPP to injured employees. The protocol was to give an associate a form, a pamphlet, the phone number for the WC administrator and discuss the PPP program and have the associate sign off on the session. The PPP website is also provided to the injured worker. She recalled going through the process with Petitioner. The purpose was to have Petitioner sign off on the paperwork and make sure that he was getting the care that he needed. RX 12 was the WC packet given to employees. RX 13 was Petitioner's signed acknowledgement of receipt of RX 12, signed by Petitioner and Dusenbery. RX 14 was the ER referral to Dr. Frisch. Dusenbery checked the PPP website and confirmed that Frisch was in the PPP. Apparently, Frisch's practice was undergoing some changes and Dusenbery wanted to make sure that the referred physician was in the PPP. Dusenbery did not check on Dr. Johnson's status with the PPP. Dusenbery knew that Johnson and Frisch were in the same practice at that time.

During the meeting, Dusenbery talked with Petitioner about making an appointment with Dr. Frisch. Petitioner did not choose to opt out of the PPP at that time. To Dusenbery's knowledge, Petitioner never opted

out of the PPP. The practice is for the employee to do so in writing. RX 15 was a fax cover sheet that Dusenbery sent to Mariela at Dr. Frisch's office, authorizing a visit with Dr. Frisch. Dusenbery testified that she didn't know if Petitioner sought treatment with a physician outside of the PPP. She did receive a note saying follow-up was with Dr. Johnson. The following question and answer took place at page 48 of the 9/14/2020 transcript: "Q: Mr. Arenas testified on direct examination that you directed him to seek follow-up medical care with Dr. Randon Johnson. Did you ever do that? A.: Not to my knowledge." Dusnebery testified that she did not recall setting up the actual appointment for Petitioner with Dr. Johnson.

On cross-examination, Dusenbery testified that she documented Johnson's follow up recommendations with IPMG, Respondent's third party administrator. Dusenbery would have found out that Petitioner was seen by Dr. Johnson through Epic, Respondent's medical information system. She could not remember voicing any objection to Petitioner being seen by Dr. Johnson and did not know if she authorized Petitioner's second visit with Dr. Johnson. She possibly authorized the second visit and did not verify which physician she authorized the visit with. As the WC coordinator, she would receive off work slips from injured employees. Dusenbery did not tell Petitioner that if he wanted to treat with Dr. Johnson, he would have to reject the PPP.

Petitioner provided additional testimony at the second hearing. He said that he did not receive training about the PPP and did not know what a PPP is. He did recall meeting with Dusenbery and signing documents after he was released from the ER. After Dusenbery set an appointment with the Presence Orthopedic Group, she told Petitioner the address: 1431 North Western Ave. (near St. Elizabeth Hospital). Petitioner was not instructed to see a specific doctor in the practice. On cross-examination, Petitioner acknowledged that he signed RX 12 and RX 13.

CONCLUSIONS OF LAW

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

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d).

To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his employment and his injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)

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

The Arbitrator, as the trier of fact in this case, has the responsibility to observe the witnesses testify, judge their credibility, and determine how much weight to afford their testimony and the other evidence presented. Walker v. Chicago Housing Authority, 2015 IL App (1st) 133788, ¶ 47 Petitioner's testimony is found to be credible. He does appear to be an unsophisticated individual and any inconsistencies in his testimony are not attributed to an attempt to deceive the finder of fact.

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

Petitioner's current condition of ill-being regarding his left foot, to wit: Persistent left ankle pain secondary to ankle instability; Posterior malleolus fracture; synovitis; intra-articular chondromalacia; medial and lateral gutter syndrome; torn lateral ligament complex and inflamed ligamentous-like plica in the anterior compartment (as revealed in the surgical findings of the 4/11/2017 arthroscopic procedure by Dr. Primus and the MRI studies of 8/9/2016 and 3/15/2016), status post 4/11/2017 arthroscopic surgery, is causally related to the accidental injury of February 10, 2016.

This finding is based on the credible testimony of Petitioner, the medical records and the course of events demonstrated by the evidence adduced. There is no evidence of any prior injury to Petitioner's left foot. While some of the intra-operative findings appear degenerative, the fact of Petitioner's accidental injury is conceded and Petitioner's prior apparent good health and continued complaints and findings as shown by Dr. Primus' records, along with resolution of many of Petitioner's complaints post-surgery persuade the Arbitrator that Petitioner's condition of ill-being is causally related to the work accident. International Harvester v. Industrial Comm'n, 93 Ill.2d 59, 63-64 (1982)

Dr. Holmes endorsed causation as to the malleolus fracture, but did not concur with the need for surgery and to causation as to the "paralyzing pain" events that Petitioner described to him. He did not address causation as to the ligament tears and did not provide additional opinions given the operative report.

The chain of events supports the Arbitrator's finding on causation and Dr. Holmes' opinions do not persuade the Arbitrator to the contrary.

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, AND ISSUE (O), CHOICE OF DOCTORS/PPP COMPLIANCE, THE ARBITRATOR FINDS:

The medical services provided to Petitioner were reasonable and necessary to cure or relieve the effects of the injuries sustained and are causally related to the work accident of February 10, 2016.

This finding is based upon the Arbitrator's finding above on the issue of causation, Petitioner's testimony and the medical records.

Dr. Holmes' opinion that the surgery was not indicated, and the retrospective UR opinions do not persuade the Arbitrator otherwise. The bottom line is Petitioner's symptoms resolved to a great degree after the surgery and the related disputed PT.

Petitioner's claimed medical expenses were set forth on the attachment to the RFH (Arb X 1). The appropriate charges are awarded as follows:

Presence St. Mary (PX 1): **Paid by WC**

Dr. Randon Johnson/
Presence Orthopedic Group
(PX 2): **Paid by WC**

Dr. Eugene Jao/La Clinica (PX 3):	**$24,815.00 (Balance)**
Chicago Center for Sports Medicine & Orthopedic Surgery/Dr. Primus (PX 4):	**$8,618.70 (Balance)**
Metro Health Solutions (PX 5):	**$4,564.71 (Fee Schedule)**
American Diagnostic MRI, LLC (PX 6):	**$1,160.30 (Fee Schedule)**
NorthStar Anesthesia (PX 7):	**$873.39 (Pt. Balance) (Remainder Blue Cross paid and write off)**
Mercy Hospital (PX 8):	**Paid by Blue Cross**

Award: $40,032.10

The award is based upon the evidence adduced and is made in accordance with §§8(a) and 8.2 of the Act. As such, Respondent is entitled to any appropriate Fee Schedule and negotiated rate reductions and no award shall be made for balance billing.

Respondent submits that it is not liable for medical expenses incurred after Petitioner ceased treatment with Dr. Johnson, as Petitioner exceeded his 2 choices of physicians, due to Respondent's PPP program. This argument does not have merit.

First, Respondent, through Dusenbery, set up the appointment with Dr. Johnson (albeit via a failed attempt to schedule a visit with Dr.Frisch). Dusenbery's testimony was that she documented Dr. Johnson's follow-up instructions with Respondent's TPA. Dusenbery did not recall setting up the actual appointment with Dr. Johnson, but she did not deny that she did so. She could not remember voicing any objection to Petitioner being seen by Dr. Johnson and did not know if she authorized Petitioner's second visit with Dr. Johnson. At some point, Respondent had to know that Petitioner was being treated by the PMG orthopedist that was not in the PPP and took no steps to remedy the situation such that its associate was getting "good care". Petitioner was not told that if he wished to continue treatment with Dr. Johnson, he would have to opt out of the PPP. It was not shown that Petitioner was advised that Dr. Johnson was his one non-PPP physician choice. Dr. Johnson is Respondent's choice of physician.

Second, Respondent failed to obtain Petitioner's declination of the PPP in writing, as is required by §8(a)4(B) of the Act. The lack of a written declination of the PPP persuades the Arbitrator that Respondent's actions regarding Petitioner's medical treatment in this case were either inept or a bad faith attempt to take advantage of an unsophisticated injured worker.

Third, Respondent is estopped from using the PPP as a sword to avoid payment for Petitioner's §8(a) expenses from his one legitimate non-PPP choice, Dr. Jao/La Clinica and the referral chain of providers therefrom. Petitioner relied in good faith on Respondent's agents in getting treatment from Dr. Johnson. The Arbitrator did not find any reported PPP cases in researching the issues presented in this case. The doctrine of estoppel can be applied in Workers' Compensation cases. Kaskaskia Constructors v. The Industrial

Commission, 61 Ill. 2d 532 (1975) {employer estopped from raising the statute of limitations as a defense} Here, we do not know why the PMG Ortho office set the first appointment with Dr. Johnson instead of Dr. Frisch, but it was not shown that Petitioner made this choice and, further, Respondent took no action to get Petitioner to the PPP approved doctor. Indeed, Dusenbery did not recall raising any objection to Petitioner being see by Dr. Johnson and did not recall if she authorized Petitioner's second visit with Dr. Johnson. On this record, Dr. Johnson is not Petitioner's non-PPP choice.

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

Petitioner claims 84-6/7 weeks of TTD for the time period of February 11, 2016 through September 22, 2017. (ArbX 1)

RX 3 shows that Petitioner was off due to workers' comp from February 12, 2016 through May 18, 2016 (13-6-7 weeks); November 28, 2016 through December 11, 2016 (2 weeks); and January 23, 2017 through July 31, 2017. Petitioner was off work through September 22, 2017 and 1/23/2017 – 9/22/2017 is 34-6/7 weeks. The entire time period is 50-5/7 weeks and this is the awarded TTD.

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

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors;

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records.

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

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. Accordingly, no weight is given this factor in determining PPD.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a security guard at the time of the accident and that he is able to return to work in his prior capacity as a result of said injury. This factor is given moderate weight in determining PPD.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 44 years old at the time of the accident. He has a 20-plus years anticipated work-life, during which he will have to deal with the effects of the injury. This factor is given moderate weight in determining PPD.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner was released to full duty as of September 23, 2017. This factor is given appropriate weight in determining PPD.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner does have some residuals from the injury, as shown by the therapy records and the records of Dr. Primus. His subjective complaints of pain when walking long distances, pain when standing for long periods of time and pain with weather changes are consistent with the records and the injury (acknowledging that Petitioner stands a great deal of time at his new job).

~~Based on the above factors, and the record taken as a whole, the Arbitrator finds that as a result of the~~ ~~injuries sustained, Petitioner suffered permanent partial disability to the extent of 25% loss of use of the left foot~~ pursuant to §8(e)11 of the Act.

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

The awarded TTD is $20,619.31. Respondent is entitled to a credit of $11,299.99 for indemnity benefits paid against the TTD award and there is an agreed §8(j) credit for LTD benefits paid of $8,739.54. **Thus, the net TTD owed is $579.78.**

Respondent is entitled to a §8(j) credit for the Mercy Hospital bill paid by Blue Cross (only to the extent of the §8.2 benefit owed) and as to the NorthStar Anesthesia bill paid by Blue Cross (only to the extent of §8.2 benefits owed).

Respondent shall keep Petitioner safe and harmless from any and all claims or liabilities that may be made against him by reason of having received the said §8(j) payments, only to the extent of such credit.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC004672
Case Name	WEST, MATT v. CITY OF PEORIA
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0194
Number of Pages of Decision	11
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Stephen Kelly
Respondent Attorney	Ryan W. Kitzhaber

DATE FILED: 5/25/2022

/s/Kathryn Doerries, Commissioner

Signature

22IWCC0194

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 ROCK ISLAND	)	☐ Reverse [Choose reason]	☐ Second Injury Fund (§8(e)18)
		X Strike portion of sentence under Conclusions of Law	☐ PTD/Fatal denied
		☐ Modify [Choose direction]	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MATT WEST,

Petitioner,

vs. NO: 20 WC 04672

CITY OF PEORIA,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of permanent partial disability, nature & extent only, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission, herein, modifies the Arbitrator's decision under Conclusions of Law, first paragraph, striking the portion of the last sentence after "sustained". The sentence should read, "However, the Arbitrator finds Petitioner's right hand is compensable under §8(e)(9) of the Act with regard to the injuries sustained."

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $836.69 per week for a total period of 126.41 weeks, as provided in §8(e)(11) and §8(e)(9) of the Act, for the reason that the injuries sustained caused 45% loss of use of Petitioner's right foot (75.15 weeks), 12.5% loss of use of Petitioner's right hand (25.63 weeks), and 12.5% loss of use of Petitioner's left hand (25.63 weeks).

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.

May 25, 2022
o- 5/10/22
KAD/jsf

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC004672
Case Name	WEST, MATT v. CITY OF PEORIA
Consolidated Cases	No Consolidated Cases
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Bradley Gillespie, Arbitrator

Petitioner Attorney	Stephen Kelly
Respondent Attorney	Ryan W. Kitzhaber

DATE FILED: 11/2/2021

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 2, 2021 0.06%

/s/Bradley Gillespie, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

NATURE AND EXTENT ONLY

MATT WEST Case # 20 WC 004672
Employee/Petitioner
v.
CITY OF PEORIA
Employer/Respondent

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Bradley Gillespie**, Arbitrator of the Commission, in the city of **Rock Island**, on **July 12, 2021**. By stipulation, the parties agree:

On the date of accident, **February 11, 2020**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**95,338.44**, and the average weekly wage was $**1,833.43**.

At the time of injury, Petitioner was **49** years of age, ***married*** with **1** dependent child.

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

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

ORDER

Respondent shall pay Petitioner the sum of **$836.69**/week for a further period of **126.41 weeks**, totaling $105,765.98, because the injuries alleged by Petitioner resulted in 45% loss of use of the right foot, totaling 75.15 weeks, pursuant to §8(e)(11) of the Act; 12.5% loss of use of the right hand, totaling 25.63 weeks, pursuant to §8(e)(9) of the Act; and 12.5% loss of use of the left hand, totaling 25.63 weeks, pursuant to §8(e)(9) of the Act.

Respondent shall pay all reasonable, necessary, and causally related medical and hospital bills from the date of the injury through the time of the trial.

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

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

Bradley D. Gillespie — **NOVEMBER 2, 2021**

Signature of Arbitrator

BEFORE THE WORKERS' COMPENSATION COMMISSION OF THE STATE OF ILLINOIS

MATT WEST,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No: 20 WC 004672
	)	
CITY OF PEORIA,	)	
	)	
Respondent.	)	
	)	

FINDINGS OF FACT

On February 11, 2020, Matt West (hereinafter "Petitioner"), was a forty-nine (49) year-old patrol officer for the City of Peoria Police Department (hereinafter "Respondent"). (PX #4) Petitioner began his career with the City of Peoria Police Department on July 26, 1999. Tr. p. 20. His assignments included time as a patrol officer, traffic officer, and property crimes detective. Tr. p. 21. On the date in question, Petitioner was assigned to day shift as a patrol officer responding to calls of service and traffic accidents. *Id.* His duties required him to respond to calls involving auto accidents, robberies, and shootings. Tr. p. 22. Petitioner testified that he would have to make life and death decisions, perform unexpected lifting, run and jump in pursuit of suspects, and potentially have altercations with suspects. Tr. p. 23.

On February 11, 2020, Petitioner responded to an intrusion alarm at the Trinity Compassionate Care Marijuana Dispensary. Tr. p. 25. During a previous security assessment with the manager of the dispensary, Petitioner was informed that trouble would most likely occur when a delivery of marijuana was happening. *Id.* The alarm changed from an intrusion alarm to an employee activated holdup alarm. Tr. p. 26. Petitioner was responding Code 1 in his squad car assuming that a robbery was taking place. *Id.* Petitioner was heading south on Sterling with his lights and siren activated. *Id.* When he entered the intersection Sterling and Bainer it was clear, but another vehicle pulled out in front of him and he struck the vehicle. (Tr. p. 26) The collision caused Petitioner to lose consciousness and he was transported to a local emergency room from the scene of the accident. (PX #4). Petitioner testified that he regained consciousness in the ambulance and recalled Officer Taylor being present at the time. Tr. p. 29.

Upon arrival at the OSF Emergency Department, Petitioner's primary complaints were back pain and right ankle pain. (PX #4) Emergency room records report that Petitioner was responding to a call when his vehicle struck another vehicle, airbags deployed, and Petitioner lost consciousness. (PX #4 p. 73) X-rays taken at that time revealed a trimalleolar fracture of the right ankle with dislocation, a tiny avulsion fracture of the dorsomedial triquetrum of the right wrist, and a mildly displaced fracture of the ulna styloid process of the left wrist. A CT scan of Petitioner's facial bones revealed no acute maxillofacial bone fracture and an age-indeterminate, likely chronic, fracture of the left nasal bone with deviation of the nose to the left. (PX #4) On February 11, 2020, a closed reduction of the right ankle dislocation was undertaken. (PX #4 pp. 72, 96, 97)

On February 17, 2020, Dr. James Maxey performed an open repair with internal fixation to repair Petitioner's right ankle trimalleolar fracture. (PX #4 pp. 93-96).

On February 24, 2020, Petitioner was seen by Dr. Jeffrey Garst at OSF Orthopaedics for his bilateral wrist fractures. On exam, Petitioner had good range of motion of both wrists with about 60 degrees of volar flexion and dorsiflexion of both wrists. (PX #2 p. 1) He exhibited tenderness over the dorsum and ulnar side of both wrists. *Id.* Dr. Garst interpreted the radiographic studies to show a tiny avulsion fracture at the ulnar styloid on the left wrist and a tiny avulsion injury at the triquetrum on the right wrist. *Id.* Dr. Garst believed Petitioner's bilateral wrist fractures would heal naturally with conservative care. (PX #2). Petitioner was continued off work.

Petitioner attended a post-surgical follow-up exam with Dr. Maxey on March 2, 2020. (PX #2 pp. 4-9) During this examination, Petitioner rated his ankle pain as a 2/10 and stated he was taking Tylenol Extra Strength as needed for pain control. (PX #2 p. 4) X-rays revealed a well-aligned trimalleolar fracture. (PX #2 p. 6) Petitioner was continued off work and advised to return in a month. Petitioner returned to see Dr. Maxey on March 31, 2020. (PX #2 p. 10) During this examination, Petitioner had great range of motion of his right ankle and no pain complaints. *Id.* X-rays of the ankle revealed some pre-existing osteoarthritis and healing of the trimalleolar fracture. *Id*. Dr. Maxey felt that Petitioner could remove the boot, weight bear as tolerated, drive a car and perform light duty office work only. *Id*.

Petitioner was also seen by Dr. Garst on March 31, 2020. (PX #2 p. 12) During his examination, Petitioner had full range of motion of all his fingers, could straighten his fingers out all the way, and was able to make full fists with both hands. *Id*. Dr. Garst noted that Petitioner had a little weaker grip strength but was otherwise doing well. *Id*. X-rays revealed healed fractures of both wrists. *Id*. Dr. Garst released Petitioner from his care, returned him to full duty without restrictions regarding his bilateral wrists and pronounced him at Maximal Medical Improvement with regard to his wrists. (PX #2 p. 12) Since his release on March 31, 2020, Petitioner has not returned to see Dr. Garst, or any other physician, regarding his bilateral wrist injuries. (Tr. pp. 61-62).

On April 1, 2020, Petitioner was seen by Dr. Edward Moody of OSF Occupational Health. (PX #3) During this examination, Petitioner demonstrated full dorsal and palmar flexion of both wrists with no weakness of grip and full flexion opposition of both thumbs. (PX #3 p. 1) Petitioner reported he was not having any issues with memory, confusion, dizziness, vertigo, blurring of vision or double vision, or sensory sensitivity. *Id*. At trial, Petitioner testified that he never treated for a concussion, never complained of any head related issues, and was never seen by a neurologist or psychologist due to the February 11, 2020 accident. (Tr. pp. 65-66) Dr. Moody noted generalized soft tissue swelling of the right ankle, 5º of dorsiflexion, and 15º plantar flexion. (PX #3 p. 1) Dr. Moody observed that Petitioner could perform minimal weight-bearing with the right foot and that he placed all of his weight on the right heel when transitioning from the chair to table. *Id*. Dr. Moody agreed with Dr. Maxey limiting Petitioner to sedentary work only, office environment and positional changes as needed. (PX #3 p. 2)

Petitioner had a follow-up examination with Dr. Maxey on April 30, 2020. (PX #2 p. 16) During the examination, Dr. Maxey noted that Petitioner had a slight limp but was doing well overall. *Id*. Petitioner indicated that he had intermittent aching and stinging with prolonged weight bearing. *Id*. He denied numbness and tingling and was not taking any pain medication. *Id*. X-rays of the right ankle revealed a healing well-aligned right ankle fracture. (PX #2 p. 17) Dr. Maxey continued Petitioner on light duty until May 12, 2020, at which time he returned Petitioner to full unrestricted duty. (PX #2 p. 24) At arbitration, Petitioner stated that he had not returned to see Dr. Maxey, or any other physician, regarding his right ankle, since April 30, 2020. (Tr. pp. 62-63)

Petitioner was also seen by Dr. Moody on April 30, 2020. (PX #3) During this examination, Petitioner reported no problems related to his bilateral wrist injuries and stated he was doing pretty well with regard to his right ankle. (PX #3 p. 3) Dr. Moody observed that Petitioner still had a slight limp. *Id*. Petitioner reported being able to walk without any particular limitation but had not yet attempted running. *Id*. Dr. Moody noted that

Petitioner's job description required the ability to run 0.25 miles and that Petitioner still has a way to go. *Id*. Dr. Moody scheduled a follow-up for May 7, 2020. (PX #3 p. 3).

On May 7, 2020, Petitioner had an examination via telephone with Dr. Moody. (PX #3 p. 4) Petitioner reported that he was able to resume jogging and was able to go a half mile continuously without any problem or without any significant pain flare ups. *Id*. Dr. Moody placed Petitioner at maximum medical improvement and returned Petitioner to full unrestricted duty effective May 12, 2020. *Id*.

On October 28, 2020, Petitioner was seen by Dr. Bryan Neal of Arlington Orthopedic & Hand Surgery Specialists for a Section 12 examination at the request of Respondent. (RX #2) During his examination, Petitioner reported working full time without restrictions as a police officer for the City of Peoria. *Id*. Petitioner was asked to list all anatomic areas that were injured in the February 11, 2020 accident. Petitioner listed injuries to his right ankle, right wrist, left wrist, right and left hands, head, concussion, nasal fracture, neck and back strain. (RX #2 p. 5) Petitioner advised that he underwent surgery for his right ankle fracture. *Id*. Dr. Neal reported that Petitioner did not have any surgery for his right wrist/hand and was not treated with casts or splints. *Id*. Dr. Neal noted that Petitioner did not have surgery for his left wrist fracture and was not treated with casts or splints. (RX #2 p. 6) Petitioner advised that his hand lacerations had healed. *Id.* Regarding his neck and back strains, Petitioner denied having any treatment directed to his neck or back and it was noted that any soft tissue strain had resolved. *Id.* Dr. Neal provided the following diagnoses: (1) static intermittent dorsal right hand pain without concurrent subjective wrist symptomology, with dorsal carpal region residual soft tissue swelling, status post fracture; (2) static intermittent residual left hand symptomatology, status post fracture; and (3) Residual right ankle pain, swelling, and stiffness, status post open reduction internal fixation surgery for trimalleolar fracture of the right ankle with dislocation. (RX #2 p. 11) Dr. Neal was asked to provide AMA impairment ratings for Petitioner's right ankle and bilateral wrist injuries. Regarding his right trimalleolar fracture of the right ankle, Dr. Neal calculated that Petitioner sustained a 13% lower extremity impairment, which converts to a 5% whole person impairment. (RX #2 p. 14) Regarding his right triquetrum fracture, Dr. Neal determined a 2% upper extremity impairment, which correlates to a 1% whole person impairment. (RX #2 p. 16) Regarding his left ulnar styloid fracture, Dr. Neal assessed a 2% upper extremity impairment which is equivalent to 1% whole person impairment. (RX #2 p. 17) Using the 5% whole person impairment from the right ankle, 1% whole person impairment from the right wrist and 1% whole person impairment from the left wrist, combined to yield a total of 7% whole person impairment. (RX #2 p. 18)

Petitioner testified he had worked in his full unrestricted capacity as a City of Peoria police officer from approximately May 12, 2020 through the time of arbitration on July 12, 2021. (Tr. p. 67) Petitioner further testified he had not received any treatment for his alleged injuries since May 7, 2020. *Id*. He acknowledged that he would have sought treatment if he thought it was necessary. *Id*. Petitioner admitted that he would have requested to be taken off work if he felt he couldn't perform his job duties safely, but he did not. (Tr. p. 67)

CONCLUSIONS OF LAW

The parties stipulated the sole issue in dispute is the nature and extent of Petitioner's alleged injuries. During his testimony at arbitration, Petitioner presented his right hand to be viewed by the Arbitrator. At that time, the Arbitrator noted Petitioner's right hand had some discolored, slightly raised scars approximately an inch and a half in length. (Tr. pp. 50-51). However, the Arbitrator finds Petitioner's right hand is compensable under Section 8(e)(9) of the Act with regard to the injuries sustained, and, therefore, a disfigurement award would be improper pursuant to Section 8(c) of the Act.

In support of the Arbitrator's Decision relating to **(L). What is the nature and extent of the injury?** *the Arbitrator finds the following:*

Section 8.1b of the Illinois Workers Compensation Act requires consideration of the following enumerated factors in determining an employee's permanent partial disability:

(i) The reported level of impairment pursuant to an American Medical Association Impairment Rating;

(ii) The occupation of the injured employee;

(iii) The age of the employee at the time of the injury;

(iv) The employee's future earning capacity; and

(v) Evidence of disability corroborated by the treating medical records.

Section 8.1b further provides no single factor shall be the sole determinant of disability. Additionally, Illinois Appellate Courts have affirmed the aforementioned factors are not exclusive, meaning the Commission is free to evaluate other relevant considerations. See *Flexible Staffing Services v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 151300WC. In accordance with Section 8.1b, the relevance and weight of any factors used in reaching a conclusion in this matter are set forth below.

(i) With regard to subsection (i) of Section 8.1b(b), the Arbitrator notes Respondent submitted a Section 12 report authored by Dr. Bryan Neal without objection by Petitioner, which included impairment ratings pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. Dr. Neal provided impairment ratings of a 13% lower extremity impairment for Petitioner's right ankle and a 2% upper extremity impairment for each of Petitioner's bilateral wrists. (Respondent's Exhibit #2). The Arbitrator notes this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation. Accordingly, the Arbitrator some weight to this factor.

(ii) Second, regarding the occupation of the injured employee, the Arbitrator notes Petitioner was a police officer for the City of Peoria Police Department at the time of the February 11, 2020 accident. He returned to full duty as a police officer on May 12, 2020. At arbitration, he testified he was voluntarily retiring from his position as a City of Peoria police officer on July 27, 2021. The Arbitrator acknowledges the heavy nature of police work and gives some weight to this factor.

(iii) Third, regarding the age of the injured employee, the evidence establishes Petitioner was forty-nine (49) years old at the time of his work-injury. The Arbitrator considers Petitioner's age at the time of the accident and his relatively long average life expectancy. The Arbitrator also notes Petitioner testified he is voluntarily retiring from the City of Peoria Police Department on July 27, 2021 and presented no evidence of an intent to re-enter the workforce. Based on the foregoing, the Arbitrator places some weight on this factor.

(iv) Fourth, with regard to Petitioner's future earning capacity, the Arbitrator finds Petitioner presented no evidence of lost earning capacity. Petitioner returned to his employment and worked in his full unrestricted capacity from May 12, 2020 through the time of Arbitration on July 12, 2021. Petitioner testified he is voluntarily retiring from his position as a City of Peoria police officer on July 27, 2021. As such, the Arbitrator places no weight on this factor.

(v) Lastly, with regard to evidence of disability corroborated by the treating medical records, the Arbitrator notes the medical records in evidence establish Petitioner had initial complaints of pain in his back and right ankle while at the emergency room on February 11, 2020. The Arbitrator notes Petitioner did lose consciousness as a result of the accident; however, Petitioner testified he never treated for a concussion, never complained of any head related issues, and was never seen by a neurologist or psychologist as a result of the February 11, 2020 accident. (Tr. pp. 65-66). Additionally, no medical records were entered into evidence establishing any head related issues or treatment.

The evidence establishes Petitioner was diagnosed with a trimalleolar fracture of the right ankle with dislocation. At his last examination regarding his alleged right ankle injury, Petitioner had a slight limp but was doing well overall. Petitioner reported being able to jog a half mile continuously without any problem or significant pain. Petitioner was discharged from medical care and has not received any further treatment regarding his right ankle injury.

The evidence also establishes Petitioner sustained a tiny avulsion fracture of the dorsomedial triquetrum of the right wrist and a mildly displaced fracture of the ulna styloid process of the left wrist. At his last examination regarding his bilateral wrist injuries, Petitioner had a full range of motion of all his fingers. Petitioner could straighten his fingers out all the way and make full fists on both sides. Petitioner had full range of motion of both wrists with about 70 degrees of volar flexion and 70 degrees of dorsiflexion. Petitioner was discharged from medical care and has not received any further treatment regarding his bilateral wrist injuries.

The Arbitrator finds Petitioner's current complaints of right hip pain, right shoulder pain, left shoulder pain, and neck pain are not corroborated by the medical records. No medical records were placed into evidence establishing any injuries or treatment to Petitioner's right hip, right shoulder, left shoulder or neck. During Petitioner's examination with Dr. Neal on October 7, 2020, Petitioner listed multiple body parts he felt were injured during the February 11, 2020 accident. Petitioner never complained of any hip issues and actually reported to Dr. Neal that he has a history of arthritis in the right hip, has had right hip corticosteroid injections twice, he takes meloxicam for his right hip, and he was not having any right hip pain at that time. Petitioner also reported to Dr. Neal he believed his alleged neck strain had resolved and he denied having any treatment directed to his neck. The Arbitrator finds the medical evidence does not corroborate any causal relationship between Petitioner's current complaints of right hip pain, right shoulder pain, left shoulder pain or neck pain and the February 11, 2020 accident, as Petitioner never treated or complained of any alleged injury prior to the time of arbitration.

The Arbitrator also finds it significant Petitioner returned to full-duty as a police officer for Respondent on May 12, 2020 and testified he had been able to perform his duties and had not returned for any treatment since his return to full duty. Petitioner further acknowledged he would have sought treatment, if it was necessary. (Tr. p. 67). Petitioner further testified that if he felt he couldn't perform his job duties safely, he would have requested to be taken off work, but didn't. *Id*.

Based on the above factors, and the record taken as a whole, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 45% loss of use of the right foot, or 75.15 weeks, pursuant to §8(e)(11) of the Act; 12.5% loss of use of the right hand, or 25.63 weeks, pursuant to §8(e)(9) of the Act; and 12.5% loss of use of the left hand, or 25.63 weeks, pursuant to §8(e)(9) of the Act, for a total of 126.41 weeks of compensation.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC006915
Case Name	HEREDIA, VERONICA v. MCDONALD'S
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0195
Number of Pages of Decision	12
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Jose Rivero
Respondent Attorney	Dana Benedetti

DATE FILED: 5/26/2022

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS	)
	) SS.
COUNTY OF COOK	)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Veronica Heredia,

Petitioner,

vs. NO: 17WC 006915

McDonald's,

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, 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 July 29, 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 $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.

May 26, 2022

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MEP/ypv
049

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HEREDIA, VERONICA Case# **17WC006915**
Employee/Petitioner

McDONALD'S
Employer/Respondent

On 7/29/2020, 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:

0147 CULLEN HASKINS NICHOLSON ET AL
JOSE RIVERO
10 S LASALLE ST SUITE 1250
CHICAGO, IL 60603

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

V. Heredia v. McDonald's, 17 WC 6915

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

Veronica Heredia
Employee/Petitioner
v.
McDonald's
Employer/Respondent

Case # **17** WC **006915**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **11/14/2019**. 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 ______

V. Heredia v. McDonald's, 17 WC 6915

FINDINGS

On **11/24/2016**, 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 regarding her left eye ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$28,280.53**; the average weekly wage was **$565.61**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **1** dependent children.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**2,153.96** for medical benefits, for a total credit of $**2,153.96**.

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

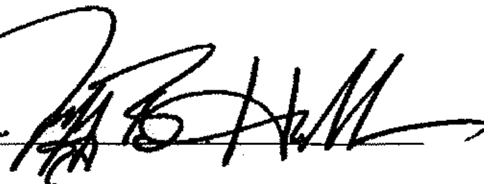
ORDER

Respondent shall pay Petitioner Permanent partial disability benefits of $339.36/week for 5 weeks because the injuries sustained caused Petitioner to suffer 5 weeks disfigurement to the face, as provided in Section 8(c) of the Act.

No benefits are awarded under Section 8(e)(13) 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

July 27, 2020
Date

ICArbDec p. 2

JUL 29 2020

FINDINGS OF FACT

Petitioner testified via a Spanish/English interpreter.

On November 24, 2016, Petitioner worked as a Manager for McDonald's in Cicero, Illinois. (T.18). Her duties included working with all the employees, cleaning machines, sweeping, mopping, do inventories, schedules, and sometimes work in the kitchen. (T.19). Petitioner had worked for Respondent for 12 years and was promoted to Manager after two years. (*Id.*).

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of her employment by Respondent on November 24, 2016. Petitioner testified that she was in the drive-through area cleaning the refrigerator. (T.20). She removed both glass-sliding doors to ensure they were clean, and after she placed the second door back in, the other door fell on top of her, hitting her on the left side of her face below her eyebrow. (T.20-21). She had no impact to her eye. (T.33). She stated the impact pushed her back and a lot of blood came from the left eyebrow. (T.22). From observation of Petitioner's gestures, the Arbitrator noted for the record that her pain started from the nose, over the forehead, and down the side of her face towards her left ear. (T.22-23).

A co-worker drove Petitioner to Loretto Hospital that day, where records demonstrate she presented with a small (.5CM) superficial laceration to the left upper eyelid area without any other injuries. (RX.3, p.1-2). Examination of the head and eyes revealed no subconjunctival hemorrhage, and the review of symptoms was negative. (RX.3, p.2). No visual complaints were noted. A CT of the orbits was performed, which was normal. (RX.3, p.10). Petitioner was diagnosed with a superficial laceration of the left upper eyelid. (RX.3, p.2). Dermabond was applied, and Petitioner was released home and instructed to follow-up in two days for a wound check. (RX.3, p.6).

Petitioner returned to Loretto Hospital on November 28, 2016 in for a scheduled wound check. (PX.1, p.19). Petitioner reported pain, but denied vision changes. (*Id.*). Examination of her head and eyes revealed a normal cornea, no discharge, no redness, no nystagmus, and a healing laceration to the left upper eyelid. (PX.1, p.20). She was discharged home with no further scheduled appointments.

Approximately 9 weeks later, on January 28, 2017, Petitioner presented to Dr. Garcia at America's Best and She was referred to an Ophthalmologist at Westchester Eye Center. (PX.3, p.12).

On February 24, 2017, Petitioner presented to Dr. Andriani Siavelis of Westchester Eye Center for her initial Ophthalmologist visit with a chief complaint of "my left eye tears and feels pulses." (PX.3, p.20). Petitioner told Dr. Siavelis that she suffered a concussion from the initial trauma in November, had stiches around the eye, and experienced a line going across her visual field without flashes or floaters and a decrease in her peripheral vision one week after the injury. (*Id.*). Petitioner reported she was an everyday smoker. (*Id.*). Examination revealed 20/20 vision in the right eye, and 20/50 vision in the left, with a branch retinal arterial occlusion, optic nerve damage, and decreased peripheral field to finger counting inferiorly. (PX.3, p.20-23; RX.1, p.17-20). Smoking cessation was advised. (PX.3, p.19).

Petitioner returned to Westchester Eye Center on March 2, 2017 and was seen by Dr. Spero Kinnas. (PX.3, p.25-31; RX.4). Examination of both eyes remained the same, including the visual acuities. Dr. Kinnas found decreased circulation of the superior nerve, made a diagnosis of ischemic optic neuropathy, and noted he "could not find a link from the trauma history to the disc and retinal findings on my exam." (PX.3, p.26; 41). Dr. Kinnas referred Petitioner to her primary care physician, Dr. James Hwang M.D. of Lawndale Christian Health

Center, regarding evaluation to consider cardiovascular, collagen vascular, hyperviscosity, and carotid conditions "that could be contributory to this ocular presentation." (*Id.*).

Dr. Hwang spoke with Dr. Kinnas on March 2, 2017, where consideration of connective tissue disease or embolism was discussed and noted. (PX.2, p.4). Petitioner was unable to be seen by Dr. Huang, due to her condition involving a workers' compensation case. (*Id.*).

On March 7, 2017, Petitioner signed the Application for Adjustment of Claim with her attorney.

Also on March 7, 2017, Petitioner re-presented to Loretto Hospital with 10/10 pain and reported that for the last two weeks, she had left eye pain and loss of vision. (PX.1, p.30). She denied trauma, pain, conjunctivae inflammation, eyelid inflammation, redness, discharge, and tearing. (PX.1, p.39). Her prior eyelid superficial laceration had healed unremarkably. (PX.1, p.40). Petitioner reported that vision changes were "intermittent?" (*Id.*). "Can see periph, but appears reluctant to do so with eye chart. States can't see eye chart straight on, but was able to correctly ID number of fingers held up." (*Id.*). Physical examination was normal. (PX.1, p.29), and her eye and head examination noted atraumatic. (PX.1, p.41). The doctor's Assessment revealed as follows: "Cannot consistently reproduce [complaint] with [snelling] chart. Nurse and myself performed test. Patient response varies. Also spoke to with fluent Spanish interpreter. Story also shifts?...." (*Id.*). She was referred to Dr. Benjamin Mark of Benjamin Eye Care. (PX.1, p.31).

Petitioner saw Dr. Benjamin Mark on March 7, 2017, reporting that that morning, she woke up with intense pain and "half my vision in my left eye is completely black and the other half is very blurred." (PX.1, p. 54). Review of symptoms was positive for blurred vision and pain, but negative for spots in vision and vision loss. (*Id.*). She was discharged with the Assessment/Plan noting "HTHn (HTN?) untreated as cause ???" (*Id.*).

Petitioner's Application for Adjustment of Claim was filed with the Commission on March 9, 2017.

Also on March 9, 2017, Petitioner presented to Dr. Francisco Marruenda M.D. of Chicago Eye Institute on for an initial visit. (PX.4, p.15). Petitioner reported her left eye symptoms started two weeks ago, that her vision got progressively more limited, and that she had a loss of peripheral vision two days prior to the examination including claims that her eye was all black where she could not see. She denied flashes. (PX.4, p.17). Dr. Marruenda's Assessment revealed loss of vision after trauma to left temple with loss of consciousness six weeks ago. (PX.4, p.18).

An MRI of the brain was ordered by Dr. Marruenda and performed on March 14, 2017. (PX.4, p.29-30). The clinical indication was injury of the left optic nerve. During Petitioner's follow-up visit on March 16, 2017, Dr. Marruenda interpreted the MRI findings as negative, finding it "only shows smaller size of left optic nerve." (PX.4, p.21). During this visit, Petitioner claimed vision reduced to counting fingers at 1 foot based on a subjective field examination. (PX.4, p.20). Dr. Marruenda referred Petitioner to a neuro-ophthalmologist. (PX.4, p.21).

Petitioner presented to the University of Illinois Eye Clinic on April 6, 2017, where she reported a history of her eye swollen shut the day after her eyelid laceration repair. (PX.4, p.23). Since then, Petitioner reported severe loss of visual acuity, claiming she "barely can't see at all." (*Id.*). The diagnosis was traumatic optic neuropathy from possible hematoma. She was again referred to a neuro-ophthalmogist. (PX.4, p.25).

On May 10, 2017, Petitioner presented to neuro-ophthalmogist, Dr. Michael Rosenberg M.D., at Northwestern Medicine for an Independent Medical Examination at the request of Respondent. (RX.1). Dr. Rosenberg reviewed the initial ER records from Loretto Hospital and subsequent records, which revealed normal pupil

examinations, which he opined excluded any possibility that she had retinal or optic nerve injury at that time since any abnormality of retina or optic nerve due to injury would have immediately caused a pupil abnormality. (RX.1, p.22-23). Significant aspects of the history and examination included Petitioner immediately noted decreased vision in the left eye after the injury, but when he pointed out the benign findings at the Loretto ER to Petitioner, she volunteered that the issue developed approximately two weeks after the injury. (RX.1, p.22). During the physical examination, Petitioner stated she could not see Dr. Rosenberg's fingers three feet in front of her, but when special testing was performed (optokinetic) using a mirror, Dr. Rosenberg recorded that she had normal response indicating vision significantly better than what Petitioner claimed. (RX.1, p. 24-25). Dr. Rosenberg opined that Petitioner had an acute ischemic event involving the retinal artery of the left eye, usually due to an embolus (a clot traveling to the eye), which was due to an underlying vascular disease (arteriosclerosis). (RX.1, p.26-27). He found the diagnosis of central retinal artery occlusion was in "no way" related to the work accident that occurred in November of 2016. (RX.1, p.26). His report concluded that an embolus would not be expected to occur as a result of major head trauma let alone the trivial trauma she experienced, and that the objective findings and past medical records did not correlate with her subjective complaints. Dr. Rosenberg later testified consistent with these findings, noting that there is no article in the literature of someone developing a retinal artery occlusion from a trivial injury or even major head injury not involving the eyeball. (*Id.*). Dr. Rosenberg authored a follow-up report on September 1, 2019, where he maintained his opinions after review of additional medical evidence. (RX.1, exh.3).

On November 6, 2017, Petitioner returned to Chicago Eye Center and was seen for the first time by Dr. Francisco Martinez M.D. (PX.4, p.26). Petitioner reported she smoked 2-3 cigarettes per day for 30 years. (*Id.*). No visual complaints were elicited. No visual complaints were elicited at her follow-up visit with Dr. Martinez on March 19, 2018. (RX.5, p.5).

Petitioner's last medical visit was with Dr. Marruenda on January 24, 2019. (PX.4, p.36). Petitioner presented from follow-up from her March 16, 2017 visit with Dr. Marruenda. No visual complaints were elicited from Petitioner, and examination showed no changes. (PX.4, p.37). Dr. Marruenda diagnosed Petitioner with "late onset traumatic optic neuropathy" and opined that he did "not find any other possible etiology for this optic atrophy, only possible cause is head trauma in the weeks prior to the beginning of symptoms." (*Id.*). No intervention was required. She was to follow-up in one year.

The deposition of Dr. Francisco Marruenda M.D. was taken by the parties at Petitioner's attorney's office on August 12, 2019. (PX.5). Dr. Marruenda testified he studied medicine in Granada, Spain, with a focus in ophthalmology, and had his medical license since 1999. (PX.5, p.5). The record is silent as to any board certifications for Dr. Marruenda, after review of his testimony, his CV, and his records. Dr. Marruenda testified that based on his initial examination, his diagnosis was traumatic optic neuropathy secondary to the trauma on the left eye (PX.5, p.7), and that he could not find any other obvious reason for the damage to the optic nerve other than the trauma that she sustained. (PX.5, p.9). Dr. Marruenda testified he did not review any records of treatment prior to his initial visit with Petitioner on March 9, 2017, so he had no idea whether Petitioner was a smoker, if she had underlying vascular disease, or if she had any other comorbidities that could have caused her condition. (PX.5, p.17).

On cross-examination, Dr. Marruenda agreed that there are many ways one could damage the optic nerve, and many ways one could suffer from loss of visual acuity. (PX.5, p.11). Dr. Marruenda agreed that damage to the retina or optic nerve would have immediate findings and symptoms, and would be seen on a pupil examination. (PX.5, p.19-20). He was unaware of the normal pupil exam from November 24, 2016, and unaware Petitioner denied vision changes on November 28, 2016. (PX.5, p.20-21). He also testified and agreed on cross-examination that an embolus, or clot traveling to the eye, could cause loss of visual acuity, and that such clot could occur due to underlying vascular disease irrespective of any blunt force trauma. (PX.5, p.12).

Dr. Marruenda agreed that smoking was a risk factor an underlying vascular disease, as well as high blood pressure, high cholesterol, obesity, hereditary lines, age, and nutritional deficiencies. (PX.5, p.14). He testified that he relied wholly on the information and complaints provided to him by Petitioner, and agreed that his opinions would likely change if Petitioner's history was incorrect. (PX.5, p.18). Dr. Marruenda characterized the trauma suffered as "severe" based on his understanding that Petitioner had a loss of consciousness following the incident. (*Id.*). He referred Petitioner to a neuro-ophthalmologist since he agreed they were more specialized and experienced to deal with Petitioner's condition. (PX.5, p.21).

On October 10, 2019, the deposition of Dr. Michael Rosenberg M.D. was taken by the Parties at Northwestern Medicine's Medical School Department of Ophthalmology. (RX.1). Dr. Rosenberg testified that since 1975, he has been a board-certified ophthalmologist with additional training and a subspecialty in neuro-ophthalmology. (RX.1,p.7). In addition to treating approximately 150 patients per week (RX.1, p.10), he is also in charge of the urgent clinic at Northwestern, and is a full-time professor of Ophthalmology and Medicine at Northwestern. (RX.1, p.7-9). Dr. Rosenberg testified consistent with his reports, where he declined to endorse causation of Petitioner's left eye retinal artery occlusion as related to the November 24, 2016 incident. He testified that the initial two ER visits were reasonable, and found Petitioner reached MMI on November 28, 2016 when Petitioner denied vision changes, which eliminated the work accident as being causative. (RX.1, p.34-36). He found Petitioner required no further treatment nor work restrictions as related to the accident. (RX.1, p.35).

Petitioner testified she continued working as a Manager and lost no time from work as a result of her accident. (T.24). She testified she started experiencing "changes" following the accident where she would bend down at home and hit the table, or hit her head on the wall when turning corners to the left. (T.25). She testified she experienced headaches (T.26), and started noticing issues with her "sight" around three weeks, more or less, after the accident. (T.28). As of the day of trial, Petitioner testified she has problems carrying out her activities, and has to make more of an effort than before by putting everything onto her right side to maintain control as she cannot see out from the left side. (T.30-31). Petitioner stopped working for Respondent at or around May/June 2018, and started working at Midway Airport as a chef shortly thereafter. (T.29-30).

The Arbitrator observed Petitioner, who walked into the arbitration room wearing glasses, but immediately took them off and wore them around her neck throughout the entirety of the trial. Petitioner testified her glasses were not prescription, and that she wore them for protection. (T.30). In response to Petitioner's testimony that she had a scar on her left eyelid, the Arbitrator conducted a viewing, stating for the record that there was a "laceration wound that's more than a quarter of an inch long, and it's slightly depressed. And at the widest point, I would say it's an eighth of an inch long. Maybe it's three-eighths of an inch long by an eighth of an inch wide at it's widest point...right on the corner of the eyelid on the lateral side of the left eyelid." No photographs of the scar are included in the record or recorded in the medical evidence.

CONCLUSIONS OF LAW

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

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d).

To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)),

including that there is some causal relationship between his employment and his injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)

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

Regarding Issue "F" Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds:

The Arbitrator finds the opinions of the board certified neuro-ophthalmologist, Dr. Michael Rosenberg, persuasive and finds Petitioner failed to prove that her left eye optic neuropathy and alleged loss of visual acuity is causally related to the November 24, 2016 work accident. Dr. Rosenberg is the only physician in the record who specializes in neuro-ophthalmology. His CV is very impressive. Even treating physician and ophthalmologist, Dr. Francisco Marruenda, referred Petitioner to a neuro-ophthalmologist and testified this was because they are more specialized and experienced to deal with Petitioner's type of condition. (PX.5, p.21). Had Petitioner sustained any trauma to her retina or optic nerve as a result of the November 24, 2016 trauma and laceration, the signs of injury would be immediate. They were not, as evidenced both by the Loretto medical records and Petitioner's testimony. Petitioner denied vision changes at her initial and follow-up ER visits on November 24, 2016 and November 28, 2016, and her pupil examinations were normal on those dates, eliminating the work accident as causative of any eye pathology. Both Dr. Rosenberg and Dr. Marruenda agreed that trauma causing vision changes would be confirmed immediately by observation and abnormality within the pupil. Dr. Kinnas also recorded in his records that he failed to associate Petitioner's condition to the November 2016 incident. Based on the entire record, it is reasonable to conclude that Petitioner's condition is related to an underlying and unrelated vascular condition, especially given that Petitioner was diagnosed with smoking dependence and has been smoking 2-3 cigarettes per day for 30 years.

The Arbitrator finds the causation opinions of Dr. Marruenda to be not persuasive. The record is silent as to his board certification status, he testified he relied solely on the information provided by Petitioner, failed to review any records of treatment prior to his March 9, 2017 initial visit, including the Loretto ER records which noted no vision changes and contained a benign left eye examination. Additionally, Dr. Rosenberg testified that the diagnosis of "late onset traumatic optic neuropathy" is unknown in the literature.

As such, the Arbitrator concludes that Petitioner sustained a minor superficial laceration to her left upper eyelid on November 24, 2016, that healed and required no further treatment after her November 28, 2016 wound-check visit, which is when she reached MMI. The injury resulted in the scar described by the Arbitrator and did not cause any left eye pathology.

Regarding 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:

In light of the Arbitrator's finding above on the issue of causation, the Arbitrator finds the initial two ER visits at Loretto Hospital on November 24, 2016 and November 28, 2016 to be reasonable and causally related to the accident. Petitioner's claim for the bill from Union Health services is denied.

Respondent has otherwise paid all appropriate charges as evidenced by Respondent's Exhibit 2.

Regarding Issue "L" What is the nature and extent of Petitioner's injuries?, the Arbitrator finds:

In light of the Arbitrator's findings regarding the issue of causation, Petitioner suffered a minor superficial laceration to the left upper eyelid. The Arbitrator did have the opportunity to observe and describe the scar that Petitioner sustained and noted that she had a "laceration wound that's more than a quarter of an inch long, and it's slightly depressed. And at the widest point, I would say it's an eighth of an inch long. Maybe it's three-eighths of an inch long by an eighth of an inch wide at its widest point...right on the corner of the eyelid on the lateral side of the left eyelid."

Accordingly, Petitioner is entitled to receive from Respondent the sum of $339.36 per week for a period of 5 weeks, as provided in Paragraph (c) of Section 8 of the Act.

Regarding Issue "N" Is Respondent due any credit, the Arbitrator finds:

The Parties stipulated that Respondent paid $2,153.96 in medical benefits, per RX 2 and the Arbitrator finds that Respondent is entitled to a credit for same.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC009080
Case Name	DURU, VERONICA v. STATE OF ILLINOIS READ MENTAL HEALTH CENTER
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0196
Number of Pages of Decision	13
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Karolina Zielinska
Respondent Attorney	Drew Dierkes

DATE FILED: 5/26/2022

/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

Veronica Duru,

Petitioner,

vs. NO. 20WC 009080

State of Illinois (Read Mental Health Center),

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 30, 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.

Pursuant to §19(f)(1) of the Act, this Decision and Opinion on Review of a claim against the State of Illinois is not subject to judicial review.

May 26, 2022

SJM/sj
o-3/30/2022
44

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC009080
Case Name	DURU, VERONICA v. STATE OF ILLINOIS (READ MENTAL HEALTH CENTER)
Consolidated Cases	No Consolidated Cases
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Kurt Carlson, Arbitrator

Petitioner Attorney	Karolina Zielinska
Respondent Attorney	Drew Dierkes

DATE FILED: 9/30/2021

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 28, 2021 0.05%

/s/Kurt Carlson, Arbitrator
Signature

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

September 30, 2021

/s/ Brendan O'Rourke
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

Veronica Duru
Employee/Petitioner

Case # **20** WC **09080**

v.

State of Illinois (Read Mental Health Center)
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 **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **07-19-21**. 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 **3/22/20**, 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 $ **113,400.00**; the average weekly wage was $**2,180.77**.

On the date of accident, Petitioner was **54** 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 $**0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**1,453.85** / week for **11-6/7** weeks, commencing **3/31/20** through **6/21/20** as provided in Section 8(b) of the Act.

Respondent shall pay directly to Petitioner reasonable and necessary medical services of **$14,214.33**, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner the sum of $**836.69**/week for **27.175 weeks**, as provided in Section 8(e) of the Act, because the injuries sustained caused a 12.5% loss of use of the right foot, 1.5% loss of use of the right leg, and 1.5% loss of use of the left hand.

Respondent shall pay Petitioner compensation that has accrued from 3/22/20 through 7/19/21, 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.

Kurt A. Carlson
arbitrator

SEPTEMBER 30, 2021

State of Illinois)
)
County of Cook)

BEFORE THE
ILLINOIS WORKERS' COMPENSATION COMMISSION

Veronica Duru **Petitioner**,	)	
v.	)	**20 WC 009080**
State of Illinois (Read Mental Health Center) **Respondent.**	)	

FINDINGS OF FACT

At the time of the injury on March 22, 2020, Veronica Duru ("Petitioner") was a 54-year-old employee of the State of Illinois – Read Mental Health Center ("Respondent"). She had worked for Respondent since November 16, 2016, as a Registered Nurse with the title, RN-1. Petitioner's job duties as an RN-1 consisted of treating patients, administering medication, lifting patients, and constantly walking from unit to unit throughout the treatment facility approximately every 15 minutes. Petitioner was on her feet and walking approximately 75% of her shifts. Petitioner's shifts usually began at 10:45 PM. However, on March 22, 2020, Petitioner's Supervisor, Rosaline Oluyede, called Petitioner and instructed her to begin her shift early at 9:00 PM in order to take the temperatures of co-workers entering Respondent's front lobby. Petitioner was asked to do this because COVID-19 had just started around this time in March of 2020.

Petitioner testified that Respondent's main door would close at 8:00 PM on a daily basis. Petitioner and her co-workers would have to use the side door entrance after 8:00 PM. The side door entrance is for employees only and can only be accessed with an employee key.

Accident

On the date of the injury, March 22, 2020, Petitioner testified it had been snowing prior to her arrival at Respondent's facility. Neither Respondent's parking lot nor the walkways leading into Respondent's facility were plowed or cleared of snow. Petitioner walked through the parking lot and used her employee key to enter the employee-only side door of Respondent's facility. As she entered, Petitioner testified the bottom of her shoes were covered in snow and she slipped and fell on the tile. As she was falling, Petitioner tried to brace herself by outstretching her arm. Petitioner testified she felt immediate pain in her wrist, knee, and ankle as she hit the floor. Specifically, Petitioner testified her ankle swelled up immediately. Petitioner testified both the security guard and her supervisor, Rosaline Oluyede, assisted her following the injury and filled out an incident report. Petitioner was referred to occupational health for medical care, however, the provider was not open until the following morning.

Medical Treatment

Physicians Immediate Care

Petitioner presented to Physicians Immediate Care on March 23, 2020 (Px 1). She complained of sharp, constant pain in the right ankle since March 22, 2020 (Px 1, p. 3). Petitioner reported she was walking into the building from outside to start her shift when she slipped and fell and injured her right ankle (Px 1, p. 3). She underwent x-rays for the right ankle which revealed an ankle fracture (Px 1, p. 18). She was diagnosed with a non-displaced fracture of lateral malleolus of right fibula (Px 1, p. 18). Petitioner was applied for a cast and instructed to use either crutches or a knee scooter for 4-6 weeks because she needed to be immobilized (Px 1, p. 18).

Associated Medical Centers of Illinois

Petitioner presented to Associated Medical Centers of Illinois (hereinafter "AMCI") on March 31, 2020 (Px 2). She complained of right knee, right ankle, and left wrist pain (Px 2, p. 18). She reported it was snowing and she walked into her work building and slipped on the tile floor (Px 2 p. 18). On a 10 point scale, Petitioner reported she had 5/10 right knee pain, 9/10 right ankle pain, and 4/10 left wrist pain (Px 2, p. 18). She reported her work duties required her to walk, bend, stand, and lift patients, but she was unable to do so because of her ankle pain (Px 2, p. 18). Petitioner was provided an "off work" note pending re-evaluation (Px 2, p. 12).

Petitioner returned to AMCI on April 2, 2020, where she was evaluated by Dr. Foreman (Px 2, p. 20). Her pain levels remained the same from her previous appointment (Px 2, p. 20). Dr. Foreman ordered x-rays of Petitioner's left wrist and right knee and referred her to a foot specialist for the right ankle fracture (Px 2, p. 21). Petitioner was also prescribed physical therapy and medication consisting of Naproxen and Lidopro (Px 2, p. 21). Petitioner was provided an "off work" note until April 30, 2020 (Px 2, p. 21).

Petitioner underwent physical therapy via Telehealth because of Covid-19 on April 6, 2020 (Px 2, p. 23). Petitioner underwent physical therapy via telehealth because of Covid-19 on April 10, 2020 (Px 2, p. 24). Petitioner underwent physical therapy, in person, from May 13, 2020, through June 15, 2020 (Px 2, p. 2-11).

Advanced Foot and Ankle Centers of Illinois

Petitioner presented to Dr. Anderson at Advanced Foot and Ankle Centers of Illinois on April 8, 2020 (Px 3). She complained of right ankle pain (Px 3, p. 9). She reported that she was walking into her work building and she slipped and fell as she stepped off the mat onto the tile floor (Px 3, p. 9). Dr. Anderson removed Petitioner's cast and took x-rays of her ankle (Px 3, p. 10). The x-rays showed a <u>nondisplaced</u> fracture of the distal fibula (Px 3, p. 10). Petitioner was applied a soft cast, recommended to continue immobilization, and was placed in a high ankle boot (Px 3, p. 10). Petitioner was to remain "off work" for four weeks (Px 3, p. 10).

Petitioner returned to Dr. Anderson on May 6, 2020 (Px 3, p. 7). Dr. Anderson recommended Petitioner complete physical therapy, and transition from wearing the high ankle boot and from

using the knee scooter (Px 3, p. 8). Dr. Anderson dispensed an ankle brace (Px 3, p. 8). Petitioner was to remain "off work" for another four (4) weeks (Px 3, p. 8).

Petitioner returned to Dr. Anderson on June 3, 2020 (Px 3, p. 3). Petitioner reported she was having pain at the lateral ankle with occasional shooting pain (Px 3, p. 4). Petitioner indicated her pain worsened with prolonged standing or walking (Px 3, p. 4). Dr. Anderson recommended Petitioner continue physical therapy three (3) times per week (Px 3, p. 5). Dr. Anderson released Petitioner to full duty work beginning on June 22, 2020 (Px 3, p. 5).

Petitioner returned to Dr. Anderson on July 1, 2020 (Px 3, p. 2). Petitioner reported she returned to work and was able to work eight (8) hour days, but her ankle and swelling worsens when she has to work sixteen (16) hour days (Px 3, p. 2). Dr. Anderson recommended Petitioner continue using a bone stimulator as well as taking Naproxen and Lidopro on an as needed basis (Px 3, p.3). Petitioner was discharged from care and released back to work without restrictions (Px 3, p.3).

Petitioner's Prior Medical History

Petitioner testified that she had never injured nor received treatment for her right ankle prior to March 22, 2020. Petitioner testified she had never injured nor received treatment for her right knee prior to March 22, 2020. Petitioner testified she had never injured nor received treatment for her left wrist prior to March 22, 2020.

Petitioner's Current Condition

Petitioner testified she currently takes Tylenol for her continuous and ongoing ankle pain. She also testified she continues to actively wear an ankle brace for her right ankle. Petitioner testified her ongoing ankle pain has made it difficult for her to ambulate at work and that she has to call off work two to three times per month. She also testified she is unable to work some mandated sixteen (16) hour shifts because of her continuous pain. Petitioner testified she can no longer participate in running because of her ongoing right ankle pain.

Petitioner testified she has not had any other accidents nor has she injured her right ankle again at any point after March 22, 2020.

ANALYSIS

With respect to issue "C," whether an accident occurred that arose out of an in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

After hearing the testimony of Petitioner and reviewing the exhibits submitted as well as the supporting case law, the Arbitrator finds that an accident did occur that arose out of and in the course of Petitioner's employment by Respondent.

To be compensable under the Act, an injury must "arise out of" and "in the course of" the claimant's employment. *820 ILCS 305/2* (2002). The phrase "in the course of" refers to the time, place and circumstances under which the accident occurred. *Caterpillar Tractor Co. v. Industrial*

Comm'n, 129 Ill. 2d 52, 57 (1989). Accidental injuries sustained on an employer's premises within a reasonable time before and after work are generally deemed to arise in the course of one's employment. *Id*. Due to the fact that employment contemplates an employee's entry upon and departure from the employer's premises as much as it contemplates his working there, employment is not limited to the exact moment when an employee begins or ceases his duties, but necessarily includes a reasonable time before commencing and after concluding actual employment, especially if the employee is following the customary route to and from the premesis. *Wabash Railway Co. v. Industrial Com.*, 294 Ill. 119; *Cudahy Packing Co. v. Parramore*, 263 U.S. 418.

An injury is said to "arise out of" one's employment if its origin is in some risk connected with or incidental to the employment so that there is a causal connection between the employment and the accident injury. *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124848. 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. *Id*. at 36. To determine whether a claimant's injury arose out of his or her employment, we must first categorize the risk to which the employee was exposed. *Id*. Illinois courts recognize three categories of risk: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks. *Id*. at 38.

Employment risks include the obvious kinds of industrial injuries and occupational diseases and are universally compensated. *Id*. at 40. 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." *Id*. Injuries resulting from a risk distinctly associated with employment are deemed to arise out of one's employment and are compensable under the Act. *Id*.

Petitioner was injured due to an employment-related risk because she fell on slippery ground at her work site. Petitioner gave undisputed testimony that she arrived at Respondent's facility at approximately 9:00 PM at the direction of her supervisor, Rosaline Oluyede. Petitioner testified it had been snowing the night of her shift and neither Respondent's parking lot nor the walkways leading into Respondent's facility were plowed or cleared of snow. Petitioner entered Respondent's facility through an employee-only entrance using a key to unlock the door. Upon entering Respondent's facility, Petitioner stepped onto a mat, and then onto a tile floor. As she stepped onto the tile with her snow-covered shoes, she slipped and fell on the slippery tile floor, fracturing her right ankle and injuring her right knee and left wrist.

Relying on *Timins v. Synetro Group*, 2008 Ill. Wrk. Comp. LEXIS 851, 8 IWCC 826, Petitioner's injury is likewise compensable even if a neutral risk analysis is required.

In *Timins*, claimant had to work later that her regular hours because she was helping her boss reprogram the phone system for one of Respondent's tenants. 2008 Ill. Wrk. Comp. LEXIS 851, 8 IWCC 826. Claimant left the office at about 7:00 PM, took the elevator down to the lobby with the intention of leaving the building, took a step or two after exiting the elevator and then felt her feet go out from underneath her. *Id.* at 7. She went up in the air and landed on the ground, injuring her shoulders and neck. *Id.* at 2-3. After claimant fell, she noticed that the back of her pants and shirt were wet. The floor of the lobby had just been mopped. *Id.*

Claimaint testified the marble lobby is a common area that you have to use if you use the elevators. *Id.* at 4. All visitors and tenants use the elevators claimant was using when she slipped and fell. *Id.* Claimant testified visitors were required to sign in after hours, and the front doors were sometimes locked. *Id.* A security guard was present in the lobby at night. *Id.*

Based on the above facts, the Commission in *Timins* held that the hazard to which claimant was exposed (i.e., freshly mopped marble floors) was not unique, but claimant was at an increased risk for encountering this hazard due to the requirements of her job and the timing of the maintenance activities. *Id*. at 14. Members of the general public could have been present at the same location but would have had to get past security and the outside doors, which were sometimes locked. *Id.* Since the accident occurred around 7:00 PM, the Commission found it even less likely that the public would have been seeking access to the elevator area. *Id.*

Similar to *Timins*, Petitioner was at an increased risk for encountering a wet tile floor in the entryway of Respondent's facility due to the requirements of her job and the fact that it snowed outside and the parking lot was not plowed. Because it was 9:00 PM when Petitioner was called into work, the main doors were locked and visiting hours were closed. Members of the general public would not have been present at the location where Petitioner fell because she had to use her employee key to enter through an employee-only entrance to enter the building to start her shift. This specific entrance had a tile floor which was slippery when met with the snow on Petitioner's shoe. This is clearly an increased risk that members of the general public would not face. As such, Petitioner's accident arises out of and in the course of employment.

For the above reasons, the Arbitrator finds Petitioner has met her burden proving that an accident occurred that arose out of and in the course of her employer with Respondent.

With respect to issue "F," whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

After hearing the testimony of Petitioner and reviewing the exhibits submitted, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injuries sustained on March 22, 2020.

Causation in a workers' compensation case may be established by a chain of events showing prior good health, an accident and a subsequent injury. *Gano Electric Contracting v. Industrial Comm'n*, 260 Ill. App. 3d 92, 96-97, 631 N.E.2d 724 (1994); *see also Darling v. Industrial Comm'n*, 176 Ill. App. 3d 186, 193, 530 N.E.2d 1135 (1988).

In this case, the evidence shows Petitioner was in good health and not undergoing any active treatment for her right ankle, right knee, or left wrist prior to her work accident on March 22, 2020. The Arbitrator personally observed Petitioner testify and found her to be credible. The medical evidence documents a history of consistent reporting regarding Petitioner's accident and symptoms. Petitioner was diagnosed with a right lower extremity fracture, right knee/leg sprain, and left wrist sprain by Dr. Foreman, and a nondisplaced fracture of lateral malleolus of right fibula by Dr. Anderson. (Px 2, p. 20; Px 3, p. 10). Both physicians opined that Petitioner's injuries were

related to her slip and fall at work. *Id*. Respondent did not offer any medical opinions to dispute the opinions of Petitioner's treating doctors.

In conclusion, the Arbitrator finds Petitioner met her burden of proof by a preponderance of the evidence that her condition of ill-being relating to her right ankle, right knee, and left wrist is causally related to her March 22, 2020 work accident.

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

Petitioner treated with the following providers following her March 22, 2020 accident: (1) Physicians Immediate Care, (2) Associated Medical Centers of Illinois, (3) EQMD, and (4) Advanced Foot and Ankle Centers of Illinois.

Outstanding balances remain for treatment at Physicians Immediate Care totaling $1,588.84 (Px 4, p. 2), Advanced Foot and Ankle Centers of Illinois totaling $2,345.43 (Px 4, p. 4), Associated Medical Centers of Illinois totaling $9,605.00 (Px 4, p. 5-9), and EQMD totaling $675.06 (Px 4, p. 10).

Due to the Arbitrator's findings above regarding accident and causation, and the fact that Respondent did not offer any evidence to dispute the reasonableness and necessity of Petitioner's medical care, the Arbitrator finds that Petitioner's medical care was reasonable and necessary and finds Respondent liable for all of Petitioner's medical care and expenses as set forth above and contained in Px 4 totaling $14,214.33. Respondent shall pay all unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner. The Arbitrator awards the outstanding medical bills outlined above to be paid directly to Petitioner pursuant to the Illinois medical fee schedule.

With respect to issue "K," whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

Petitioner alleges 11-6/7 weeks of temporary total disability ("TTD") from March 31, 2020 through June 21, 2020. The medical records show Petitioner was placed on "off work" status by Mehal Patel, D.C. as of March 31, 2020 pending re-evaluation on April 2, 2020. Petitioner was re-evaluated by Michael Foreman, M.D. on April 2, 2020 and remained "off work." Petitioner was evaluated by Joel Anderson, DPM on April 8, 2020 and remained "off work." Petitioner was re-evaluated by Joel Anderson, DPM on both May 14, 2020 and June 3, 2020 and was to remain "off work." Petitioner testified she was released and returned to work on June 22, 2020. The medical records support this.

Based on the Arbitrator's prior findings in this matter, the medical records and work status reports, and the preponderance of the evidence, the Arbitrator finds Petitioner was temporarily totally disabled from March 31, 2020 through June 21, 2020 for a period of 11-6/7 weeks.

With respect to issue "L," as to the nature and extend of Petitioner's injuries, the Arbitrator finds as follows:

Pursuant to Section 8.1b(b) of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be determined using the following five enumerated criteria, with no single factor being the sole determinant of disability: (i) the reported level of impairment pursuant to subsection (a) [AMA "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records.

First, the Arbitrator notes that an AMA impairment rating was not performed in this case. As such, the Arbitrator turns to the other four factors of permanent partial disability.

Petitioner was 54 years old at the time of the incident. The Arbitrator notes Petitioner will have to live with her disability in her chosen career as a Registered Nurse for at least another ten (10) years. At trial, Petitioner testified that she has ongoing right ankle pain and swelling. Her job requires her to be on her feet approximately 75% of her shift for eight (8) hours. Sometimes Petitioner is mandated to work sixteen (16) hour shifts, but she is unable to do so because of her ongoing right ankle pain. Petitioner also testified she has to call off work two to three times per month because of her ongoing ankle pain. Petitioner takes Tylenol and continues to actively wear her ankle brace. Nevertheless, the Arbitrator finds it significant that while Petitioner has returned to her pre-injury employment with no restrictions.

The Arbitrator also relies on the medical records in this case which indicate Petitioner sustained a non-displaced fracture of lateral malleolus of right fibula (Px 1, p. 18; Px 3, p. 10). On a 10-point scale, Petitioner also suffered 5/10 knee pain and 4/10 left wrist pain (Px 2, p. 18). Petitioner was prescribed a high ankle boot followed by physical therapy (Px 3, p. 10; Px 2, p. 2-11). The fact Petitioner is currently only 56 years old, has a work expectancy of at least ten (10) more years, is employed in an industry that requires her to be on her feet all day is a significant factor in the Arbitrator's decision as to PPD.

Based on the above, the Arbitrator finds that Respondent shall pay Petitioner permanent partial disability benefits of <u>$836.69/week</u> for <u>27.175 weeks</u>, because the injuries sustained caused 12.5% loss of use of the right foot (33.4 weeks), 1.5% loss of use of the right leg (5.375 weeks), and 1.5% loss of use of the left hand (5.125 weeks), as provided in Section 8(e) of the Act.

____

Kurt Carlson, Arbitrator
Illinois Workers' Compensation Commission

_____/_____/_____

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	09WC040502
Case Name	ROSZAK, ANTHONY v. ILLINOIS DEPARTMENT OF TRANSPORTATION
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0197
Number of Pages of Decision	17
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Steven Scarlati
Respondent Attorney	Sidney Gui

DATE FILED: 5/26/2022

/s/Maria Portela, 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 up	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANTHONY ROSZAK,

Petitioner,

vs. NO: 09 WC 40502

IL DEPT OF TRANSPORTATION,

Respondent.

DECISION AND OPINION ON REVIEW

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

We reverse the Arbitrator's award of permanent partial disability benefits under §8(d)2 of the Act and find that Petitioner has proven he is medically permanently and totally disabled under §8(f) of the Act.

Although the Arbitrator went to great lengths to discount the opinion of Dr. Schultz, he made no findings to explain why he did not rely on Dr. McNally's November 8, 2017 work note that stated Petitioner was "permanently and totally disabled." We point out that many of Dr. Schultz's records indicate "Work Status: N/A" because Petitioner had already been "Declared Disabled by Dr. [McNally]."

The Arbitrator gave Dr. Schultz's opinion "little weight in accord with §16 of the Act" because it was in the form of a narrative report. *Dec. 11*. The mere fact that Dr. Schultz's July 28, 2021 letter was addressed to Petitioner's attorney does not, by itself, mean that the opinion contained therein is any less credible. There is nothing in §16 of the Act to indicate that an opinion given in anticipation of litigation must be discounted or is not persuasive. It only states

that these types of reports are not admissible under the relaxed foundation and hearsay requirements of §16. Respondent's attorney chose to allow admission of this report without objection. *T.83*. Once this report was admitted, there was no reason to give it "little weight in accord with §16 of the Act." Instead, it should have been weighed along with all other admissible evidence. Further, Dr. Schultz was Petitioner's treating pain-management physician who was very familiar with Petitioner's condition of ill-being, and whose opinion we find persuasive in this case.

The Arbitrator also wrote, "The FCE [Functional Capacity Evaluation] found Petitioner could perform work at a light-medium physical demand level. Dr. Levin opined that Petitioner was not capable of returning to his prior job but did not find Petitioner was incapable of performing any sort of work. There was no evidence of Petitioner's good faith job search for employment within the light-medium physical demand capability established by the FCE." *Dec. 10-11*. However, we find the Arbitrator's reliance on the FCE results and Dr. Levin's §12 opinion to be misplaced.

The FCE was performed on January 21, 2016, which was ten months prior to Petitioner's final C3-4 discectomy and fusion surgery on November 23, 2016. As such, those results bear no relevance on what Petitioner's physical abilities were after that surgery. Dr. Levin examined Petitioner one time prior to the FCE and one time after, but never examined Petitioner since his last cervical fusion. At his last §12 examination on September 6, 2016, Dr. Levin agreed with the recommendation for C3-4 discectomy and fusion but wrote, "Even with surgical intervention, it will not change his work status and he will not be going back to work at his previous employment prior to July 2009." We disagree with the Arbitrator's finding that Petitioner should have engaged in a job search based on an outdated FCE and a medical opinion that was given prior to the final surgery and five years prior to the hearing.

Even Dr. Erb, Respondent's §12 examiner in Florida, wrote on March 11, 2019, "It is not expected that the patient will make any foreseeable improvement in his status. … I would not recommend a [FCE] on this patient. It is not going to put him back to work. He has been out of work for 10 years and has had three surgeries on his spine with ongoing pain. My prognosis is guarded." *Px6*. Again, since the FCE was outdated and performed prior to Petitioner's final surgery, we disagree with the Arbitrator's finding that "Dr. Erb did not take into account the FCE findings and is less persuasive for that." *Dec. 11*.

We also note that it was entirely within Respondent's ability to provide Dr. Erb with the outdated FCE that it now claims was important to providing a valid opinion. However, Dr. Erb himself opined that a new FCE would not be helpful in Petitioner's situation and "I do not foresee him going back to work in any form in any capacity." *Px6.*

Regarding Dr. Zelby's opinions, we agree with the Arbitrator's finding that his "bias is palpable" *(Dec. 10)* in this case and we give them no weight.

After a thorough review of the evidence, we find that Petitioner has proven he is entitled to a medical permanent total disability award under §8(f) of the Act based on the persuasive opinions of Dr. McNally, Dr. Schultz and Dr. Erb. Therefore, he was not required to perform a

job search under an "odd-lot" claim for benefits. We hereby modify the decision and award benefits under §8(f) of the Act commencing August 27, 2021.

All else, not inconsistent with this Decision, is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay the petitioner the sum of $805.14 per week for life, commencing August 27, 2021, as provided in Section 8(f) of the Act, because the injury caused the permanent and total disability of the petitioner. Commencing on the second July 15th after the entry of this award, the petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

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

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

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.

May 26, 2022

SE/
O: 4/19/22
49

/s/ *Maria E. Portela*

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	09WC040502
Case Name	ROSZAK, ANTHONY v. ILLINOIS DEPT OF TRANSPORTATION
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Steven Fruth, Arbitrator

Petitioner Attorney	Steven Scarlati
Respondent Attorney	Sidney Gui

DATE FILED: 11/23/2021

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 23, 2021 0.07%

/s/Steven Fruth, Arbitrator
Signature

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

November 23, 2021

/s/ Brendon O'Rourke
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

Anthony Roszak
Employee/Petitioner

Case # **09 WC 040502**

v.

Consolidated cases: ______

Illinois Dept. 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 **August 26, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **July 30, 2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$ 62,800.92,** the average weekly wage was **$1,207.71**.

On the date of accident, Petitioner was **44** years of age, **married** with **1** dependent child.

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

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

Respondent shall be given a credit of **$284,445.23** for TTD, $**0** for TPD, $**227,857.22** for maintenance, and $**0** for other benefits, for a total credit of $**512,302.45**.

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

ORDER

The parties agree and the Arbitrator so finds that Respondent **has paid** all appropriate charges for all reasonable and necessary medical services to the knowledge of both parties and additionally finds that Respondent **shall** be liable for all reasonable and related **unpaid medical** involving dates of service **up to and including August 26, 2021**, subject to fee schedule, should any further such charges be deemed still outstanding.

The parties agree and the Arbitrator so finds that Petitioner was entitled to **TTD** from July 31, 2009 to November 8, 2017, representing **431.714 weeks** and equaling **$347,590.21** (431.714 weeks x $805.14 TTD rate), and **Maintenance** from November 9, 2017 to August 26, 2021, representing **198 weeks** and equaling **$159,417.72** (198 weeks x $805.14 TTD rate). Petitioner is therefore awarded **$507,007.93** total in TTD/Maintenance benefits, for which Respondent is liable.

The Arbitrator finds that Petitioner suffered permanent partial disability of **66 & 2/3%** loss of a person-as-a-whole pursuant to §8(d)(2) of the Act and equaling **$241,543.33** (333.333 weeks x $724.63 PPD rate), which is hereby awarded.

The parties agree and the Arbitrator so finds that Respondent is entitled to a credit of **$284,445.23** for TTD, $**0** for TPD, $**227,857.22** for maintenance, and $**0** for other benefits, for a total credit due to Respondent in the amount of $**512,302.45**.

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.

NOVEMBER 23, 2021

Signature of Arbitrator

Anthony Roszak v. Illinois Department of Transportation
09 WC 40502

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The only disputed issue was: ***L:*** What is the nature and extent of the injury?

STATEMENT OF FACTS

On July 30, 2009 Petitioner Anthony Roszak was employed by Respondent Illinois Department of Transportation as a heavy equipment operator. He had been so employed for about five year before his accident. His job duties included operating and maintaining various types of heavy equipment, which regularly required lifting 40 - 80 pounds.

On July 30, 2009 Petitioner was riding in the operating cab of a long linear lane liner (truck), which was traveling approximately 40 – 50 miles per hour. The main body of the vehicle passed under an overhanging tree limb. However, the backend operating cab where Petitioner was located was taller than the main body cab. The main body cab cleared the tree limb, but the operating cab was crushed when it struck the tree limb, nearly tearing the cab completely off the back of the truck.

Petitioner was crushed inside the cab. He was twisted and tangled in hydraulic, paint, and electrical lines. He testified he was in and out of consciousness. He was told later that it took about four hours to extricate him from the crushed cab. Petitioner was then transported to St. Francis Hospital by ambulance. Petitioner presented to St. Francis Hospital Emergency Department with complaints of pain in his head, neck, right shoulder, and left leg and knee. He received emergent medical assessment and care, including radiographic imaging, but was not admitted to the hospital. He was discharged with diagnoses of a head injury, concussion, open wound of the scalp, abrasions and contusions, cervicalgia, shoulder joint pain, and left leg joint pain. He was authorized off work and advised to follow-up care.

Petitioner treated with his primary care physician, Dr. Cynthia Palmisano. In August 2009 he underwent MRIs of his right shoulder, left knee, lumbar spine, and brain. He was continued off work and referred to Dr. Merrell Reiss of Suburban Neurologists, S.C., and Dr. Gregory A. Nelson of Suburban Associates in Ophthalmology for consultations regarding his head injury.

Petitioner consulted orthopedic specialist Dr. Howard Freedberg of Suburban Orthopaedics for treatment for his headaches, neck pain, right shoulder pain, low

backpain, and left knee pain. Dr. Freedberg continued to keep Petitioner off work and referred him to physical therapy and a pain management specialist. Petitioner had multiple rounds of physical therapy and a series of epidural steroid and branch block injections in his shoulder, neck, and lower back.

Dr. Freedberg referred Petitioner to Dr. Thomas McNally for a surgical evaluation. Additional diagnostic testing including MRIs and EMG/NCVs was performed. Petitioner remained off work, and after failing conservative treatment underwent a right L4-5 laminotomy discectomy by Dr. McNally at Alexian Brothers Medical Center May 19, 2010 (PX #2). Following this surgery, he underwent another series of lumbar epidural and medial branch injections at Advanced Pain Centers on October 13 and November 29, 2010, and on January 6, 2011.

Petitioner was presenting with C8 left-sided paresthesias and had cervical discectomies and fusions at C5-6 and C6-7 by Dr. McNally at Alexian Brothers Medical Center on May 2, 2012 (PX #2).

On referral from Dr. McNally, Petitioner came under the care of Dr. Dmitry Novoseletsky at Suburban Orthopaedics and underwent a sacroiliac injection on June 24, 2013.

Without relief from further conservative treatment, Petitioner underwent a second lumbar spine surgery, a lumbar decompression and fusion at L4-5 by Dr. McNally at Alexian Brothers Medical Center on April 14, 2014 (PX #1c).

Petitioner continued to follow up with Drs. McNally and Novoseletsky at Suburban Orthopaedics. Dr. Novoseletsky performed sacroiliac injections on August 24, 2014, and sacroiliac branch blocks on November 4, 2014.

On January 20, 2015 Petitioner underwent a §12 IME with Respondent's physician, orthopedist Dr. Mark Levin (RX #2). Dr. Levine noted Petitioner's medical history, particularly a lumbar fusion by Dr. Thomas McNally, as well as radiofrequency ablations six months prior to the IME. Dr. Levin also noted Petitioner's pain management by Dr. Dmitry Novoseletsky. He also reviewed Petitioner's records from St. Francis Hospital, Dr. Cynthia Palmisano, Suburban Ophthalmology, Suburban Neurologist, Dr. Howard Freedberg, Dr. Olga Brasil, Alexian Brothers Hospital, Dr. Eugene Lipov, Dr. Rozman EMG, Dr. Lopez EMG, and multiple X-rays, CTs, and MRIs. He reviewed a job description for a highway maintainer.

Dr. Levin opined that Petitioner's medical conditions and complaints were causally related to the work injury and that the treatment was reasonable and necessary. Dr. Levin further opined that Petitioner was not at MMI and was incapable of returning to work as a highway maintainer.

On January 21, 2015 Dr. Novoseletsky performed sacral lateral branch blocks on the left at L5, S1, S2, and S3.

On January 12, 2016 Petitioner underwent a Functional Capacity Evaluation at Suburban Physical Therapy (PX #1b). The FCE was noted as valid. The FCE placed him the at the light-medium physical demand level. Petitioner's job was noted as Highway Maintenance Heavy Equipment Operator, which was a medium physical demand level. Petitioner testified that he was bedridden for three days following the FCE.

Dr. Levin performed another IME on September 6, 2016. The doctor reviewed additional medical records of Petitioner noting he had been recently recommended for fusion at C2-3. Dr. Levin noted Petitioner's current symptoms appeared to be related to disc pathology at C3-4, which he noted was likely related to the previous fusion at C5, C6, and C7 due to increased stress which led to further degeneration. He opined that discectomy and fusion at C3-4 was appropriate. He further opined that Petitioner was not yet at MMI, which should be realized 6 to 12 months postoperatively.

Finally, Dr. Levin noted that Petitioner's work status was unchanged and that he would not be able to return to work at his previous employment.

On November 23, 2016 Petitioner underwent his second cervical fusion at C3-C4 by Dr. McNally at Alexian Brothers Medical Center. Thereafter, Petitioner underwent another long course of therapy and follow up care, including intervention for pain management with Dr. Novoseletsky (PX #1c).

Dr. McNally opined that Petitioner was at MMI with permanent restrictions, noting Petitioner was permanently and totally disabled, and transferred his care to Dr. Novoseletsky for ongoing pain management. He further opined that Petitioner's pre-existing medical conditions had been aggravated and exacerbated by his work accident.

Petitioner relocated to Florida, and his care was transferred to the pain management specialists at Florida Pain & Rehab. In early 2018 Petitioner relocated again within the state of Florida, and his care was transferred to Dr. Schultz at Rehab and Pain Management.

On March 11, 2019 a third §12 IME was performed by orthopedic surgeon Dr. Donald Erb in Sarasota, Florida (PX #6). In addition to conducting a clinical examination Dr. Erb reviewed Petitioner's records by Dr. Neil Schultz, The Villages Regional Hospital, Dr. Cesar Uribe, Suburban Orthopaedics, Alexian Brothers Hospital, Dr. Alfredo Lopez, Dr. Thomas McNally, Dr. Olga Brusil, operative report, and MRIs of the knee, right shoulder, brain, and lumbar spine. Dr. Erb noted Petitioner's long history of high-dose opioids, although he was currently on tramadol, as well as cervical and lumbar fusions.

Dr. Erb's impressions included 1) Work Comp injury on 7/30/09; 2) anterior cervical discectomy and fusion at C5, C6, and C7; 3) recommendation for C3-4 anterior cervical discectomy and fusion on 11/23/16; 4) cervical neck pain and arm pain; 5) lumbar spinal pain with leg pain the; 6) diabetes mellitus; and 7) smoker.

Dr. Erb opined that Petitioner had reached MMI since his cervical fusion at C34 on November 23, 2016. He did not recommend an FCE as "[I]t was not going to put him will back to work." Dr. Erb did not foresee that Petitioner, due to "three" [*sic*] spinal surgeries, that Petitioner could go back to work "in any form in any capacity," including as a heavy machine operator.

Respondent engaged neurosurgeon Dr. Andrew Zelby to conduct an IME of Petitioner in Florida on April 21, 2021 (RX #4). In addition to a clinical exam Dr. Zelby reviewed numerous medical records of Petitioner, including imaging and electrodiagnostic testing. He noted Petitioner's care with his primary physician, Dr. Palmisano, neurologist Dr. Reiss, orthopedist Dr. Freedberg, orthopedist Dr. McNally, who performed multiple cervical and lumbar surgeries, Dr. Brasil, Dr. Lipov, Dr. Novoseletsky, Dr. Patolot, Dr. Euribe, Dr. Schultz, and Dr. Erb's IME, as well as a January 12, 2016 FCE, which found Petitioner capable of light–medium physical demand level work.

On examination Dr. Zelby noted essentially normal lumbar range of motion but loss of motion in the cervical spine. Upper and lower extremity strength was normal, as was sensation to pinprick. Deep tendon reflexes were normal and symmetric throughout. Dr. Zelby's assessments included: 1) concussion with loss of consciousness; 2) post-concussion syndrome; 3) degenerative cervical spondylosis without myelopathy or radiculopathy; 4) degenerative lumbar spondylosis without radiculopathy; 5) history of cervical fusion; and 6) history of lumbar fusion.

Dr. Zelby opined that Petitioner sustained a cervical strain which was likely a temporary exacerbation of a degenerative condition which was not accelerated beyond

normal progression. He particularly noted Dr. Reiss's normal neurological exam in August 2009, and also that the August 2011 EMG showing early cervical radiculopathy was not causally related to the work accident. He further opined that there was no medical evidence to suggest that the medical treatment received was necessary or more likely to become necessary because of the work accident.

Dr. Zelby further noted that Petitioner did not develop low back pain until a week after his accident and specifically denied back pain while in the hospital. He added that Petitioner's complaints of back pain could be consistent with a sprain/strain but would not be consistent with an injury to the lumbar spine including any injury to the L4-5 disc. Dr. Zelby stated that such an injury would have given rise to immediate back pain. He also noted that Petitioner had no symptoms or complaints with the right lower extremity beyond a complained of right foot tingling on one occasion prior to the August 12, 2009 MRI. He added that the progression the findings on MRI at L2-3 in 2013 would not be related to the work injury but was more likely a progression unrelated to the accident. He further opined that it was more likely than not that the abnormal radiographic abnormality at L4-5 on the right was not caused or made symptomatic by the work accident. Dr. Zelby opined that there was no clear medical evidence that the L45 discectomy was necessary or more likely to have become necessary because of the July 30, 2009 work injury, adding that the lumbar fusion was not necessary because of the accident.

Lastly, Dr. Zelby opined that Petitioner was capable of returning "to most, if not all of the same job duties he performed prior to July 2009 without restriction." He stated that Petitioner's reported persistence and severity of symptoms are inconsistent with the objective findings on exam and inconsistent with the natural history of the objective condition in his spine and nervous system. He added that Petitioner's reported persistence and severity of symptoms "seems like an exaggeration." He did not believe Petitioner needed further medical care.

Dr. Zelby also opined that there was no medical basis preventing Petitioner from safely working at a near-medium physical demand level which would include occasional lifting of 40 - 50 pounds and frequent lifting of 20 - 25 pounds, and that he could lift 25 pounds overhead.

Petitioner testified that Dr. Zelby conducted the IME in a spare office of a law firm and that he carried his professional equipment or instruments in a "Jewel" bag.

Petitioner's Exhibit #4, a letter dated July 28, 2021 from Petitioner's treating physician Dr. Neil Schultz confirming that Petitioner is permanently, totally disabled due to chronic post-surgical pain, was admitted in evidence without objection.

On direct examination Petitioner testified at length about various recreational activities he engaged in prior to his injuries, which included tennis, softball, horseback riding, and golf. He testified that attempting to swing a baseball bat or a golf club would "put me on the floor." He added that the emotional and financial strain of his condition almost broke up his marriage. On cross-examination he acknowledged that his commitment to his family following the birth of his daughter in 1994 took up all his free time and limited those recreational activities.

Petitioner testified he has had little improvement with his multiple spinal surgeries and pain management procedures over the years and has continued with conservative pain management care through the present. Petitioner continues to be severely limited in his activities of daily living, requires pain medication for his complaints and has not returned to work since the date of his accident.

Petitioner denied having retired August 11, 2017 from his employment with Respondent and testified on cross-examination that he believed he is still on disability leave from the State. He further testified that he moved out of state approximately four or so years before trial. He moved there because he cannot handle the cold weather in Illinois. Petitioner testified that he does not believe he can work.

On cross-examination Petitioner acknowledged that he received a letter from Respondent on July 21, 2021, regarding the need to make self-directed job search efforts within his permanent restrictions to continue receiving maintenance (RX #6). He denied knowing what permanent restrictions he would need to consider when looking for any job. Petitioner did not testify to or submit any evidence that he had made any self-directed job search efforts or that he requested guided vocational rehabilitation services.

Petitioner's Exhibit #5 is a Respondent's payment of benefits and expenses ledger. There are payments for surveillance from 2014 to 2020. No other evidence relating to surveillance was offered in evidence. A negative inference may be drawn where a party has exclusive control over evidence or a witness and does not offer the evidence or witness.

CONCLUSIONS OF LAW

L: What is the nature and extent of the injury?

Petitioner sustained multiple injuries, particularly to the spine, as a result of the July 30, 2009 work accident, and underwent four spinal surgeries, including two cervical spine fusions and a lumbar spine fusion, as well as multiple pain management

procedures. Petitioner suffers from chronic pain and requires ongoing pain management treatment.

Based on his medical history and current complaints and limitations Petitioner argues that he is permanently and totally disabled. His claim is supported by opinions from a wide variety of treating and examining physicians. Petitioner's orthopedic surgeon Dr. Thomas McNally, who performed the four spine surgeries, opined that Petitioner was at MMI and was permanently and totally disabled. Dr. Neil Schultz, Petitioner's Florida pain management treater, has also opined that Petitioner is permanently and totally disabled. Respondent's §12 examiner, orthopedic surgeon Dr. Mark Levin, opined that Petitioner was incapable of returning to his former employment. Respondent's IME examiner in Florida, orthopedic surgeon Dr. Donald Erb, did not foresee Petitioner's return to work in any capacity.

On the other hand, Respondent's third §12 examiner, neurosurgeon Dr. Andrew Zelby, opined that Petitioner was at MMI and was capable of returning to "most if not all" of his prior job duties without restrictions. He added his opinion that Petitioner was exaggerating his symptoms.

The number of experts offering opinions regarding a specific issue may be more convincing than a lesser number of expert opinions, but a lesser number of expert opinions may be more convincing than the greater number. Here, the greater number of expert opinions is clearly more persuasive than the one opposing opinion. There is a remarkable consistency among the disability opinions of Drs. McNally, Levin, Schultz, and Erb.

However, Dr. Zelby's bias is palpable, particularly in noting his perception of Petitioner's exaggerated symptomology, which was not noted by any other physician who treated or examined Petitioner. In addition, the unorthodox manner of the Zelby examination and its setting, which he omitted from his report, is noteworthy. While a physician carries his expertise with him regardless of the circumstances, the overall atmosphere of Dr. Zelby's IME detracts from its reliability and persuasion.

Accordingly, the Arbitrator does find that Petitioner proved he is significantly disabled but that he failed to prove that he is permanently and totally disabled. While the Arbitrator gives no weight to the opinions of Dr. Zelby there are opinions and certain facts that do not support a finding of permanent and total disability.

Petitioner's job as a Highway Maintenance Heavy Equipment Operator was at a medium physical demand level. The FCE found Petitioner could perform work at a light-medium physical demand level. Dr. Levin opined that Petitioner was not capable of

returning to his prior job but did not find Petitioner was incapable of performing any sort of work. There was no evidence of Petitioner's good faith job search for employment within the light-medium physical demand capability established by the FCE.

Drs. Schultz and Erb found that Petitioner was permanently and totally disabled, using the language of the Workers' Compensation Act. However, Dr. Schultz's opinion is in the nature of a narrative report by a treating physician, for which the Arbitrator gives it little weight in accord with §16 of the Act. Dr. Erb did not take into account the FCE findings and is less persuasive for that. It comes down to weighing the opinion of Dr. Erb verses Petitioner's lack of a good faith job search within his capabilities.

Based on Petitioner's lack of a good faith job search the Arbitrator finds that Petitioner suffered a loss of trade and evaluate Petitioner's permanency 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 Highway Maintenance Heavy Equipment Operator. He could not return to the physical demands of that occupation but did not engage in a good faith job search. The Arbitrator gives moderate weight to this factor.

iii) Petitioner was 44 years old at the time of his accident. He had a statistical life expectancy of approximately 37 years. Petitioner is likely to suffer from continuing pain, limitations, and disability for the remainder of his life. The Arbitrator gives great weight to this factor.

iv) Petitioner has been kept off work by various of his physicians. Although various physicians opined that Petitioner is permanently and totally disabled, there was no evidence of a good faith job search despite Respondent's request. Absent a good faith job search the Arbitrator cannot adequately assess the effects of Petitioner's earning capacity and gives great weight to this factor.

v) There is no dispute that Petitioner was seriously injured in his work accident on July 30, 2009. As stated above, Petitioner was required to undergo a significant course of medical care including two cervical spine fusions, two surgeries to the lumbar spine, one of which was a fusion, as well as extensive pain management intervention, including epidural steroid injections. This care has spanned more than a decade and is likely to continue into the foreseeable future. Various physicians have opined regarding Petitioner's disability and its permanency, some opinions as noted above being more persuasive than others.

Petitioner testified that he frequently relies on his wife for assistance with daily activities, which is not supported by any medical directive or restriction documented in any medical record. Petitioner's credibility was affected by his embellished testimony regarding recreational activities

before his injury when it became clear his did not engage in those activities any where near to the extent claimed in the years before his accident. There was evidence that surveillance was conducted. No reports or imaging of surveillance were offered in evidence. The Arbitrator infers that the surveillance did not rebut Petitioner's claims of limitation and disability. 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 loss of trade equivalent to a loss of 66 & 2/3 loss of a person-as-a-whole, 333.333 weeks at $724.63/week.

Steven J. Fruth, Arbitrator — Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC035748
Case Name	SMITH, MICHAEL v. JOLIET PUBLIC SCHOOL DIST 86
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0198
Number of Pages of Decision	13
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Latoya Burwell
Respondent Attorney	Kristin Lechowicz

DATE FILED: 5/26/2022

/s/*Stephen Mathis, Commissioner*

Signature

STATE OF ILLINOIS	)
	) SS.
COUNTY OF WILL	)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Smith,

Petitioner,

vs. NO. 18 WC 35748

Joliet Public School District,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, prospective medical, causal connection, notice, any and all issues raised at September 16, 2021 trial, temporary disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 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.

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.

May 26, 2022

SJM/sj
o-4/27/2022
44

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC035748
Case Name	SMITH, MICHAEL v. JOLIET PUBLIC SCHOOL DISTRICT
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Paul Cellini, Arbitrator

Petitioner Attorney	Chris Cooper
Respondent Attorney	James McConkey

DATE FILED: 11/17/2021

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 16, 2021 0.06%

/s/*Paul Cellini, Arbitrator*
Signature

STATE OF ILLINOIS	)	☐ Injured Workers' Benefit Fund (§4(d))
	)SS.	☐ Rate Adjustment Fund (§8(g))
COUNTY OF WILL	)	☐ Second Injury Fund (§8(e)18)
		☒ None of the above

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

MICHAEL SMITH
Employee/Petitioner

Case # **18** WC **35748**

v.

Consolidated cases: ______

JOLIET PUBLIC SCHOOL DISTRICT
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 **Paul Cellini**, Arbitrator of the Commission, in the city of **Joliet**, on **September 16, 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, **November 27, 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 $**56,843.28**; the average weekly wage was $**1,093.14**.

On the date of accident, Petitioner was **56** 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 $**Unknown** under Section 8(j) of the Act.

ORDER

The Arbitrator finds that the Petitioner sustained accidental injury which arose out of and in the course of his employment with Respondent on November 27, 2018. The Arbitrator further finds that Petitioner's mouth, left wrist, left hip and low back pain are causally related to the November 27, 2018 accident.

Petitioner provided timely notice of the November 27, 2018 accident to Respondent pursuant to Section 6(c) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$728.76 per week** for **5-1/7 weeks**, commencing **November 28, 2018 through January 2, 2019**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of **$7,149.26**, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall authorize the treatment recommended by Shining Smiles with regard to a permanent bridge for Petitioner's lower front teeth.

Penalties as provided in Sections 19(k) and 19(l) of the Act and Attorney Fees as provided in Section 16 of the Act are denied.

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

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

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

Signature of Arbitrator

NOVEMBER 17, 2021

STATEMENT OF FACTS

Petitioner works for the Respondent as a custodian at the Hubbard School, which involves keeping the school, classrooms and the lunchroom clean. He testified that he works 8 hours per day, gets two 15 minute breaks and a 30 minute lunch, and remains "on the clock" during the 15 minute breaks. He had worked for Respondent for 10 years as of the hearing date

On 11/27/18, Petitioner testified he was walking up to the building while coming back from his 15 minute break and slipped and fell on the side of a ramp leading to a building doorway. He was not aware of anyone else being present when he fell. He testified: "I slipped on ice. As I was getting up on the ramp I lost my footing." He testified that he injured his left hip, low back and left hand, and had some teeth knocked out. Petitioner believed he had been at work for about two hours when the incident occurred. He reported the incident to the school principal, Kyle Sartain, right after it occurred, indicating he slipped and fell outside the building. During their discussion, an accident report was prepared, and Petitioner then sought treatment at DuPage Medical.

The Respondent submitted both Petitioner's (Rx1) and his supervisor's (Rx2) accident reports into evidence. Petitioner's indicates an 11/27/18 injury at approximately 12:55 involving "mouth head left side broke 2 teeth." He states: "slipped on rap [sic] tried to get up and fell again." P agreed this was completed in his handwriting, and he signed it on 11/27/18. (Rx1). The supervisor's report, completed by Kyle Sartain on 11/27/18, notes Petitioner reported a 12:40 p.m. incident at the Hubbard school walking in the parking lot coming back from his break: "He slipped and fell down twice on ice." Mr. Sartain reports complaints of left side of leg and hip soreness, head soreness and a chipped tooth. It was indicated there were no witnesses. (Rx2).

Petitioner testified the night before the accident it had snowed, and there was snow in the parking lot on 11/27/18. He testified that he returned to the school on 11/27/18 after he went to DuPage Medical and took a photo of the ramp where he fell (Px5), which he testified shows ice/snow and accurately depicts what the ramp looked like at the time of the accident. Petitioner testified that snow was around the area that he fell on 11/27/18, and that he had slipped on ice as he was getting up on the ramp and lost his footing. The Arbitrator notes that Px5 is a black and white photo that depicts a sloped ramp from the ground area up to a double door.

There is a very thin layer of snow on the ramp and slightly deeper but choppy and slushy snow at the base and side of the ramp. There appear to be footprints and wheel tracks in the snow. (Px5).

The DuPage ER report of 11/27/18 indicates Petitioner reported he had just slipped and fallen at work, hit his head with no loss of consciousness and knocked out two bottom teeth, which he didn't save. He reported head, mouth and left hip pain. Petitioner was diagnosed with soft tissue left hip pain and tooth avulsion, prescribed ibuprofen and he was advised to moderate his activity. He was also advised to follow up with his primary provider if needed and to see a dentist for his teeth. (Px2).

Petitioner visited Shining Smiles on 11/27/18 reporting broken front teeth. It was noted that a temporary 3 unit bridge had dislodged: "INS shows were recently done, however after speaking with (patient) it appears he never returned for the final prosthesis. Informed that INS will not cover a new bridge and that he should return to original dentist if he doesn't want to pay for a new bridge." A proposed treatment plan for the bridge provided a cost estimate of $4,200.00. (Px3). Petitioner testified that he wants to get this procedure completed.

Petitioner also sought treatment at Illinois Orthopedic Network (ION) on 11/28/18. He reported slipping and falling "while leaving for work." He fell on his left side and reported left hand, back and hip pain, noting he had been to the hospital. Petitioner testified he told them he slipped and fell at work and which body parts he injured. Dr. Mohiuddin, a pain physician, prescribed physical therapy for left wrist and low back (6 out of 10 level) pain along with tizanidine and Lidocaine patches to use in addition to ibuprofen. He was held off work and advised to follow up in a month. (Px1). Petitioner attended physical therapy with chiropractor Dr. Cohen from 12/10/18 through 12/20/18. (Px4). On 12/26/18, Petitioner returned to ION reporting ongoing left back and hand pain but at a 1/10 level. It was noted that Petitioner was injured on 11/27/18 when he fell on ice in a parking lot at work. Dr. Sharma opined that Petitioner had reached maximum pain management improvement, stating Petitioner: "States no pain. Wants to RTW." Petitioner was released from care and to full duty as of 1/2/19. (Px1).

Petitioner testified he did not seek any further medical treatment. He did, however, undergo further treatment for his teeth. At the 12/11/18 follow up at Shining Smiles, imaging was obtained, and some type of procedure was performed on Petitioner's teeth with resin and bonding at a charge of $1,040.00. The Arbitrator cannot determine exactly what the procedure was. Blue Cross/Blue Shield paid $753.00 of this bill and it indicates there was a $25.00 co-pay with a remaining patient responsibility of $207.00. (Px3).

Prior and subsequent reports from DuPage Medical were part of the evidentiary records. On 7/3/18, Petitioner reported to DuPage medical ER that he fell on his right hip at work, but he denied pain and declined treatment, reporting that Respondent wanted him to get checked out. A 7/1/19 report of Dr. Jimenez from DuPage Medical ER provides the following history: "Fall off ladder, last rung, on Friday. C/O lower back & left hip pain." More specifically, the report states: "patient states was at work 3 days ago, and stepped off a ladder and missed one step, and fell from standing position and landed on left hip. Has been taking aleve without help. Has been ambulatory since the event. Reports pain to the left lateral hip area." X-ray showed no acute left hip fracture. The diagnosis was left hip contusion and Petitioner was prescribed pain medications and advised to follow up with his primary provider within 7 days. (Px2).

Petitioner believed he was off work for a month or so on the advice of his doctor and returned to work in December 2018 or January 2019 when he was released to do so. Petitioner testified the last time he had treatment related to this accident for his body was on 12/26/18, and for his teeth on 12/11/18. He doesn't take any medications related to the accident and hasn't since a month or two after the accident. He had been prescribed a muscle relaxer and a pain medication at the time of the accident. He has continued to work regular

duty. At the current time, Petitioner testified he didn't have much difficulty with his activities due to pain, but that he still gets 6/10 pain and his low back/left hip will hurt sometimes with prolonged sitting or standing.

On cross-examination, Petitioner agreed the 11/27/18 accident report he completed did not mention a back injury. Petitioner testified that his back started to give him trouble when he awoke the day after the accident. He told the doctor his back was giving him trouble, and x-rays were taken at one of the facilities. He did not recall running into Mr. Sartain near the ramp where he fell after he had reported the incident. He told him where he fell on the ramp but denied ever going out to the ramp and showing Sartain where he fell.

On further cross, Petitioner testified he took the photograph in Px5 with his cell phone later in the day on 11/27/18 after he had been to the doctor, though he could not recall at what time he took the photo. He did not check in with the Respondent while he was there and did not return to work, "I just took the picture" and then left. Petitioner agreed that the photos in Rx3 to 6 depict the ramp where he fell, but without the snow. He marked the area of the ramp where he fell with an "X" on Rx3. He testified that as he was stepping up to the ramp from the side when he slipped.

Petitioner testified the dentist advised him he needed three bottom front teeth replaced. He did already have a bridge in the area where the teeth are missing, indicating this broke at the time of the accident and he threw it away." He testified he told Mr. Sartain he broke the bridge and he was bleeding from his mouth at the time.

Petitioner agreed he has been able to perform his regular job for Respondent without any problems since returning to work. He hasn't worked anywhere else. He had not received any short or long term disability benefits. Petitioner agreed that the Respondent pays at least a portion of his premiums towards his group medical health coverage. He could not recall if any of his bills had been paid but he did send the initial bill to his health insurer.

Kyle Sartain, the principal at Hubbard High School for the last six years, testified that he basically supervises everything at the school, including keeping a safe working environment. On 11/27/18, Petitioner came into the office to report an injury, so per school protocol an accident report was completed both by Petitioner (Rx1) and himself (Rx2). To his recall, Petitioner told him he had slipped and fallen on ice in the parking lot. He mentioned his teeth were chipped, soreness on his left side and head pain. He did not report a back injury that day and Mr. Sartain agreed nothing about Petitioner's back was noted in the accident report. He testified that his report (Rx2) is accurate as to what Petitioner told him. He agreed the supervisor's report does indicate Petitioner reported left side leg and hip pain, as well as head soreness and chipped teeth. When he met with Petitioner in his office, he pulled his lip down and there was blood on his bottom lip. Petitioner never mentioned a dental bridge and he was not aware of Petitioner having a bridge.

After meeting with Petitioner, Mr. Sartain went out to examine the parking lot to see if the building engineer had cleared the snow. Mr. Sartain testified that he bumped into the Petitioner on his way out to look at the ramp and was aware he was leaving to go see the doctor. When he did, he testified he asked the Petitioner about exactly where he fell, and he described the direction he was walking in and where he cut through some snow. He testified that when he looked at the ramp it was clear of snow and ice but was wet from where the snow had melted. He testified that when he went to look at the ramp it was clear of snow at the base. There was snow built up on the side of the ramp where the engineer had moved shoveled snow. He agreed that the Petitioner told him he fell in the location where he marked Rx3 with an "X." Sartain testified that he would anticipate that people would use the full ramp from ground level to the door when traversing it. And would not want anyone to use the ramp from the side as it is not the safest route.

Mr. Sartain was shown the ramp photograph (which Petitioner testified he took later in the day on 11/27/18) and testified it did not depict the ramp as it looked when he inspected it on 11/27/18. He again indicated there was no snow or ice on the ramp itself, it was all on the side of the ramp. Mr. Sartain testified that it had snowed in the early morning hours that day and it was sunny at the time Petitioner indicated he fell. Everything was basically cleared other than on the side of the ramp. He disagreed with Petitioner that Px5 accurately depicted the snow/ice conditions that existed after the fall on 11/27/18. Mr. Sartain testified the photos in Px5 and Rx3 to Rx6 accurately depict the ramp area generally, other than the ice and snow, and he acknowledged the photos in Rx3 to Rx6 were not taken on 11/27/18.

Mr. Sartain could not recall exactly when Petitioner returned to work after 11/27/18 but testified Petitioner has not reported and he has not observed Petitioner having any difficulty performing his job duties.

On cross examination, Mr. Sartain acknowledged that it is not uncommon for people to walk onto the ramp from the side, with or without snow, though it would be more commonly done when there is no snow. He agreed that Petitioner isn't the first person to try to use the ramp from the side and that an employee would not be reprimanded for accessing the ramp from the side. He agreed the Petitioner reported slipping on the ramp even if it wasn't indicated in the supervisor's accident report. He again acknowledged on cross exam that the parking lot did have snow in it when he went out to look at the ramp, and around the ramp, testifying there was more snow when he went out to look at the ramp than what is depicted in the photo in Px5, but that there was no snow on the ramp itself. He agreed that the doors up the ramp are a reasonable means of entry and exit to the building. As to the report indicating a "left side" injury, his recall was Petitioner complained of his left hip.

The Arbitrator notes that there is a factual dispute as to whether Px5 depicts the condition of the ramp at issue on 11/27/18 when the Petitioner slipped and fell based on the testimony of Petitioner and Mr. Sartain. The Arbitrator also acknowledges that the photos in Rx3 to Rx6 accurately depict the ramp where Petitioner fell but were not taken on 11/27/18 and thus do not accurately depict the condition of the ramp at the time the Petitioner fell.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator relies on Petitioner's credible testimony and consistent medical records, to find that he sustained an accident resulting in injury to his left hip/lower back, left hand, and head which arose out of and in the course of his employment.

With regard to the "in the course of" element, the Petitioner was walking in the parking lot on his return from a break and was on the Respondent's property when he fell while accessing the ramp on ice and snow. In fact, there is no evidence as to whether Petitioner had even left the Respondent's property at all during his break. He testified he remained on the clock during his breaks In the case of *Segler v. Industrial Comm'n*, the court stated: "An injury is "in the course of" employment when it occurs within the period of employment, at a place where the employee can reasonably be expected to be in the performance of his duties, and while he is performing those duties or doing something incidental thereto. (See *Scheffler Greenhouses, Inc. v. Industrial Comm'n.* (1977), 66 Ill.2d 361, 366-67, and cases cited therein.) Acts of personal comfort are generally held to be incidental to employment duties and, thus, are in the course of employment." However, if the employee

voluntarily and in an unexpected manner exposes himself to a risk outside any reasonable exercise of his duties, any injury incurred as a result will not be within the course of employment. See *Union Starch v. Industrial Comm'n*. (1974), 56 Ill.2d 272, 277, and cases cited therein." *Segler v Industrial Comm'n*, 81 Ill.2d 125 (1980).

Here, the Petitioner was working his regular day, remained clocked in and remained on the Respondent's property when he alleges he was injured. He was on Respondent's property walking back into the building at the end of his 15 minute break. Based on the Act and Illinois case law, the Arbitrator finds that Petitioner's accident of 11/27/18 occurred in the course of his employment.

The "arising out of" requirement mandates that the injury must have originated from some risk connected with or incidental to the employment so that there is a causal connection between the employment and the accidental injury. *Caterpillar Tractor Company v. Industrial Commission*, 129 Ill.2d 52 (1989).

In this case, the Arbitrator finds that the snow and ice around the ramp in this case created a hazardous condition on the Respondent's premises. Illinois courts have traditionally held that snow and ice constitute a "hazardous condition" supporting compensability. *Suter v. Illinois Workers' Comp. Comm'n*, 2013 IL App (4th) 130049WC.

Respondent's proposed decision cites *Hatfill v. Industrial Comm'n*, 202 Ill.App.3d 547, 560 N.E.2d 369 (1990) (benefits denied to a claimant injured when he jumped across water that had accumulated in front of a ditch while walking to his car in the company parking lot) and *Dodson v. Industrial Comm'n*, 241 Ill.Dec. 820, 308 Ill. App. 3d 572, 720 N.E.2d 275 (1999) (benefits to denied to claimant who slipped and fell while walking to her car after departing the sidewalk and walked across a grassy slope to reach her vehicle faster). In the former, the Court noted that there were two walkways to the upper level parking lot on each side of the ditch and found that the Commission could have inferred that the injuries resulted from a personal risk undertaken by the employee. In the latter, the Court found that the claimant voluntarily exposed herself to an unnecessary personal danger solely for her own convenience, a danger that was entirely separate from her employment. Respondent argues the Petitioner here was injured as the result of taking an unnecessary personal risk, as opposed to a risk inherent in his work, by attempting to access the ramp from the side, involving a step up and snow/ice, as opposed to a cleared ramp starting at ground level.

There is no dispute that Petitioner attempted to gain access to the ramp that led into the school building from its side, where snow had been shoveled as a result of the previous night's snowfall, however the Arbitrator does not believe this action constituted an unnecessary personal risk. The Petitioner was accessing the ramp from the side in a fashion that Mr. Sartain acknowledged is at least fairly regularly done by employees of Respondent. Based on the photos in Px5 and Rx3 through Rx6, it appears that someone approaching from the right side (while facing the doors) of the ramp might easily walk along the building and step up to the ramp. This did not involve jumping across a ditch or walking down a grassy hill where a sidewalk was available. This was a simple step up onto a ramp. There was no significant deviation from the path into the building as occurred in *Hatfill* and *Dodson*. The evidence is undisputed that there was snow and/or ice on the side of the ramp where the Petitioner was stepping up. Of note, Mr. Sartain testified that there was snow in the parking lot when he went out to investigate the ramp, so Petitioner likely was walking in some level of snow until he got to the ramp. It is unclear if the ramp itself had any ice or snow on it at the time Petitioner slipped and fell, but it certainly appears that there was ice and snow on the ground in the area where he was stepping up to the ramp. While it may not have been the smartest idea versus walking up the ramp from the bottom, this just does not rise to the level of acceptance of personal risk in the manner depicted in *Hatfill* and *Dodson*.

Also as stated in the *Segler* case: "Despite the fact that an employee chooses an unreasonable and unnecessary risk, the employer may, nonetheless, be held liable if he has knowledge of or has acquiesced in such a practice or custom. Principal Sartain's testimony makes it clear that it is not an uncommon occurrence for employees to access the ramp at issue from the side rather than accessing it at the end of the ramp from ground level. Thus, the Arbitrator believes the Respondent also acquiesced in such access to the ramp, further strengthening the finding that the Petitioner sustained injury which arose out of and in the course of his employment on 11/27/18.

While there was a factual issue presented as to the presence of snow and ice on the ramp, the Arbitrator notes that the Petitioner did not specify that he slipped on the ramp, but rather that he slipped while stepping up to the ramp. Secondly, it clearly had snowed earlier that day and the fact that it may have appeared to be cleared does not mean there was nothing slippery remaining on the ramp. The Arbitrator found the Petitioner's testimony credible that he slipped on ice while stepping onto the ramp.

The Arbitrator finds that the Petitioner sustained accidental injuries arising out of and in the course of his employment with Respondent on 11/27/18. The Arbitrator notes that causation was not specifically put at issue, as the key issue was accident and, if found in Petitioner's favor, he clearly timely reported is injuries. However, the Arbitrator must determine what the injuries were in this case. The Arbitrator finds that the Petitioner sustained injury and/or pain to the left hand/wrist, left hip/low back and head/face. However, the last treatment Petitioner received for these injuries was in December 2018, almost three years prior to the hearing. Additionally, the Arbitrator notes that the Petitioner returned to full duty work on or about 1/3/19 and has continued to work full duty since that time. The Arbitrator further notes that on 7/1/19, Petitioner reported to DuPage Medical that he fell off the last rung of a ladder at work with complaints of low back and left hip pain. Based on the preponderance of the evidence, the Arbitrator finds that the causal relationship of any current left hand/wrist and left hip/low back conditions to the 11/27/18 accident ended well before the hearing date.

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

Both the Petitioner and Mr. Sartain testified that the Petitioner reported the 11/27/18 slip and fall on the ramp at school right after it occurred, and accident reports were completed by both of them at that time. The Petitioner clearly provided timely notice of the accident to the Respondent.

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

The Arbitrator finds and concludes that Respondent is liable for the medical treatment rendered to Petitioner as a result of the work accident on November 27, 2018. Petitioner's medical records document timely medical care rendered in connection with Petitioner's lower back, left hip, left hand, and mouth sustained as a result of her work accident. The Arbitrator finds the medical treatment reasonable and necessary. While Respondent objected to the medical bills as being unreasonable and/or unnecessary, no evidence was presented by Respondent in support of this argument. The Petitioner's treatment was limited to approximately one month after the accident date.

Petitioner alleged the following medical bills were the liability of the Respondent:

Illinois Orthopedic Network: $ 382.98

Shining Smiles:	$ 1,113.40
Midwest Specialty Pharmacy:	$ 2,750.58
Chicago Pain Center	$ 2,820.00
DuPage Medical Group.	$ 82.30

Respondent shall pay directly to Petitioner the reasonable and necessary medical expenses of $7,149.26, as provided in sections 8(a) and 8.2 (medical fee schedule) of the Act.

Based on Petitioner's testimony that the premiums for his group health carrier with Respondent are contributed to by Respondent, pursuant to Section 8(j) of the Act the Respondent is entitled to credit for any payments made by the group health carrier towards the awarded bills, so long as the respondent holds the Petitioner harmless with regard to any and all charges for which Respondent obtains this credit.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the Petitioner is entitled to the prospective dental treatment recommended by Shining Smiles. The evidence supports the fact that the Petitioner had a preexisting recommendation for the permanent bridge. However, he also had not acted on that recommendation and continued to use his temporary bridge as he had been. The Arbitrator finds that further injury to Petitioner's teeth and destruction of the temporary bridge occurred at the time of the slip and fall on 11/27/18. Thus, the work injury left Petitioner with no teeth, and thus is clearly a contributing cause to the current need for the permanent bridge. Respondent shall authorize this treatment.

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

According to Arbitrator's Exhibit 1, Petitioner alleges entitlement to TTD from 11/28/18 through 1/2/19. This time period is supported by the records of ION (Px1). The Petitioner testified he believed he was off work for approximately a month. Based on the preponderance of the evidence presented, the Arbitrator finds that the Petitioner is entitled to TTD from 11/28/18 through 1/2/19.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

While the Arbitrator has determined that the Petitioner's 11/27/18 accident arose out of and in the course of his employment with Respondent, the Respondent's defense in this matter was reasonable. While the Arbitrator doesn't believe the defense was tremendously strong under the facts of the case, the Arbitrator also doesn't believe that the defense presents evidence of unreasonable and vexatious conduct on the part of Respondent as required by Section 19(k) of the Act. Nor does the Arbitrator believe that the defense unreasonably delayed the payment of benefits under Section 19(l) given the accident dispute. Penalties and fees under Sections 19(k) and 19(l) of the Act and attorney fees under Section 16 of the Act are denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC010074
Case Name	STANTON, JAMES v. WRIGHT PROPERTY MANAGEMENT LLC
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	22IWCC0199
Number of Pages of Decision	11
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Casey VanWinkle
Respondent Attorney	Noah Hamann

DATE FILED: 5/26/2022

/s/Stephen Mathis, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Stanton,

Petitioner,

vs. NO. 20 WC 10074

Wright Property Management,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, causal connection, temporary disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 23, 2021, is hereby affirmed and adopted.

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

No bond is required for the removal of this cause to the Circuit Court. 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.

May 26, 2022

SJM/sj
o-4/13/2022
44

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC010074
Case Name	STANTON, JAMES v. WRIGHT PROPERTY MANAGEMENT LLC
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Casey VanWinkle
Respondent Attorney	Noah Hamann

DATE FILED: 11/23/2021

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 23, 2021 0.07%

/s/*Linda Cantrell, Arbitrator*

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

James Stanton
Employee/Petitioner

v.

Wright Property Management LLC
Employer/Respondent

Case # **20** WC **010074**

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 **Herrin**, on **9/16/21**. 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

K. [x] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

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

N. [ ] Is Respondent due any credit?

O. [ ] Other _____

FINDINGS

On the date of accident, **11/26/19**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**33,215.00**; the average weekly wage was $**638.75**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**3,066.00 (PPD Advance) and $4,759.46** for medical benefits paid, for a total credit of $**7,825.46**.

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

ORDER

Based on the Arbitrator's finding that Petitioner's current condition of ill-being in his left knee is not causally connected to his injury, 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.

NOVEMBER 23, 2021

Arbitrator Linda J. Cantrell

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JAMES STANTON,)
)
Employee/Petitioner,)
)
v.) Case No.: 20-WC-010074
)
WRIGHT PROPERTY MANAGEMENT,)
LLC,)
)
Employer/Respondent.)

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on September 16, 2021 pursuant to Section 19(b) of the Act. Petitioner made an oral motion to Amend the Application for Adjustment of Claim to correct he date of accident from November 27, 2019 to November 26, 2019. Petitioner's motion was granted without objection. The issues in dispute are accident, causal connection, medical expenses, temporary total disability benefits, and prospective medical care. All other issues have been stipulated.

TESTIMONY

Petitioner was 49 years old, single, with no dependent children at the time of accident. Petitioner worked for Respondent as a General Manager for twenty years performing general construction on rental properties. Petitioner testified that on November 26, 2019, he was climbing down an extension ladder and missed a rung. He stated he fell approximately three feet to the ground and immediately knew he skinned his elbow and was hurt. Petitioner testified that a couple of days later his left knee swelled "huge" and he was in so much pain he went to the emergency room. Petitioner stated he did not mention the accident to the emergency room department because he was in so much pain and he did not think he was injured that bad from falling off the ladder. He testified that the ladder incident on 11/26/19 was the only thing he could think of that would have caused his left knee injury.

Petitioner testified that his coworker, David Childers, was still at the top of the ladder when he fell. Petitioner sought treatment with Dr. Young at The Orthopedic Institute who drained his left knee on multiple occasions. Petitioner testified he did not continue treating because Respondent denied liability. Petitioner continued to perform office work for Respondent following the injury and did not engage in construction because he could not get on a roof, lay

flooring, or perform other construction work. Petitioner testified that after his accident he was not able to squat or bend to perform his work duties. He denied any problems with his left knee prior to the accident.

Dr. Young has recommended a left knee arthroscopy with a possible meniscectomy which Petitioner desires to undergo. Petitioner testified that he stopped working for Respondent on 3/16/21 when he and the owner of Respondent's business mutually agreed to part ways because he was unable to perform his full job duties. Petitioner testified he is currently working at a store owned by his girlfriend. He operates a cash register and helps her sell items. She helps him with his expenses, but he does not receive a regular paycheck.

On cross-examination, Petitioner testified that he did not land on his knee when he fell. He claims he twisted his body and fell on his right side, sustaining scrapes on his right elbow and hand. He did not have any scrapes to his knee. Petitioner did not have any bruising to his knee at any time after the accident, but stated his knee began to swell two or three days later. Petitioner testified that Dr. Young did not give him any formal work restrictions and agreed that his medical records regarding restrictions are accurate.

Petitioner called David Childers to testify as a witness. Mr. Childers worked for Respondent and was Petitioner's coworker on 11/26/19. Mr. Childers testified that on 11/26/19 he was working on a roof with Petitioner. He stated Petitioner was going down the ladder taking tools to the ground when he heard a "ruckus." Mr. Childers testified that he turned around and looked down from the roof and saw Petitioner lying on the ground. He asked Petitioner what happened and Petitioner reported he missed a rung and fell. He asked Petitioner if he was alright and Petitioner responded, "yeah, I guess." Mr. Childers was not cross-examined.

MEDICAL HISTORY

On 11/26/19, Petitioner was examined in the emergency room at SIH Memorial Hospital Carbondale for complaints of chest pain that started that day and a swollen leg with tingling for "about a week". Petitioner had concerns for a heart attack as he had a myocardial infarction two years prior. Edema was noted in Petitioner left leg. A venous Doppler ultrasound of the left leg was performed that revealed soft tissue fluid collection along the anterior and medial knee. He was diagnosed with pain to his left calf and chest wall and fluid in the left knee. He was discharged and ordered to follow up with his primary care provider. There is no mention of a work accident or incident that contributed to Petitioner's knee/leg/calf condition.

Petitioner returned to the emergency room at SIH Memorial Hospital Carbondale on 11/29/19 for complaints of pain and swelling in his left knee with an onset of almost one week ago. Another section of the medical report states Petitioner's symptoms started a couple of days ago. Petitioner did not mention a fall or work accident. His knee was more swollen and painful than at the last visit. A CT scan of the left knee revealed a large joint effusion in the suprapatellar space, with no acute fractures. He was diagnosed with suprapatellar bursitis of the left knee and his knee was aspirated. He was prescribed Hydrocodone, Toradol, and Clindamycin and his knee was immobilized upon discharge.

On 12/5/19, Petitioner presented to The Orthopedic Institute of Southern Illinois where he provided a history of accident at work on 11/26/19 when he slipped and fell while descending a ladder. He stated his pain was 7 out of 10 with burning, throbbing symptoms. Petitioner was unable to fully flex or extend his knee secondary to pain. Physical examination revealed severe swelling of the prepatellar bursa with tenderness on palpation of the proximal aspect of the knee just above the patella, distal pole of the patella, and anterior aspect of the knee. Dr. Young aspirated Petitioner's knee and injected Lidocaine ad Decadron. He was given light duty work restrictions and prescribed Medrol Dosepak. Petitioner was ordered to wear the knee brace as needed and to follow up in one week.

On 12/12/19, Petitioner returned to Dr. Young and reported he was doing well, and the swelling resolved. He stated he had pain on the top of his knee at times where they tried to drain his knee in the emergency room. Physical examination revealed normal flexion and extension, no edema, and no tenderness to palpation. Petitioner was able to fully flex and extend his knee. Dr. Young released Petitioner at MMI with no restrictions.

Petitioner returned to Dr. Young on 1/30/19 and reported his knee began to swell three days ago and he was in severe pain. Petitioner was unable to bear weight. Physical examination revealed limited range of motion, positive ballottement testing, severe swelling due to an effusion of the prepatellar area, and mild tenderness on the posterior aspect of the knee in the flexion crease. Dr. Young aspirated Petitioner's knee and ordered an MRI. He ordered Petitioner to continue using crutches but did not provide work restrictions.

The MRI was performed on 1/17/20 and revealed a complex tear of the medial meniscus. Petitioner followed up with Dr. Young on 1/28/20 and reported decreased swelling but ongoing pain. Petitioner stated he had difficulty climbing stairs and ladders and at the end of a full duty workday he had swelling. Dr. Young recommended a left knee arthroscopy with possible meniscectomy and allowed Petitioner to continue working full duty without restrictions.

On 2/6/20, Petitioner returned to Dr. Young with complaints of increased swelling and pain. Petitioner's knee was aspirated and injected, and surgery was again recommended. Dr. Young allowed Petitioner to continue working without restrictions. On 2/26/20, Petitioner advised Dr. Young the aspiration helped but he was still experiencing pain and tightness. Dr. Young did not place Petitioner on work restrictions. On 3/17/20, Petitioner reported he could not walk up stairs and had trouble bending his knee to get in a car. His pain interferred with his sleep and he declined pain medication. Dr. Young noted he was still waiting for workman's comp approval for surgery. Petitioner stated Respondent was accommodating his physical limitations and Dr. Young kept him off restrictions.

On 4/8/20, Dr. Young received denial from worker's compensation for surgery and Petitioner has not returned for further treatment.

CONCLUSIONS OF LAW

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

To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arouse out of and in the course of his employment with employment. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 203 (2003). An injury "arises out of" employment when "the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Id.* A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in order to fulfill his job duties. *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124848, ⁋36.

Accordingly, an injury arises out of an employment-related risk (*i.e.*, a risk "distinctly associate with" and "incidental to" his 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 incidental to his assigned duties." *McAllister*, 2020 IL 124848, ⁋36; see also *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989).

The Arbitrator finds that Petitioner's injury arose out of and in the course of his employment because he was injured while performing an act that Respondent reasonably expected him to perform incidental to his construction duties. There is no dispute Petitioner was required to use a ladder to perform construction work on the roofs of real estate he was assigned to rehab.

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

Petitioner testified he fell approximately three feet off the ladder to the ground. He stated he twisted his body and fell on his right side sustaining scrapes to his right elbow and hand. Petitioner testified he did not land on his left knee and did not have any scrapes to his knee. He further stated he did not have any bruising to his knee at any time after the accident. Petitioner testified that the ladder incident on 11/26/19 was the only thing he could think of that would have caused his left knee injury.

On the day of the accident Petitioner presented to the emergency room for complaints of chest pain that started that day and a swollen leg with tingling for "about a week". Petitioner did not report the work accident that occurred that day or any incident that he attributed to his left leg/knee symptoms. Fluid was already noted in Petitioner's left knee when he arrived at the hospital at 7:10 p.m. the day of the accident. The record did not show any acute physical exam finings such as scrapes or bruises to Petitioner's knee and the only finding was effusion. The record states Petitioner had been wearing a knee immobilizer but does not state how long he had been wearing the brace. Petitioner did not testify as to the use of an immobilizer at trial. The diagnosis of effusion, lack of any acute findings, no report of injury/accident, and recorded statement that the onset of his symptoms was about a week ago, suggests Petitioner's symptoms existed prior to the alleged date of accident.

Petitioner testified his left knee began to swell a couple of days after the accident which caused him to seek emergent medical treatment. The onset of Petitioner's left knee symptoms conflict with the dates provided to the emergency department the day of the accident and

Petitioner's testimony. The Arbitrator notes that no accident report or report of injury was admitted into evidence. Further, Petitioner made an oral motion at trial to amend the Application for Adjustment of Claim to change the date of accident from 11/27/19 to 11/26/19.

Petitioner again reported to the emergency room three days after the work accident and did not report his work accident or attribute his left knee symptoms to any incident.

Petitioner presented a witness, David Childers, who testified he did not see Petitioner fall off the ladder. Mr. Childers testified he heard a "ruckus" and saw Petitioner laying on the ground. Petitioner told Mr. Childers he missed a rung and fell and thought he was alright. There was no testimony that Petitioner was in pain, needed assistance off the ground, walked with a limp, or had any indication of injury.

The first mention of a work accident in the medical records is on 12/5/19 when Petitioner was examined by Dr. Young. Petitioner reported he slipped and fell while descending a ladder at work on 11/26/19. The record does not contain a description of Petitioner's accident or state whether he landed on or struck his left knee in the incident. Dr. Young did not provide any opinions, whether by medical record or testimony, that Petitioner's current condition of ill-being in his left knee was caused or aggravated by the work accident.

Therefore, the Arbitrator finds Petitioner has not met his burden of proof that his current condition of ill-being in his left knee is causally related to the injury.

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

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

Having found that Petitioner's current condition of ill-being in his left knee is not causally connected to his injury, medical benefits are denied.

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

Having found that Petitioner's current condition of ill-being in his left knee is not causally connected to his injury, temporary total disability benefits are denied.

Linda. J. Cantrell, Arbitrator

DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	12WC020986
Case Name	GARCIA, ARTURO v. PRIDE CONTAINER CO
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0200
Number of Pages of Decision	25
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Robert Smoler
Respondent Attorney	Brad Antonacci

DATE FILED: 5/27/2022

/s/Maria Portela, 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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ARTURO GARCIA,

Petitioner,

vs. NO: 12 WC 20986

PRIDE CONTAINER CO./STRIVE 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 causation, medical expenses, temporary total disability benefits, nature and extent, benefit rate/wages, and Sections 19(k), 19(l) penalties and Section 16 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 affirms the Arbitrator's decision as to causation, denial of temporary partial disability and temporary total disability benefits, denial of penalties and fees and the nature and extent of Petitioner's disability. However, the Commission modifies the Arbitrator's decision regarding Petitioner's average weekly wage/benefit rate, the award of medical expenses and the credit awarded to Respondent.

The Commission finds that the Petitioner met his burden of proving his lower back condition was causally related to the work accident but failed to prove the alleged bilateral knee condition was causally related to the work accident. Petitioner credibly testified that he was pushing a load when he felt pain in his back and the incident report confirms same. (Rx7) Petitioner immediately informed Emilio Diaz of the accident and advised he was going to see his doctor. (Rx7 and T. 67-68)

Petitioner went to see his primary care physician, Dr. Flores, on March 12, 2012 complaining of, among other things, back pain. (Px1) Petitioner returned to Dr. Flores on March 15, 2012 with continued complaints of back pain and an MRI was ordered. (Px1) The March 16, 2012 MRI showed disc protrusions without significant central canal stenosis. (Px1)

Petitioner did not complain of knee problems at the time of his work accident. (Rx7) He did not complain of knee problems until nearly a month after the work accident and related it to driving a forklift, rather than pushing a heavy skid. (Px2) Additionally, he reported to his doctor that the onset of knee pain was March 30, 2012. (Px1)

Petitioner did not prove that his bilateral knee condition was causally connected to a March 12, 2012 work accident. However, the evidence supports that his back condition was causally connected to the March 12, 2012 incident and that he reached maximum medical improvement (MMI) at the time of his release from Physician's Immediate Care on September 27, 2012. The Arbitrator's decision in regard to causation is affirmed.

The Commission reverses the Arbitrator's findings that there was no concurrent employment and therefore, modifies the Petitioner's average weekly wage/benefit rates. Respondent did not offer into evidence wage records for the year preceding the accident. Additionally, Respondent failed to present any witnesses to rebut Petitioner's testimony with respect to his wages, the existence of mandatory overtime or his working a second job of which Respondent was aware.

The Commission relies, in part, on the testimony of Emilio Diaz, plant manager for Respondent at the time of the injury, in determining Petitioner's average weekly wage from his employment at Pride Container. Mr. Diaz testified that in the year preceding the accident, mandatory overtime occurred only 3 to 4 weeks out of the year. Mr. Diaz testified that Petitioner earned $18.45 per hour prior to the accident date. [T. 69] However, the Commission notes that Petitioner placed into evidence a paycheck stub for the period from October 3, 2011 through October 9, 2011 indicating his hourly rate of pay was $17.83 per hour. (Px10) The Commission finds the rate as reflected on the paycheck stub to be the most reliable evidence in terms of arriving at Petitioner's hourly pay rate.

Based on the above, the Commission calculates Petitioner's average weekly wage at Pride in the year preceding the accident as follows: 48 weeks x $17.83 per hour x 40 hours per week = $34,233.60. 4 weeks of mandatory overtime x $17.83 per hour x 60 hours per week = $4,279.20. Adding Petitioner's total earnings equals $38,512.80 and dividing by 52 weeks equals an average weekly wage of $740.63 instead of the $766.38 calculated by the Arbitrator.

In regard to concurrent employment, Respondent introduced into evidence certified subpoena responses from T.M. Doyle Teaming Co. and PTO Services, the company which allegedly paid Petitioner, indicating Petitioner was never an employee of these companies. (Px15 and Rx5, 6) Petitioner, in turn, introduced wage records from T.M. Doyle for the period from March 12, 2011 through March 3, 2012 which equals 51 1/7 weeks. (Px16) The Commission notes that the last four digits of the social security number and Petitioner's address on Px16 match the last four digits of the social security number and the address in Px10 which is Petitioner's paycheck

stub from Respondent and that Petitioner has met his burden of proving concurrent employment.

The Commission calculates Petitioner's total earnings at T.M. Doyle equal $18,218.44. Dividing same by 51 1/7 weeks equals $356.23. Based on the combined wages, $740.63 from Petitioner's employment at Pride and $356.23 from his employment at T.M. Doyle, the Commission finds Petitioner's correct average weekly wage is $1,096.86.

The Commission also modifies the Arbitrator's award for medical expenses. Px3, the records of MRI River North, indicate that the lumbar spine MRI performed on March 16, 2012 was completed at that facility and that BlueCross BlueShield, not Respondent's insurer, Sentry, paid the bill in part, and that there was still an outstanding balance. Additionally, none of the bills of Dr. Flores were paid by the worker's compensation carrier. The Commission finds Respondent liable for the charges corresponding to the March 12, 2012, March 15, 2012 and March 31, 2012 visits as they were related to Petitioner's complaints of back pain stemming from the March 12, 2012 work accident.

Moreover, the Commission clarifies the credit to which Respondent is entitled. In the "Findings" portion of the decision, the Arbitrator stated: "Respondent also is entitled to a credit for those paid medical bills listed in Rx2 under Section 8(j) of the Act."

Section 8(j) states in pertinent part:

> (j) 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. In such event, the period of time for giving notice of accidental injury and filing application for adjustment of claim does not commence to run until the termination of such payments. 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. Any employer receiving such credit shall keep such employee safe and harmless from any and all claims or liabilities that may be made against him by reason of having received such payments only to the extent of such credit.

The Commission modifies the language of the final sentence of the *Findings* section of the Arbitrator's decision to read as follows: "Respondent also is entitled to a credit for those paid medical bills listed in Rx2. Respondent is also entitled to a credit for those medical bills paid in Px3 under Section 8(j) of the Act. Respondent has paid a portion of the MRI bill as noted in Px3 and is entitled to a credit under Section 8(j) for payment made. Respondent shall hold Petitioner harmless for the balance."

The Commission affirms the Arbitrator denial of temporary total disability benefit

payments and temporary partial disability payments. The Petitioner did not submit evidence to support he was entitled to either. Although Petitioner claimed he was off work from March 12, 2012 through March 15, 2012, he did not provide any off work slips to support an award for temporary total disability benefits. As to an award of temporary partial disability, the Commission affirms the denial of same. Petitioner claimed he was entitled to temporary partial disability benefits for the period from March 13, 2012 through September 27, 2012, a period of 28 3/7 weeks. Petitioner failed to prove he was working light duty on a part time or full time basis and that he earned less than he would have earned if employed in a full capacity of his position. Accordingly, the Petitioner is not entitled to any temporary partial disability benefits.

Further, the Commission affirms the Arbitrator's denial of Sections 19(l), 19(k) and 16 penalties and fees. Petitioner failed to present any evidence to show entitlement to penalties and attorney's fees.

The Commission also affirms and adopts the Arbitrator's decision regarding the award of 7% loss of person as a whole for the injuries sustained to his low back. The Arbitrator's analysis of Section 8.1b(b) was on point.

i) No AMA rating was submitted and this factor is given no weight.

ii) Petitioner, although in a different job than that held at the time of the work accident, has returned to work full duty with no evidence of impairment or accommodations necessary to perform his job. This factor is given some weight.

iii) Petitioner was 59 years old at the time of the accident. This factor is given some weight.

iv) The evidence supports that the Petitioner is earning a higher hourly wage at the time of trial than at the time of the accident. This factor is given some weight.

v) The medical records corroborate the disability to the low back between March 12, 2012 and September 27, 2012. Although Petitioner was released with permanent restrictions, those restrictions were based on an invalid FCE. Petitioner testified and the medical records support that Petitioner does have some residual pain in his back. This factor is given moderate weight.

Given Petitioner's state of good health prior to the injury and continued minimal problems, as well as supporting factors laid out above, the Commission affirms the award of 7% MAW.

Lastly, the Commission corrects a scrivener's error on page 15 of the Arbitrator's decision, 9 lines from the top to read "not ever" as opposed to "not never".

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $658.12 per week for a period of 35 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 7% loss of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is liable for the 3 visits to Dr. Flores in March of 2012 as well as the MRI of March 16, 2012 pursuant to §8(a)

of the Act, subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that 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 $24,000.00. 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.

May 27, 2022

/s/ *Maria E. Portela*

MEP/dmm
O: 032922
49

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GARCIA, ARTURO Case# **12WC020986**
Employee/Petitioner

PRIDE CONTAINER COMPANY/STRIVE GROUP
Employer/Respondent

On 2/20/2020, 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:

2739 SMOLER LAW OFFICE PC
ROBERT J SMOLER
30 N LASALLE ST SUITE 2140
CHICAGO, IL 60654

6205 HEYL ROYSTER VOELKER & ALLEN
BRAD ANTONACCI
33 N DEARBORN ST 7TH FL
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

ARTURO GARCIA
Employee/Petitioner
v.
PRIDE CONTAINER COMPANY/STRIVE GROUP
Employer/Respondent

Case # **12** WC **20986**

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 **DOUGLAS S. STEFFENSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **FEBRUARY 28, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **MARCH 12, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**39,852.00**; the average weekly wage was $**766.38**.

On the date of accident, Petitioner was **59** 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 $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

Respondent also is entitled to a credit for those paid medical bills listed in RX 2 under Section 8(j) of the Act.

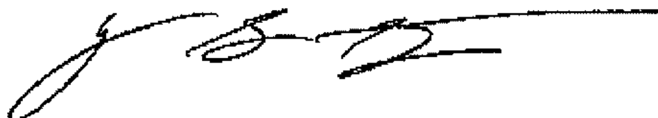
ORDER

As detailed in the attached memorandum discussing the *Findings of Fact and Conclusions of Law:*

- The Respondent shall pay Petitioner the sum of **$459.83** per week for a further period of **35 weeks**, as provided in **Sections 8(d)2 and 8.1b** of the Act, because the injury to the Petitioner caused a **7% loss of use of the person-as-a-whole**; and,
- Petitioner's claim for medical bills is denied and Respondent is entitled to a credit for paid medical bills listed in RX 2; and,
- Petitioner's claim for TTD and TPD benefits is denied; and,
- Petitioner's claim for penalties and attorney's fees is denied; and,
- The Respondent shall pay those benefits that have accrued in a lump sum, and shall pay the remainder, 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

FEBRUARY 20, 2020
Date

FEB 2 0 2020

ARTURO GARCIA v. PRIDE CONTAINER COMPANY/STRIVE GROUP

12 WC 20986

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried before Arbitrator Steffenson on February 28, 2019. The issues in dispute were causal connection, average weekly wage (AWW), medical bills, temporary total disability (TTD) and temporary partial disability (TPD) benefits, penalties and attorney's fees, and the nature and extent of the injury. (Arbitrator's Exhibit 1). The parties also requested a written decision, including findings of fact and conclusions of law, pursuant to Section 19(b) of the Act and agreed to receipt of this Arbitration Decision via e-mail. (Arbitrator's Exhibit (*hereinafter*, AX) 1).

FINDINGS OF FACT

On March 12, 2012, Petitioner was employed by Respondent as a machine helper assistant. (Transcript 15). His position involved inserting paper inside a machine, requiring lifting in the range of ten to thirty pounds, sometimes more, according to Petitioner. (Transcript (*hereinafter*, Tr. 16). Emilio Diaz testified he is currently the process manager for the Respondent. Respondent manufactures corrugated boxes. (Tr. 71). At the time of the injury, he was the plant superintendent. (Tr. 63). He testified that assistant operators such as Petitioner push loads on a conveyor up to a lift and would also set up machines with the operators. This would involve setting up the feed section of the machine and performing the duties of the machine operator. (Tr. 64-65). They would push, and not lift loads anywhere from 80 pounds to 400 pounds on a conveyor. (Tr. 65). Respondent offered into evidence a written job description for the position of Rotary Assistant. (Respondent's Exhibit 3). It notes the Rotary assistant should be able to lift repetitively 10 to 30 pounds and push loads on conveyor up to 100 to 250 pounds with assistance. (Respondent's Exhibit (*hereinafter*, RX) 3 at 2).

On March 12, 2012, Petitioner was pushing a container and attempted to lift and push when he experienced mid-back pain, according to his testimony. (Tr. 16-17). He did not testify to experiencing any knee pain. He did not fall to the ground. (Tr. 57). Mr. Diaz testified that Petitioner reported his work injury to him. Mr. Diaz completed an incident investigation report on March 12, 2012. (Tr. 67 and RX 7). Mr. Diaz testified Petitioner indicated he injured his

lower back but did not indicate he injured his knees. (Tr. 68).

Petitioner presented to Dr. Flores on March 12, 2012, complaining of low back pain and a left ingrown toenail. (RX 8). He stated that his low back pain was sharp and "came and went." There was no mention of his work duties or any work injury. Dr. Flores noted a normal neurological examination and diagnosed onychia and paronychia of the toe. On cross examination, Petitioner admitted that his only complaint to Dr. Flores on March 12, 2012 was back pain. (Tr. 47). Petitioner returned to Dr. Flores on March 15, 2012 with back pain. Dr. Flores noted no neurological deficits and no tingling sensation of the lower legs. Petitioner was able to walk without limping but had pain when sitting, lying down and standing up for prolonged periods of time. Petitioner denied trauma to the area but noted he had been pushing boxes and heavy carts at work. Petitioner's back was noted to be tender at the paravertebral muscles localized to the lumbosacral area. Dr. Flores diagnosed lumbago and prescribed an MRI.

Petitioner underwent a lumbar MRI on March 16, 2012 at MRI of River North. (Petitioner's Exhibit 3). Between L2–S1, the MRI revealed disc protrusions in the lumbar spine that impressed on the ventral thecal sac surface but without significant central canal stenosis.

Petitioner first presented to Physicians Immediate Care (PIC) on March 22, 2012. (RX at 76). He complained of mid back pain after pushing a heavy skid of paper. Petitioner denied radiation, numbness or tingling. He was diagnosed with a thoracic strain and prescribed naproxen and Tylenol. He was provided with a work restriction of no lifting greater than 30 pounds from the waist to the shoulder.

Petitioner next presented to PIC on March 29, 2012, reporting that he was feeling somewhat better. (RX 4 at 85). He again noted no pain radiating to the lower extremities and his back pain "came and went." He was diagnosed with a lumbar strain that was improving. He was to begin physical therapy and continue his medications and work status.

Petitioner next presented to Dr. Flores on March 31, 2012. (RX 8). Petitioner was reporting mild pain on flexing and extending his back. Petitioner's neurological examination was normal. Petitioner now noted tenderness on flexion and extension of both the knees with no swelling. Dr. Flores now diagnosed gout and lumbago.

In follow up at PIC on April 5, 2012, Petitioner reported his lumbar pain was continuing but slightly diminished. (RX 4 at 92). Petitioner now complained of bilateral knee pain, left greater than right. He reported that he first noted the knee pain on March 30, 2012. Petitioner

admitted on cross-examination that he advised the doctors at PIC on April 5, 2012 that his knee symptoms first began on March 30, 2012. (Tr. 49). Petitioner was to continue physical therapy, medication and a Medrol Dosepak. His work restrictions remained the same. X-rays of the left knee revealed slight joint space narrowing of the lateral compartment and degenerative joint disease.

In follow up with Dr. Flores on April 7, 2012, Petitioner presented with knee pain. (RX 8). Dr. Flores noted Petitioner had a history of gout and had been having bilateral knee pain after eating more meat than usual over the weekend. He noted Petitioner was taking medications for this condition. Petitioner's examination appeared to be normal. Dr. Flores diagnosed Petitioner with gout again. Dr. Flores made no diagnosis with respect to Petitioner's lower back and Petitioner was not complaining of his lower back. When questioned on cross-examination about his appointment with Dr. Flores on April 7, 2012, Petitioner both denied he had been diagnosed with gout and stated: "I don't even know what that (gout) is." (Tr. 50-51). He also denied taking medication for his knees prior to March 12, 2012. (Tr. 51).

Petitioner next received medical treatment at PIC on April 12, 2012. (RX 4 at 99). He was still complaining of back pain, weakness in both legs as well as radiation to both legs. He was referred to Dr. Harsoor for pain management and further evaluation.

Petitioner presented to Dr. Harsoor on April 18, 2012. (Petitioner's Exhibit (*hereinafter*, PX) 4). Petitioner was reporting pain in his low back and bilateral legs. Dr. Harsoor gave the Petitioner the option of medications, injections, physical therapy and surgery. Petitioner indicated he would like to try lumbar epidural steroid injections. However, Petitioner's medical records do not indicate the Petitioner ever received these injections.

On April 19, 2012 at PIC, Petitioner noted no pain radiation to his lower extremities. He was assessed with a lumbar strain and provided with the same work restrictions. (RX 4 at 110).

When Petitioner presented to Dr. Flores on April 23, 2012, he was only complaining of knee pain with no history of fall or trauma. (RX 8). His knee pain was noted to be progressively getting worse. Dr. Flores again diagnosed gout. He recommended bilateral knee MRIs. There is no reference to Petitioner's lower back symptoms in this record.

At PIC on April 26, 2012, Petitioner complained of back pain with radiation down the left leg. (RX 4 at 111, 121). He also complained of left knee pain. The Petitioner underwent bilateral knee MRIs on April 28, 2012 at MRI of River North. (PX 3). The left knee MRI was noted to show acute mid substance split tear involving the distal patellar tendon from its tibial

insertion. Grade I chondromalacia was noted in the patella with a large amount of degenerative subchondral edema within the patella. There was grade I chondromalacia within the medial compartment and a large suprapatellar joint effusion. The right knee MRI revealed Grade 2 chondromalacia within the medial compartment with a partial thickness focal cartilaginous defect and degenerative subchondral edema and sclerosis. There was also grade I chondromalacia in the patella. There was mild intramuscular strain of the popliteus near the myotendinous junction, with intact tendon and a small suprapatellar joint effusion.

On May 2, 2012, Dr. Flores again treated Petitioner for knee pain. (RX 8). Petitioner mentioned occasional lower back tenderness. After discussing the MRI results, Dr. Flores assessed Petitioner with a tendon tear of the left knee and chondromalacia of the patella. He recommended Petitioner continue with NSAID therapy and referred Petitioner to an orthopedic surgeon.

Petitioner presented to Dr. Cherf at the Chicago Institute of Orthopedics on June 9, 2012. (RX 9). Petitioner described his March 12, 2012 accident and noted there was no contact to his knees and he did not fall. Dr. Cherf noted the left knee MRI from April 28, 2012 documented possible mid substance split tear of the distal patellar tendon as well as degenerative changes in the patella femoral joint and a medial compartment, as well as the patella femoral compartment. Petitioner complained of bilateral knee pain. Dr. Cherf, following examination, diagnosed Petitioner with osteoarthritis of the bilateral knees. He provided a bilateral cortisone and lidocaine knee injections and wanted Petitioner to return to work with no restrictions. Petitioner returned to Dr. Cherf on the July 30, 2012 noting decreased knee pain and increased knee function. Petitioner noted he was working full time, full duty. Dr. Cherf felt Petitioner had reached maximum medical improvement (MMI) and required no additional medical treatment. He noted that if Petitioner does have osteoarthritis, he would be happy to treat Petitioner under his private insurance. He released Petitioner to work full time, full duty.

In follow up on June 9, 2012, Dr. Flores noted that Petitioner was doing well with no current complaints. (RX 8). Petitioner noted no joint or back pain or muscle problems. His examination was normal. On June 16, 2012, Dr. Flores again noted Petitioner was having intermittent knee pain and diagnosed gout. There is no reference to Petitioner's lower back. Petitioner again presented to Dr. Flores on June 30, 2012 and September 15, 2012 with no reference to his lower back or knees.

Petitioner continued to receive medical treatment at PIC in May, June and July of 2012. (RX 4). On July 12, 2012, the physician at PIC changed Petitioner's work restriction to no lifting

greater than 45 pounds from floor to waist level, waist to shoulder level and overhead. (RX 4 at 241). On August 16, 2012, Petitioner reported some back pain, but his knee was improved. (*Id.* at 274). It was noted that his bilateral knee sprain/strain was resolved.

Petitioner underwent a functional capacity evaluation (FCE) at Accelerated Rehab on September 24, 2012. (RX 4 at 279 and PX 5). During the evaluation, the physical therapist noted that Petitioner performed with inconsistent effort and was not able to "prove his abilities." He lifted a maximum 20 pounds, limited by complaints of pain. His efforts were inconsistent 92.3% of the time.

Petitioner last received medical treatment at PIC on September 27, 2012 complaining of continued back pain. (RX 4 at 298). The doctor diagnosed lumbar strain. Petitioner was released from care at that time and placed at MMI. The physician noted Petitioner had no residual disability or impairment but also provided a work restriction of no lifting greater than 45 pounds from floor to waist level, waist shoulder level and over shoulder level with no pushing/polling greater than 45 pounds. The doctor noted Petitioner may be capable of greater effort than that but for his inconsistent effort during the FCE.

Petitioner presented again to Dr. Flores on October 16, 2012 complaining of lower back pain. Dr. Flores noted a normal neurologic examination and diagnosed lumbago. Petitioner did not receive medical treatment again from Dr. Flores until December 31, 2012. (RX 8). Petitioner noted he experienced lower back pain when he attempted to pick up his granddaughter at that time. Dr. Flores diagnosed lumbago, provided Petitioner with an injection of Decadron and recommended Petitioner continue taking indomethacin and tramadol. Then on January 5, 2013, Petitioner noted he was having difficulty walking for about one week due to a backache in the lumbosacral area. He noted 'electrical shock' in the legs when walking. Dr. Flores again noted a normal neurological examination and diagnosed muscle spasm. He prescribed Neurontin.

Petitioner underwent a second FCE at ATI Physical Therapy on May 1, 2013. (PX 6). The evaluator felt Petitioner demonstrated his functional capabilities at a light to medium physical demand level. This meant he is capable of chair to floor lifting 43 pounds occasionally, bilateral above shoulder lifting 25 pounds occasionally, and the unilateral lifting and carrying 47 pounds occasionally.

Petitioner did not receive medical treatment again with Dr. Flores for back symptoms until July 19, 2013. (RX 8). Petitioner was claiming to have continued, intermittent back pain and an inability to lift greater than 20 pounds. Dr. Flores noted point tenderness in the spinal

area, mid-thoracic region but a normal neurological examination. He diagnosed lumbago and muscle spasm and recommended Petitioner continue his medications. This was the last treatment noted in the records.

Prior to the March 12, 2012 accident date, Petitioner received medical treatment at PIC in September of 2006 for right knee pain. (RX 4). He noted increasing pain and mild swelling of the right knee following an incident at work. He was diagnosed with right knee patellar bursitis. The doctor believed that the knee injury represented either an infective or rheumatologic or metabolic type process and would not be deemed to be work related. The Petitioner was treated with antibiotics. He continued to receive medical treatment through December 1, 2006 when he noted his right knee was feeling better while taking Tylenol arthritis as recommended by his primary care physician. He could return to work with no restrictions. Petitioner also testified to a prior left knee injury in 2009. (Tr. 33).

Subsequent to the March 12, 2012 accident date, Petitioner also testified he suffered a new injury to back "last year" (2018). (Tr. 32-33). However, he testified he received no medical treatment and continued working. (Tr. 33).

Petitioner continues to work for Pride Container. He testified his position switched from machine operator helper to bander operator and driver. (Tr. 45, 56). He said his back currently hurts "a little" when performing light duty or while sleeping. (Tr. 35). He claimed he has problems getting in and out of a car, getting out of bed, shaving, and playing with his grandchildren. (Tr. 35-36). He testified his knees are what hurts him most. (Tr. 36). He testified he currently takes medications when his pain is very strong. He continues to perform home exercises he learned in physical therapy. (Tr. 39).

Jonathan Hicks testified on behalf of the Respondent. (Tr. 85). He has been the shipping manager for the Respondent for 18 years. (Tr. 86). He is Petitioner's current, direct supervisor. (Tr. 87). He testified regarding the Petitioner's current job duties as a bander operator. (Tr. 87–88). Petitioner continues to work full time, full duty, working the same hours as the other bander operators. (Tr. 88–89). Petitioner has never advised Mr. Hicks regarding any issues he is having performing his job duties or with respect to any symptoms in his knees or back. (Tr. 89). Petitioner never appears to be injured in any way while he is working. Petitioner does not appear to be having any difficulty performing his job duties. (Tr. 89–90).

Petitioner testified he worked no overtime in the first three years at the Respondent after the March 12, 2012 work injury. Mr. Diaz testified that there was a reduction in the production at the Respondent's facility after 2012. (Tr. 65). The third shift was shut down for a

period due to this reduction. All employees were working less overtime and there was a decrease in the number of hours that the employees worked due to this reduction in production. (Tr. 66.).

Petitioner testified he earned $19.00 per hour after the accident. (Tr. 44). He placed into evidence various paycheck stubs from Respondent in 2013, 2014, 2017, 2018 and 2019. (PX 11). Respondent placed into evidence Petitioner's wage records from January 2013 through January 2019. (RX 1A and 1B). These records document Petitioner's earnings beginning at $17.74 in January 2013 and gradually increasing throughout the years, up to $20.78. These records also document Petitioner working varying amounts of overtime throughout these years. He testified that after 2016, he began to work overtime and his current rate of pay is $21.00. He continues to work full time. (Tr. 56). Mr. Hicks testified that Petitioner's currently earning $21.20 per hour. (Tr. 90). He had no knowledge of Petitioner not being provided overtime or being paid a lower rate than other employees as a result of the accident. (Tr. 94–95).

In the year prior to the work accident, Petitioner testified he worked twelve hours, sometimes eight hours. (Tr. 38, 59). He testified he sometimes worked three or four days per week, and sometimes on Saturday. (Tr. 38). He testified he averaged working 60 hours per week. (Tr. 39). He testified he earned $17.00 or $18.00 per hour. (Tr. 39). Petitioner placed into evidence one paycheck stub for the 52-week period prior to March 12, 2012, for the period from October 3, 2011 through October 9, 2011.

Mr. Diaz testified that Petitioner earned $18.45 per hour prior to March 12, 2012. (Tr. 68–69). Mr. Diaz requested Petitioner's wage records from the Respondent (Tr. 77), and he also testified that the Respondent attempted to obtain Petitioner's wage records from prior to 2012 (Tr. 83), but the Respondent did not have these records. Petitioner testified to working varying amounts of overtime, and sometimes he worked no overtime. (Tr. 39-40, 59). He first testified he was asked to work overtime (Tr. 39-40), then testified he was required to work overtime. (Tr. 40). Mr. Diaz testified that Petitioner would work overtime when the operator was out on vacation or out for some other reason, and this overtime would be mandatory. (Tr. 69). Mandatory overtime was three to four weeks out of the year. (Tr. 70). He noted that there was additionally "sign-up" overtime, but this was voluntary. (Tr. 69–70).

Petitioner testified he worked for a company called TM Doyle in the year prior to the work accident. (Tr. 41). He testified that individuals at Respondent were aware he was working at TM Doyle. (Tr. 41). He claimed he worked 20 to 22 hours per week, earning $22.00 per hour. (Tr. 43). He testified he worked fixing lights on trailers, greasing trailers, and changing hoses.

He testified he did not return to work at TM Doyle because he said he could not push the oil cart. (Tr. 44). Petitioner placed into evidence paycheck stubs from TM Doyle from December 25, 2011 to March 3, 2012 (PX 12), paycheck stubs from Transportation Personnel Services from October 9, 2011 to November 26, 2011 (PX 13), a subpoena response from ADP dated December 30, 2016 (PX 14), and weekly payroll sheets from TM Doyle for the period March 5, 2011 through March 17, 2012 (PX 16). These weekly payroll sheets from TM Doyle also contain a certification from William Doyle indicating the attached records represent timesheet wage records which TM Doyle Teaming prepared and submitted to PTO Services, Inc., so that PTO services could issue paychecks to Petitioner. (PX 16).

Respondent introduced into evidence certified subpoena responses from PTO Services and TM Doyle Teaming Co. (RX 5 and 6). Interestingly, PTO Services responded by indicating their files did not show any one with Petitioner's name in their records. (RX 5). Also, TM Doyle Teaming Co., Inc. responded by indicating that Petitioner was not a Doyle employee. (RX 6).

CONCLUSIONS OF LAW

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

Issue F: *Causal connection*

Based on the evidence, the Arbitrator finds the Petitioner failed to prove his current condition of ill-being with respect to his *bilateral knees* is causally related to the work accident. However, the Petitioner proved that his condition of ill-being with respect to his *lower back* was causally related to the work accident *through September 27, 2012*. Thereafter, Petitioner's current condition of ill-being with respect to his lower back is unrelated to the work accident.

BILATERAL KNEES

Petitioner made no complaints with respect to his bilateral knees on the date of accident. He further provided no testimony with respect to experiencing any knee pain on the date of accident. He did not fall to the ground. (Tr. 57). Petitioner also advised Dr. Cherf that his knees did not contact anything during the fall. (RX 9). Mr. Diaz completed an incident investigation report on the date of accident after speaking with Petitioner. (RX 7). Petitioner indicated he injured his lower back at that time but did not indicate he injured his knees. There is no evidence of any injury to the Petitioner's knees on the date of accident.

Petitioner further made no complaints of knee pain in the medical records until March 31, 2012 with Dr. Flores. He had received medical treatment on four occasions prior to that date with both Dr. Flores and PIC but failed to mention any bilateral knee pain. If Petitioner was truly experiencing knee pain from the accident, it stands to reason he would have mentioned this to his doctors during one of those four (4) visits.

Additionally, when Petitioner first began complaining of knee pain, he reported that he first noted the knee pain on March 30, 2012, 18 days after the accident. (RX 4 at 92). He reported this history to the physician at PIC on April 5, 2012. Petitioner even admitted that he advised the doctors at PIC of this history of initial knee pain.

Then, on April 7, 2012 when Petitioner presented to Dr. Flores, Dr. Flores noted that Petitioner had a history of gout. (RX 8). Petitioner also admitted to eating more meat than usual over the weekend. Dr. Flores noted that Petitioner was taking medication for gout as well. Dr. Flores diagnosed Petitioner with gout. These records make it clear that Petitioner's bilateral knee condition is causally connected to a pre-existing gout and in no way related to the work accident.

Additionally, the Petitioner's credibility before the Arbitrator is adversely impacted when he testified that he had never been diagnosed with gout and "I don't even know what that (gout) is." (Tr. 50-51). The record is clear that he was taking medication for gout prior to the accident ever occurring.

The only orthopedic surgeon to provide medical care to Petitioner for his bilateral knees was Dr. Cherf and he provided no causal connection opinion. (RX 9). In fact, Dr. Cherf's diagnosis suggests that Petitioner's knee condition is causally connected to a pre-existing condition. Dr. Cherf diagnosed Petitioner with osteoarthritis of the bilateral knees and never diagnosed any acute injury.

Finally, the Arbitrator notes that Petitioner was experiencing knee pain prior to March 12, 2012. According to the PIC records, Petitioner received medical treatment for three months for right knee pain. Petitioner also testified to a prior left knee injury in 2009.

The Petitioner made no complaints of knee pain on the date of accident. He did not fall at the time of the accident and did not strike his knees. When he did begin complaining of knee pain almost three weeks after the accident, he noted the pain began at the end of March after eating more meat than usual. Petitioner was then diagnosed with gout, a condition he was

noted to be taking medications for and suffering from prior to the work accident. No physician, including Dr. Cherf, the treating orthopedic surgeon for the knees, provided a causal connection opinion, and Dr. Cherf even suggested Petitioner's condition is related to pre-existing osteoarthritis. The records and Petitioner's testimony document prior left knee and right knee injuries. Based on all the above, the Arbitrator finds that Petitioner failed to prove that his bilateral knee condition is in any way causally connected to the March 12, 2012 work accident.

LOWER BACK

With respect to his lower back, the Petitioner suffered a lumbar strain that resolved as of September 27, 2012. Petitioner testified and the medical records support a back injury occurring on March 12, 2012. Petitioner noted no neurologic symptoms such as radicular numbness or tingling in his legs and his neurologic examination was normal. He was complaining of only lower back pain. Dr. Flores consistently diagnosed Petitioner with lumbago and PIC physicians consistently diagnosed him with a lumbar strain, although there were multiple treatments by Dr. Flores where the Petitioner did not complain about back pain and where he was not provided with a diagnosis related to his back.

While the Petitioner's MRI revealed disc protrusions, it failed to show any significant central canal stenosis. Petitioner consistently noted improvement in his lower back symptoms prior to his release from care from PIC on September 27, 2012. He even failed to make any complaints of back pain when he presented to Dr. Flores during five (5) separate appointments on June 9, 2012, June 16, 2012, June 30, 2012 and September 15, 2012. (RX 8).

When the Petitioner last received medical treatment at PIC on September 27, 2012, the doctor still diagnosed lumbar strain and found Petitioner to be at maximum medical improvement. The doctor released Petitioner from care at that time. While the physician provided Petitioner with a work restriction of no lifting greater than 45 pounds from floor to waist level, waist to shoulder level and over shoulder level with no pushing/pulling greater than 45 pounds, the doctor also noted Petitioner had no residual disability or impairment. The reason the physician provided the work restrictions was due to Petitioner's failure to cooperate at the September 24, 2012 FCE. The doctor even noted Petitioner may be capable of greater effort and physical abilities but for his inconsistent effort in the FCE. The FCE evaluator noted Petitioner's efforts were inconsistent and 92.3% of the time and the therapist was unable to prove Petitioner's true abilities. The doctor at PIC released Petitioner from care on September 27, 2012 as well. The Arbitrator puts no weight in to the FCE results or work restrictions provided on September 27, 2012 due to Petitioner's failure to provide the appropriate effort

and based on the invalid FCE results. Also, this failure to provide appropriate effort during the FCE further adversely impacts Petitioner's credibility before the Arbitrator.

Additionally, the Arbitrator notes there is then a break in the causal connection chain. Petitioner received no medical treatment from October 16, 2012 through December 31, 2012. (Tr. 52). When Petitioner presented to Dr. Flores on October 16, 2012, he was complaining of lower back pain but again had a normal neurologic examination and was diagnosed with lumbago. He then did not return to Dr. Flores until after an intervening accident. On December 31, 2012, Petitioner advised Dr. Flores that he experienced lower back pain after attempting to pick up his granddaughter. (Tr. 53). It was after this point that Petitioner did, for the first time, report having trouble walking and complained of "electrical shocks" in his legs when walking. The injury Petitioner suffered when picking up his granddaughter was an intervening accident occurring *after Petitioner was placed at MMI and had been released from care* by the physicians at PIC, and this intervening accident broke the causal connection chain.

The Arbitrator puts no weight in the results of the second FCE from May 1, 2013. This FCE took place after Petitioner had been placed at MMI, had been released from care, and had been allowed to return to work. The second FCE also took place after Petitioner's intervening accident when attempting to lift his granddaughter. Further, Petitioner testified *at the time of trial* that his knees are what hurt him the most, and not his back. (Tr. 36). The Arbitrator only can conclude any of Petitioner's current restrictions are attributable to his unrelated bilateral knee condition, and not his lower back. Additionally, Petitioner testified to an additional intervening accident that occurred one year prior to trial. (Tr. 32-33).

Petitioner suffered a lumbar strain at the time of the accident. The MRI failed to show any significant findings. Petitioner never complained about neurologic symptoms until after an intervening accident that broke the causal connection chain and occurred after Petitioner had been placed at MMI, was authorized to return to work, and released from medical care. Prior to that date, the Petitioner was complaining about intermittent, low-level back pain and even failed to note lower back symptoms on multiple treatment dates. Petitioner could return to his regular work duties prior to his release and even the physician at PIC noted Petitioner had no residual disability or impairment at that time. Based on the above, the Arbitrator does not find Petitioner's current condition of ill-being in his lower back to be causally connected to the March 12, 2012 work injury.

Issue G: *AWW*

The Arbitrator finds that the Petitioner's AWW equals $766.38. During the proceedings before the Arbitrator[1], the Respondent was unable to obtain any wage records documentation for the 52-week period prior to the work accident. Furthermore, the Petitioner's testimony at trial regarding his wages prior to the accident was unclear as to how many hours he worked and how many days per week he worked. He testified he worked 12 hours, sometimes eight hours. He testified he sometimes worked three or four days per week, and sometimes on a Saturday. He claimed he average working 60 hours per week. (*See generally* Tr. 38-46).

The Arbitrator finds Mr. Diaz's testimony to be the most credible regarding Petitioner's wages prior to the work accident. (Tr. 68-70). Mr. Diaz testified credibly that Petitioner earned $18.45 per hour prior to March 12, 2012. Petitioner testified to work in varying amounts of overtime, and sometimes working no overtime. He first testified he was asked to work overtime but then testified he was required to work overtime. Mr. Diaz testified that Petitioner would work overtime when the operator was out on vacation or out for some other reason, and this overtime would be considered mandatory overtime. Mandatory overtime only occurred three to four weeks out of the year. There was additional overtime that was "sign-up overtime." The sign-up overtime was considered voluntary.

Based on the above, the Arbitrator finds Petitioner earned $18.45 per hour working full time for the Respondent, plus worked overtime four weeks out of the year where he would work 20 hours of overtime per week. Working 48 weeks at $18.45 per hour times 40 hours per week equals a total of $35,424.00. Working 60 hours per week for four weeks at $18.45 equals $4,428.00. The total for the 52-week period prior to the work accident is earnings of $39,852.00. Divided by 52 weeks, this leads to an AWW of $766.38.

The Arbitrator further finds that Petitioner failed to prove by a preponderance of the evidence concurrent employment. Petitioner testified to concurrent employment at TM Doyle and introduced into evidence certified records of pay stubs from TM Doyle. (PX 16). However, Petitioner and Respondent also introduced into evidence certified subpoena responses from TM Doyle Teaming Co. and PTO Services, the company which allegedly paid Petitioner, which indicated Petitioner was never an employee of those companies. (PX 15 and RX 5, 6). The

[1] Initially, this above-the-line claim was set by the Arbitrator for trial on January 22, 2019. On that date, and following pre-trial discussions concerning the disputed AWW issue and possible solutions to that issue, the trial date was specially set over to February 28, 2019. Even with this additional time granted by the Arbitrator, the parties still were unable to locate pertinent wage information to resolve the AWW issue prior to proceeding on the record.

evidence is clearly conflicting and contradictory. Based on the contradictory nature of the evidence, and when combined with the Petitioner's impaired credibility as discussed above, the Arbitrator cannot find that Petitioner had concurrent employment at the time of the accident. Therefore, the Arbitrator does not include any alleged wages from TM Doyle in the calculation of Petitioner's AWW.

Issues J & N: *Medical bills & Respondent's credit*

Respondent placed into evidence a medical payment log which documents multiple medical payments made on this claim. These include medical payments to Physicians Immediate Care, Dr. Harsoor, Weiss Memorial hospital, Dr. Cherf, University of Chicago Radiology, and ATI Physical Therapy. (RX 2).

Petitioner both claimed and placed into evidence ATI Physical Therapy medical bills and MRI of River North medical bills. (AX 1 and PX 3, 9). Based on the Arbitrator's findings regarding **Issue F** above, the Arbitrator finds this treatment is causally unrelated to the work injury and Respondent is not liable for payment of these medical bills.

The Respondent additionally paid medical bills following September 27, 2012 and it is entitled to a credit for payment of those medical bills, including bills from ATI. (RX 2).

Issue K: *TTD & TPD*

Petitioner claimed entitlement to ***TTD*** benefits from March 13, 2012 through March 17, 2012. The Petitioner introduced no evidence at trial indicating he missed those dates from work. Furthermore, the Petitioner had no work restrictions from any physician during that period. The Arbitrator therefore finds Petitioner is not entitled to TTD benefits for the period claimed.

With respect to ***TPD*** benefits, Petitioner claimed entitlement from March 13, 2012 through September 27, 2012, the day he was released from care from PIC, a period of 28 3/7 weeks. Petitioner produced no evidence of entitlement to TPD during that period. Petitioner failed to prove he was working light duty on a part-time basis or full-time basis and earned less than he would have earned if employed in a full capacity of his position. The Petitioner, therefore, is not entitled to any TPD benefits.

Issue L: *Nature & extent of injury*

Pursuant to Section 8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability ("PPD"), for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all its branches preparing a permanent partial disability impairment report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment.

(b) Also, the Commission shall base its determination on the following factors:

(i) The reported level of impairment from (a) above;

(ii) The occupation of the injured employee;

(iii) The age of the employee at the time of injury;

(iv) The employee's future earning capacity; and

(v) Evidence of disability corroborated by medical records.

(See 820 ILCS 305/8.1b)

With regards to factor (i) of Section 8.1b of the Act:

i. The Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence by either party. As such, the Arbitrator gives ***no weight*** to this factor.

With regards to factor (ii) of Section 8.1b of the Act:

ii. The Arbitrator finds the Petitioner was employed by the Respondent as a machine helper/assistant/rotary assistant at the time of the injury. Based on the testimony and written job description (RX 2), Petitioner was required to

repeatedly lift loads weighing 10 to 30 pounds and push loads on a conveyor up to 100 to 250 pounds with assistance. The final restrictions noted by PIC on September 27, 2012 indicate Petitioner could return to his former position. However, he has returned to work for the Respondent as a bander operator. Mr. Hicks testified Petitioner continues to work full time, full duty, and works the same hours as other bander operators for the Respondent. He has not never made any complaints of having issues performing his job duties or suffering any symptoms in his lower back. The Arbitrator therefore gives ***some weight*** to this factor.

With regards to factor (iii) of Section 8.1b of the Act:

iii. The Arbitrator notes the Petitioner was 59 years old at the time of the accident. (AX 1). The Arbitrator therefore gives ***some weight*** to this factor.

With regards to factor (iv) of Section 8.1b of the Act:

iv. The Arbitrator notes the Petitioner has experienced no loss of future earnings as a result of his work injury. The evidence shows Petitioner currently is earning more than he was prior to the March 12, 2012 work accident. Prior to that date, Petitioner earned $18.45 per hour. Mr. Hicks testified Petitioner currently is working full time and earning $21.20 per hour. Additionally, he continues to work overtime. As such, the Arbitrator therefore gives ***some weight*** to this factor.

With regards to factor (v) of Section 8.1b of the Act:

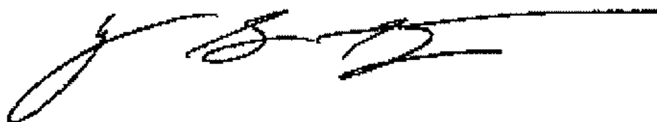
v. Evidence of disability corroborated by the treating medical records finds that the Petitioner has been diagnosed with lumbago and a lumbar strain. He was released from care and placed at MMI as of September 27, 2012. It was noted at that time Petitioner had no residual disability or impairment, but also provided work restrictions based upon an invalid FCE. Petitioner testified his back currently

hurts "little" when performing light duty or while sleeping. He testified to issues getting in and out of a car, getting out of bed, shaving, and playing with his grandchildren. He also testified his most prominent symptoms concern his unrelated bilateral knee issues. Furthermore, Petitioner's credibility at trial was adversely impacted as discussed above, and he produced no current treating medical records to corroborate his alleged ongoing symptoms. Due to the Petitioner's medically documented injuries and all of the testimony within the record, the Arbitrator therefore gives ***moderate 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 an **7% loss of use of the person-as-a-whole** pursuant to Section 8(d)2 and Section 8.1b of the Act.

Issue M: *Penalties & attorney's fees*

Petitioner claims to be entitled to penalties and attorney's fees under Section 19(k), Section 19(l), and Section 16. However, as Petitioner admitted, no such penalty or attorney's fees petition setting forth the basis to award such penalties and fees has been filed. (AX 1). Additionally, in reviewing the entire record of this matter, the Arbitrator finds that the Respondent's denial of benefits was in good faith and was in no way unreasonable or vexatious. As such, the Arbitrator denies Petitioner's claim for penalties and attorney's fees under these Sections of the Act.



Signature of Arbitrator

FEBRUARY 20, 2020
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC030604
Case Name	WALSH, TODD M v. BMWC CONSTRUCTORS, INC.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0201
Number of Pages of Decision	25
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	John Popelka
Respondent Attorney	Paul Pasche

DATE FILED: 5/27/2022

/s/Deborah Simpson, Commissioner
Signature

DISSENT /s/Deborah Simpson, 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 KANKAKEE)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TODD M. WALSH,

Petitioner,

vs. NO: 19 WC 30604

BMWC CONSTRUCTORS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by both Petitioner and Respondent and notice given to all parties, the Commission, after considering all issues and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with a correction made as to the awarded TTD dates as addressed by the Commission herein. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Petitioner, a journeyman ironworker, sustained radiating lumbar injuries after lifting and moving a 200 to 300-pound diagonal brace on August 21, 2019. The Decision of the Arbitrator in this matter contained typographic errors as to the awarded time periods during which Petitioner was entitled to TTD benefits. Specifically, in the Order section, the Arbitrator awarded TTD benefits from "October 14, 2019 through April 14, 2021, as well as on April 16, 2021 and April 18, 2021," as provided by §8(b) of the Illinois Workers' Compensation Act. However, in the body of the Decision of the Arbitrator, instead of the start date of October 14, 2019, the Arbitrator wrote that TTD should begin on October 24, 2019 on page 16 and August 27, 2019 on page 17.

Based on a review of the entire record, the Commission finds that the correct start date for Petitioner's TTD period is October 24, 2019 and changes the Decision of the Arbitrator accordingly. In so finding, the Commission is persuaded by the opinions of Dr. Cary Templin, Petitioner's treating doctor. Dr. Templin first placed Petitioner off work on August 27, 2019 and thereafter kept him either off work or on work restrictions throughout the entire period that Petitioner claimed entitlement to TTD benefits. Additionally, on March 4, 2021, Petitioner underwent a functional capacity evaluation that categorized his job with Respondent at the heavy physical demand level and categorized his physical capabilities below that threshold at the light to medium demand level. PA Kelly Burgess placed Petitioner on work restrictions per this functional

capacity evaluation on March 26, 2021. Shortly thereafter, on April 27, 2021, Dr. Templin found that Petitioner had reached MMI and was unable to return to work based on the restrictions established by the functional capacity evaluation.

Although Dr. Templin first implemented off-work restrictions on August 27, 2019, Petitioner testified that Respondent continued to pay him his salary through October 23, 2019 although he did not actually work during that time period. Petitioner thereafter returned to work for training on April 15, 2021 and was paid for the two hours he participated in training on that day at his regular $44.00 hourly rate. Petitioner then returned for an additional eight hours of training on April 17, 2021. These two training days were considered by the Arbitrator as TPD days since Petitioner returned to work for training and was paid for his time. Thereafter, Petitioner returned to work for Respondent on April 19, 2021 in a fire watch position until May 11, 2021 when Respondent notified Petitioner that he was being laid off. The Arbitrator awarded maintenance benefits commencing May 12, 2021.

Based on the above dates, along with the finding that Petitioner remained on work restrictions per his treating providers, the record supports an award of TTD benefits from October 24, 2019 through April 14, 2021, as well as on April 16, 2021 and April 18, 2021. Therefore, the Commission modifies the Decision of the Arbitrator to correctly reflect the TTD start date of October 24, 2019 and incorporates that correction into the Decision of the Arbitrator. In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay TTD benefits of $1,157.85 per week for 77 2/7 weeks, commencing October 24, 2019 through April 14, 2021, as well as on April 16, 2021 and April 18, 2021, as provided by §8(b) of the Act. With the incorporation of this correction, the Commission otherwise affirms and adopts the Decision of the Arbitrator filed on October 21, 2021.

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.

May 27, 2022

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

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

DLS/met
O- 4/13/22
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DISSENTING IN PART, CONCURRING IN PART

I respectfully dissent from the Decision of the majority in that I would have denied §19(l) and §16 penalties and fees in addition to affirming the Arbitrator's denial of §19(k) penalties. In all other respects, I concur with the Decision of the majority.

In the present matter, Respondent's conduct was not sufficiently unreasonable, vexatious, nor in bad faith to warrant §19(l) and §16 penalties and fees. In pertinent part, §19(l) of the Illinois Workers' Compensation Act provides:

> "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).

Furthermore, §16 states in relevant part:

> "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 under-payment 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.

With §19(l) and §16 in mind, I would have found that the record failed to establish that Respondent acted unreasonably, vexatiously, or in bad faith by disputing liability for the following three reasons. First, Petitioner had an extensive history of pre-accident back problems, which were significant enough to necessitate a prior lumbar surgery. Second, Dr. Joel Meyer, a board certified neuroradiologist, opined that Petitioner's MRI showed scar formation as opposed to a re-herniation and provided detailed medial reasoning for why he reached that finding. And, finally, through four reports, Dr. Kern Singh, a board certified orthopedic surgeon, provided an expert and qualified medical opinion disputing ongoing causation. The Arbitrator found that Respondent's reliance on Dr. Singh's opinions stopped being reasonable once Dr. Cary Templin's operative report documented the existence of calcified disc fragments impinging on the L4 nerve root. However, Dr. Singh had reviewed and considered this August 2020 operative report and nevertheless found there to be an informed medical basis to dispute causation. Even though I agree that Dr. Templin ultimately offered the more persuasive opinion, Petitioner's extensive pre-accident history of lumbar problems, coupled with the opinions of Dr. Singh and Dr. Meyer, provided Respondent with a reasonable and good faith basis to dispute liability.

For these reasons, I respectfully dissent from the Decision of the majority and would have found that an award of penalties and fees under §19(l) and §16 is not warranted.

DLS/met
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/s/*Deborah L. Simpson*
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC030604
Case Name	WALSH, TODD M v. BMWC CONSTRUCTORS, INC.
Consolidated Cases	No Consolidated Cases
Proceeding Type	19(b)/8(a) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Paul Cellini, Arbitrator

Petitioner Attorney	John Popelka
Respondent Attorney	Paul Pasche

DATE FILED: 10/21/2021

THE INTEREST RATE FOR THE WEEK OF OCTOBER 19, 2021 0.06%

/s/ *Paul Cellini, Arbitrator*

Signature

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

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

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

TODD M. WALSH
Employee/Petitioner

Case # **19** WC **30604**

v.

Consolidated cases: ______

BMWC CONSTRUCTORS, INC.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Kankakee**, on **August 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 **Vocational Rehabilitation**

FINDINGS

On the date of accident, **August 21, 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 $**16,456.00**; the average weekly wage was **$1,736.78**.

On the date of accident, Petitioner was **46** 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 $**41,606.36** for TTD, $**0** for TPD, $**0** for maintenance, and $**N/A** for other benefits, for a total credit of $**41,606.36**.

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

ORDER

The Arbitrator finds that the Petitioner's current lumbar condition of ill-being is causally related to the August 21, 2019 accident.

The Arbitrator finds that the Petitioner's average weekly wage was **$1,736.78** at the time of injury.

Respondent shall pay Petitioner maintenance benefits of **$1,157.85 per week** for **14-3/7 weeks**, commencing **May 12, 2021 through August 20, 2021**, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary partial disability benefits of **$44.00 per hour** for **6 hours**, commencing **April 15, 2021 through April 15, 2021**, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$1,157.85 per week** for **78-2/7 weeks**, commencing **October 14, 2019 through April 14, 2021, as well as on April 16, 2021 and April 18, 2021**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$41,606.36** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of **$71,015.00**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit for any and all awarded medical expenses that were paid by Respondent prior to the hearing, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay to Petitioner penalties of $**2,000.00**, as provided in Section 16 of the Act; $**0**, as provided in Section 19(k) of the Act; and $**10,000.00**, as provided in Section 19(l) of the Act.

The parties shall prepare a vocational rehabilitation assessment, pursuant to Commission Rule 9110.10, and shall have the Petitioner evaluated by a vocational rehabilitation expert in order to determine if the Petitioner is an appropriate vocational rehabilitation candidate pursuant to *National Tea Co. v Industrial Comm'n*, 97 Ill. 2d 424, 454 N.E. 2d 672 (1983).

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

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

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

Signature of Arbitrator

OCTOBER 21, 2021

STATEMENT OF FACTS

Petitioner is a journeyman ironworker out of Local 44 in Joliet. He has been an ironworker over 22 years and would obtain jobs either through the union hall or through contacts in the industry. As a union ironworker, he testified that he has worked for a variety of contractors. He initially worked for the Respondent, an industrial contractor in petrochemical maintenance and capital projects, on a variety of jobs starting in 2011/2012 and afterwards for a total of about five years prior to April 2019. In April 2019, he was hired by Respondent to work 40 hours week (five 8-hour days) at an NRG location. He started working at a location called Lyondell around the beginning of August, working four 10-hour days, noting the days and hours worked varied. Other than weather, rainouts or a lack of materials/job preparedness, he would work. If he wasn't informed work was postponed in advance, he would go to work in the morning and, if postponed, would be paid 2 hours show-up time. Work could be postponed for things like weather, materials needed to perform work not being available or a job site not being ready.

Petitioner worked on the Lyondell job as a "connector", which involved connecting pieces of iron while "in the air" to extend an existing platform. He would be on his feet the whole day and would work at shoulder level or above most of the day. He could lift anywhere from 50 to 100 pounds regularly and up to 150 pounds occasionally. On 8/21/19, Petitioner was installing a 14 to 15-foot diagonal brace around 10:30 a.m. (his shift ended around 4:30 p.m.) while on scaffolding about 10 to 12 feet above the ground. The 200- to 300-pound beam was being lowered by a crane and ended up getting caught on a portion of the scaffolding platform. Petitioner testified he tried to lift the beam to slide it off the platform and developed immediate back pain

radiating into the right leg to the foot with numbness. He testified he screamed and then informed his foreman that he hurt his back. He was sent back to ground level for the rest of the day. No one asked him to complete an accident report that day. On 8/21/19, he testified he was earning $44.00 per hour in his position.

Petitioner acknowledged prior low back treatment. He testified he developed low back and radiating right leg pain in July 2018. A 7/16/18 lumbar MRI reflected multilevel degenerative disc disease, most profound at L4/5, where there was a disc bulge with superimposed small right lateral disc protrusion. There was asymmetric right lateral recess and neuroforaminal stenosis. Changes noted at the other lumbar levels were indicated to be mild. (Px12). On 8/1/18, orthopedic surgeon Dr. Templin performed an L4/5 far lateral discectomy, decompressing the L4 nerve root with the removal of multiple large disc fragments (Px1). Petitioner testified his right leg and back pain resolved after surgery. He did not undergo any post-operative physical therapy and Dr. Templin released him to full duty iron work on 9/11/18. His report notes Petitioner indicated no back or right leg pain, just an occasional twinge of numbness and tingling. (Px1). Petitioner testified he returned to full duty iron work at that time and continued to work through 8/21/19. He sought no further treatment for his back in that time period and was able to perform all aspects of his job.

Respondent submitted the records of Ridge Chiropractic Center, most of which are from July 2018, but also a number of records reflecting intermittent treatment at this facility for his back and/or neck between 2008 and 2018. (Rx3). Petitioner also treated four times in July 2018 at Minor Chiropractic, which appears to have occurred while his chiropractor at Ridge had been out of town. (Rx4). The Arbitrator notes that the treatment prior to July 2017 is occasional but appears to reflect relatively chronic episodes of low back pain at varying levels.

Following the 8/21/19 incident, Petitioner returned to work the next day on 8/22/19 but didn't perform any work, testifying this was cleared with the Respondent. He did not complete an accident report that day and wasn't sure when the document ended up being completed. Petitioner testified he received his salary through October 2019 despite not showing up for work during that time.

Petitioner sought treatment with Dr. Templin on 8/27/19, noting the Respondent did not ask him to be examined at any specific clinic. He reported he had done well post-surgery until lifting something heavy at work on 8/21/19, with persistent pain in the right buttock and leg since that time. Diagnosis was acute right low back pain with radiculopathy and Dr. Templin prescribed a lumbar MRI, medication and held Petitioner off work. Dr. Templin also opined: "The patients symptoms do stem from this work injury. He was pain free leading into this and developed immediate pain following this injury." (Px1).

The impression in the 9/10/19 lumbar MRI radiology report was of a recurrent and slightly smaller (versus the 7/16/18 MRI) right lateral protrusion of the L4/5 disc causing moderate right neuroforaminal stenosis. Also noted was an L3/4 disc bulge eccentric to the right with mild to moderate right and mild central canal and left foraminal stenosis. (Rx5, DepxR8). Following his review of the MRI on 9/22/19, noting Petitioner's ongoing complaints and the recurrent L4/5 herniation with severe lateral recess and foraminal stenosis, Dr. Templin recommended L4/5 fusion. (Px1).

Petitioner testified he began to receive TTD on 10/4/19, but the recommended surgery was not authorized. Respondent scheduled a Section 12 examination with orthopedic surgeon Dr. Singh on 1/15/20 pursuant to Section 12 of the Act. The history indicated Petitioner was at work on 8/21/19 and was lifting a heavy diagonal brace (approximately 350 pounds) that was held by a crane and developed immediate low back pain. He complained of 7/10 back pain with dysesthesia throughout the right leg and foot. Dr. Singh reviewed Petitioner's 2018 records, noting chiropractic treatment in July 2018 and the 8/1/18 discectomy with Dr.

Templin. He noted Petitioner's job with Respondent was at the heavy work level. Dr. Singh documented a normal neurological exam with no evidence of Waddell signs. The 9/10/19 MRI films were not available, and Dr. Singh wanted to review the film before providing his opinions. In the meantime, he recommended work restrictions (20 pounds lift/push/pulling and no bend/stoop/twist/squatting) (Px7).

Petitioner testified that his visit with Dr. Singh had been scheduled for 8 a.m., that he was brought into the examination room at approximately 7:55 a.m. and that Dr. Singh spent less than 5 min with him. In support of this, he produced a parking garage ticket stub indicating he arrived at 7:02 and left at 8:05 a.m. (see Px8). Petitioner also testified that Dr. Singh's indication in his report that he had been in a motor vehicle accident on 8/27/19 and treated at the Bolingbrook Hospital emergency room was not true, as he had not been in an accident and did not seek treatment at this facility.

Dr. Singh issued an addendum report on 1/24/19 following his review of the 9/10/19 lumbar MRI films. In his opinion, the films reflected states post-surgical L4/5 laminectomy defect and a resolved L4/5 far right lateral herniated disc, with no residual herniated disc at L4/5. He was unable to correlate Petitioner's pain complaints with these findings and, given no neural compression or neurologic exam findings consistent with lumbar radiculopathy, opined Petitioner could return to full duty work. Dr. Singh further opined that Petitioner's current subjective complaints were unrelated to the 8/21/19 accident date, and that fusion surgery was not appropriate given Petitioner's right leg pain was nonanatomic with no correlating neurologic findings of significant stenosis on the current MRI films. He again referenced the alleged 8/27/19 motor vehicle accident and that Petitioner had denied it occurred. (Rx5, DepxR3).

Petitioner testified the Respondent did not accommodate the work restrictions indicated by Dr. Singh, and his TTD benefits were terminated as of 2/19/20.

On 5/12/20, Petitioner returned to Dr. Templin with ongoing complaints, which the doctor noted were 75% leg pain and 25% back pain. Exam indicated improvement of weakness but some ongoing neurologic findings. Noting he disagreed with Dr. Singh regarding causation and a finding of maximum medical improvement (MMI), Dr. Templin recommended physical therapy and a right transforaminal injection, and limited Petitioner to light duty per Dr. Singh's indications (20 pounds, bending and twisting to tolerance). (Px1).

Petitioner attended physical therapy at Athletico from 5/14/20 through 6/8/20 (Px4), testifying he had some improvement in his leg and foot symptoms with therapy, but it didn't help his back pain. Petitioner initially saw Dr. Sharma on 5/15/20 and underwent a right L4/5 injection on 5/28/20. Petitioner reported a consistent history of having resolved symptoms following his 2018 surgery and immediate right low back pain into the right leg with numbness in August 2019 when he was pulling a 200- to 300-pound diagonal brace caught on scaffolding while bent over. Dr. Sharma stated: "MRI images from 9/10/19 Hinsdale orthopedics were reviewed with the patient which demonstrated a far-right lateral disc herniation at the L4/5 disc level causing severe neuroforaminal narrowing and right L4 nerve impingement." The doctor noted Petitioner had substantial reduction in pain following the injection. (Px5). Petitioner testified that his right leg and foot pain resolved with the injection, but returned after about 6 to 8 hours, and he continued to have back pain.

In response to interrogatories from Respondent, Dr. Singh on 5/19/20 reiterated that the 7/16/18 lumbar MRI confirmed a right far lateral L4/5 disc herniation, while the 9/10/19 films showed a right L4/5 laminectomy defect with no residual disc herniation or nerve root compression. He also again noted his examination of Petitioner reflected normal neurologic findings with negative straight leg raise testing, resulting in a diagnosis of a soft tissue muscular strain, which had since resolved. He opined that the 8/21/19 incident did not cause any objective change in Petitioner's lumbar spine, either as a new injury or an aggravation/exacerbation of his

preexisting condition. He again opined that the Petitioner did not need fusion surgery and was capable of returning to full duty ironwork. (Rx5, DepxR4).

On 6/9/20, Dr. Templin again recommended fusion surgery, noting Petitioner had not returned to his pre-accident baseline condition, with ongoing restrictions in the meantime. (Px3). At Petitioner's 6/18/20 follow up, Dr. Sharma noted Petitioner had near complete relief of his right leg and foot symptoms for 6 to 8 hours following the injection, after which the pain returned. (Px5). On 8/19/20, Dr. Templin performed surgery involving an L4/5 far lateral discectomy and decompression, and interbody fusion with instrumentation and caging. In addition to describing the fusion procedure, the report states: "We then extended further laterally and decompress the L4 nerve root along its path. We remove multiple calcified pieces of disc which were impinging the nerve." (Px3). Petitioner testified he was discharged from the hospital on 8/20/20 and that the radiating pain down the right leg to the foot had pretty much resolved following surgery. (See also Px3).

Petitioner followed up with Dr. Templin on 9/22/20 and 11/3/20. He continued to hold Petitioner off work and on 11/3/20 prescribed physical therapy. Dr. Templin noted normal neurological exam findings and that Petitioner indicated his right leg pain had resolved. (Px1).

Dr. Singh issued an additional addendum on 12/14/20 following a review of Petitioner's updated medical records, noting nothing in these records caused him to change his prior opinions. This appeared to include the operative report of 8/19/20. (Rx5, DepxR9)

Dr. Singh's deposition was obtained on 12/16/20. He testified that Petitioner described his 8/21/19 injury history as trying to lift a 350-pound diagonal brace that was attached to a crane and developing low back pain. The 1/15/20 physical and neurological examination of Petitioner was essentially normal, including sensation and straight leg raise test. Pending review of the recent MRI films, Dr. Singh's provisional diagnoses were a disc herniation at the right L4/5 interspace versus a lumbar strain, with tertiary diagnosis of right L4/5 far lateral microscopic discectomy. He opined the herniated disc had occurred prior to the date of injury, more likely sometime in July 2018. In comparing the Petitioner's 2018 and 2019 MRIs, Dr. Singh noted a large right-sided far lateral disc herniation at L4/5 with mild degenerative changes in 2018, and in 2019 there were mild degenerative with no residual disc herniation at the L4/5 far lateral space i.e. the herniated disc was not present. At this point, Dr. Singh could not correlate Petitioner's pain complaints with his normal physical examination and negative MRI of 2019. Dr. Singh's diagnoses included status post right L4/5 laminectomy defect and right L4/5 lateral herniated disc that was resolved, with the only diagnosis related to the injury of 8/21/19 was a lumbar muscular strain. The former diagnoses pre-dated the 8/21/19 injury. Because Petitioner had a normal neurological examination and the 2019 MRI showed no residual nerve compression, Dr. Singh opined Petitioner had reached MMI, no further medical treatment was needed and that he could return to full duty work. Based upon the lumbar strain, Dr. Singh opined the treatment rendered had been excessive and should have involved four weeks of physical therapy was appropriate. Dr. Singh's opinions did not change after reviewing Petitioner's January 2020 through December 2020 medical records, including the August operative report. Reiterating his diagnosis of lumbar strain, Dr. Singh opined Petitioner's lumbar condition predated the work accident, and the accident did not aggravate this preexisting condition. In his opinion, a lumbar fusion is indicated where there is instability and nerve root compression, and the Petitioner did not have these findings. (Rx5).

On cross-examination, Dr. Singh had no specific recollection of Petitioner outside his notes and reports, including how long his visit lasted. He reviewed no information disputing that Petitioner had no further treatment following his release after 2018 surgery until after the work accident at issue. He agreed Petitioner complained of significant back and right leg symptoms. He also agreed that Petitioner's job would be considered heavy based on the job description he reviewed. He examined the cervical spine based on

Petitioner's symptoms in the entire right leg, which wouldn't follow a particular nerve rot dermatome. Dr. Singh described his neurological examination of Petitioner's lumbar spine and reiterated there were normal findings. He acknowledged there were no positive Waddell signs. He didn't specify that straight leg raise was negative in his report because he would only indicate if its positive. He could not objectify Petitioner's symptoms, meaning he had no medical explanation for them: "his pain complaints are diffuse and vague in nature." Dr. Singh agreed that both the 2018 and 2019 MRIs showed degenerative spondylosis but opined this was not aggravated by the 8/21/19 accident. Dr. Singh's opinions were based on his own review of the films although he also reviewed the radiologist reports. His initial recommendation of light duty was based on the subjective pain. His indication in reports of a "resolved" disc herniation relate to following Dr. Templin's 2018 surgery. (Rx5).

On further cross, Dr. Singh acknowledged the MRI radiologist, Dr. Templin and Dr. Sharma indicated a recurrent L4/5 herniation in the 2019 films: "I can't testify to what their opinions regarding their interpretation is, but my interpretation is different." Dr. Singh testified that right neuroforaminal L4/5 stenosis could result in a pattern of numbness down the leg, but not the entire right leg. As to Dr. Singh's opinion that the 8/21/19 lumbar strain should have resolved in 4 weeks, Dr. Singh acknowledged there were no medical records he could point to that supported this position. As to how his subjective complaints were related to the accident for four weeks and not thereafter, Dr. Singh testified: "I'm saying I can't objectify his pain complaints, but based upon his history and what he reports to me as the mechanism of injury and his subjective reporting of pain that I believe that was causally related, but nothing to objectify it." He went on to testify that while lumbar degeneration is present per the films, Petitioner had no dermatomal distribution that would correlate to L4/5, the films showed unchanged degeneration at L3/4 and L5/S1 between the 2018 and 2019 MRIs, and he didn't believe the finding on the 2019 films at L4/5 was a recurrent herniation but rather was a residual finding from the prior 2018 surgery. He had a normal neurologic exam and Dr. Singh didn't believe there was any nerve compression that would correlate with complaints of entire right leg pain. Dr. Singh agreed Petitioner's 2018 complaints correlated with the 2018 MRI findings. As to whether the Petitioner could work as an ironworker if he did in fact have neural compression at L4/5 following the August 2019 accident, the doctor testified that an examination still would matter, and if he had normal neurologic exam findings, it would be safe for him to return to work. To his knowledge, Dr. Singh believed that both Dr. Templin and Dr. Sharma found normal neurological strength testing, that Sharma did not test for sensory, but agreed they found positive straight leg raise exam. was the same as Dr. Templin's and Dr. Sharma's examinations. As to Petitioner having temporary relief from the injection, Dr. Singh testified: "Selective nerve root and identification injections have been shown in recent literature not to be accurate, so I don't recommend it for diagnostic purposes." (Rx5).

On redirect exam, Dr. Singh clarified that by "objectifying" pain complaints he meant that if Petitioner had a disc herniation at L4/5, he should have had L4 dermatomal distribution symptoms: tibialis anterior weakness, EHL weakness, patellar reflex loss or diminishment, or diminishment of sensation in the L4 distribution on monofilament testing. Petitioner did not have any of these, and therefore Dr. Singh could not correlate Petitioner's diffuse pain complaints with any L4/5 disc herniation. The L4 nerve distribution would not encompass the entire leg, but rather would be limited to a band that included the anterior thigh, the anterior medial aspect of the knee, and the anterior medial aspect of the ankle. (Rx5).

The Arbitrator notes there was discussion in the deposition regarding whether the Petitioner was involved in a motor vehicle accident on 8/27/19. All the Arbitrator can say is that no evidence was produced at hearing which indicate such an accident actually occurred, and it was denied by Petitioner, both in his testimony and to Dr. Singh. Dr. Singh made it clear that this information had no bearing on his opinions one way or the other.

On 12/29/20, Petitioner again reported his leg pain had resolved but that his back pain remained at levels between 4 out of 10 and 9 out of 10 (4/10 to 9/10) levels, and that therapy was not helping. He was advised by

Dr. Templin to continue therapy before transitioning to a work conditioning program, and if he could not tolerate that, to possibly undergo a functional capacity evaluation (FCE) and/or lumbar CT scan. Off work status was continued. (Px1).

Dr. Templin testified via deposition on 1/8/21. He testified consistent with the medical records noted above regarding his treatment of Petitioner. As to the significance of the Petitioner's temporary relief with the May 2020 injection with Dr. Sharma, he testified that this indicated there was irritation, impingement and inflammation of the nerve root, predominantly at right L4 in this case. At the time of the fusion surgery, Dr. Templin found multiple calcified pieces of disc material underlying and pressing on the nerve root, causing irritation, which were removed to achieve decompression. Following surgery, Petitioner's leg pain resolved, though he had some ongoing back pain. He felt he wasn't progressing as well as he hoped in therapy. He had some complaints of medial foot numbness, which would be consistent with the L4 nerve root. He reiterated his diagnosis of recurrent L4/5 disc herniation with foraminal stenosis causing radiculopathy, alleviated with surgery, and causally related to the 8/21/19 work accident. He did not believe Petitioner was able to return to work as an ironworker at that time, "but hopefully he will progress to that point." On cross-examination, Dr. Templin agreed he had not reviewed any records of Petitioner having back treatment prior to 2018, but denied any such records would change his causation opinion. He agreed the surgery he performed in 2018 involved the removal of L4/5 disc fragments. He had reviewed the Petitioner's 9/10/19 lumbar MRI films prior to recommending surgery on 9/25/19, but he could not say if he had reviewed the radiologist's report prior to that time or not, though he did review it at some point. He agreed that the pre-surgical flexion/extension x-rays he obtained did not show lumbar instability but testified that the decompression of the L4/5 level would result in instability, which is why the fusion was also performed at that time. The numbness he has in the foot now is not due to current nerve root impingement, its consistent with the damage done while there was nerve impingement prior to surgery. Fragments of disc were found impinging the nerve at the time of the 8/19/20 surgery, along with disc degeneration and collapse of the disc space. The disc fragments found in the 2020 surgery were located in the same disc space as in the 2018 surgery at L4/5. (Px2).

Petitioner attended therapy at Athletico from 11/13/20 through 2/4/21 (29 visits), with a month off for rest between 11/19 and 12/7/20. The records consistently note good resolution of his leg symptoms but ongoing back pain, particular with prolonged positions (standing or sitting) and bending/squatting. Petitioner was discharged from therapy on 4/9/21, with the report indicating Petitioner had failed to meet his short- and long-term objectives despite good effort. (Px4).

On 2/16/21, Dr. Templin noted ongoing complaints of 4/10 to 5/10 low back pain and that Petitioner had been discharged from therapy due to a failure to progress. Noting Petitioner had multiple areas of lumbar degeneration and the L4/5 fusion, and the failure to improve with therapy, the FCE was recommended, with Petitioner to remain off work in the meantime. (Px1). Petitioner testified he continued to complain of low back pain: "just sharp pain, aches, its dull, you know, a whole bunch of different stuff at once", but had no complaints at this time about the right leg or foot.

Petitioner participated in the FCE at ATI on 3/4/21. The report indicates Petitioner tested at the light to medium work level while his regular job as an ironworker was categorized at the heavy work level, meaning his current abilities fell below the level needed to return to work. Petitioner advised the therapist that his work would require him to squat, stand, walk, kneel, crawl, bend and crouch. The report indicates the testing was valid, and that Petitioner is limited as follows: 1) 26 pounds occasionally above the shoulder, 2) 37 pounds occasionally from desk to chair level, 3) 35 pounds from chair to floor level, 4) carrying of 42 to 47 pounds, 5) no limitations on workday, 6) limitations on sitting (5 to 6 hours), standing (4 to 5 hours) and walking (5 to 6 hours). Frequent lifting was limited to 17 to 30 pounds, and there was no limitation on any specific activities other than crawling.

It also appears to note he was limited to 8 hours of work, but it is unclear if this took into account that he would sometimes work 10-hour shifts. (Px6).

When Petitioner saw Dr. Templin on 3/16/21, the doctor released him to return to work per the FCE, i.e. light/medium level work ("See FCE for further details."), noting this fell below Petitioner's regular heavy work duties. Due to ongoing complaints of back pain, a lumbar CT scan was also ordered. (Px1). The 3/24/21 lumbar CT scan showed post-surgical findings indicating the hardware appeared intact and the vertebral segments appeared in normal alignment. Also seen were multilevel degenerative changes throughout the lumbar spine. The Arbitrator notes that a detailed review of the report notes disc bulges at all levels from L2/3 to L5/S1, with all noted stenosis at these levels at most being mild. (Px3). Petitioner last saw Templin on 4/27/21, reporting ongoing 5/10 back pain and that when he tried to return to work the prior week, he was unable to perform all of his expected duties and had remained off work since. Dr. Templin noted the CT showed proper positioning of the instrumentation and proper vertebral alignment with a solid fusion. He found Petitioner had reached MMI and restricted him to work within the FCE restrictions. (Px1).

Neuroradiologist Dr. Meyer testified on 5/12/21 on behalf of Respondent. He is board certified in diagnostic radiology with added qualification in neuroradiology. He was asked to review the Petitioner's 7/16/18 and 9/10/19 lumbar MRI films. Dr. Meyer testified that he also reviewed the radiologists' reports, but his opinions are based on his own review of the imaging studies. Per his review, the 2018 MRI showed a prominent high far lateral disc extrusion or herniation at L4/5 causing mass effect on the right L4 nerve root, which may correlate with right L4 radicular symptoms. Other less pronounced degenerative changes were seen in the lumbar spine, but no other disc herniation or extrusion. The 2019 MRI showed improvement relative to the 2018 study, but there was scar formation involving the right far lateral/foraminal region, which is not uncommon following surgery, which here involved successful removal of the large L4/5 disc. In the 2018 films, Dr. Meyer pointed out the different features at the normal L3/4 disc and the abnormal extruded right L4/5 disc causing mass effect on the right nerve root, which is commonly associated with radicular symptoms. In his view, while "herniation" and "extrusion" are interchangeable terms, a "protrusion" is different. A "sequestered" disc is where disc fragment or fragments separate from the disc. Dr. Meyer found no recurrent disc herniation/extrusion at L4/5, noting he compared the 2018 and 2019 films: "I can see that there's still soft tissue in the area where we had previously seen a disc problem. But that soft tissue enhances with contrast, and that's characteristic of scar formation rather than disc herniation." Disc material does not enhance with contrast material, scars do. The role of the contrast in a post-operative MRI is to differentiate between a recurrent disc and scarring, which is why contrast was used in the 2019 MRI but not the 2018 MRI. (Rx6).

On cross-examination, Dr. Meyer disagreed with the 2019 MRI radiologist's finding of a recurrent disc: "I think it's a scar." As to right foraminal stenosis, Dr. Meyer testified the foramen was somewhat narrowed by scar formation and degenerative disease. He did not believe the 2019 MRI even showed a disk protrusion. He agreed that disc protrusions, extrusions and sequestrations can all cause pain and inflammation, and cause radicular symptoms if the nerve or spinal cord are compressed. He agreed his role as neurologist is not to determine treatment protocols. He described the condition shown at L4/5 in the 2019 films as a combination of scar formation and degenerative facet disease resulting in right foraminal stenosis – it would be up to the treating physician who's correlating the symptoms to describe the condition as impingement. (Rx6). The Arbitrator notes that the films were being reviewed live during the deposition, and were attached to the doctor's report, though the Arbitrator was not able to see exactly what Dr. Meyer was describing during the deposition.

Petitioner testified he returned to work for Respondent on 4/15/21 on 4/17/21, involving two hours of training on the former day and 8 hours training on the latter, and he was paid $44.00 per hour. He returned to work for Respondent at Lyondell on "fire watch" on 4/19/21, which involved making sure that safety measures are being

followed when workers were performing "hot" work. He testified this involved 10-hour days, and he would still spend his entire shift on his feet. Petitioner testified he would notice low back pain and, after being resolved following surgery, again began to feel right sided pain into the leg and foot.

Petitioner received a termination letter (Px9) on 5/11/21, stating he was being laid off due to a "reduction in force." He testified this was the typical letter he would receive upon a layoff. The Arbitrator's review of this document is consistent with Petitioner's testimony, and that as to Petitioner's "Performance", he was noted to meet minimum requirements of the job. Petitioner testified he had no reason to believe that the Respondent would hire him back in the future.

Petitioner testified that the Respondent did not offer him vocational assistance. He then began looking for work online using job search sites like Zip Recruiter "and stuff like that." He testified that he competed job logs on the ZipRecruiter site (see Px11) between 5/14/21 to 8/15/21, which is the last date noted in these records. He continues to look for work, indicating he didn't bring in his logs from the week leading up to the hearing date. He testified this was the first time he had to seek employment outside of the ironworker industry, where he wasn't either going through the union or industry people he knew. He testified he hasn't had any employment offers to date.

Petitioner's job search logs dated from 5/14/21 through 8/15/21. There are approximately 234 jobs which Petitioner indicated he applied for in this time period via Zip Recruiter in a variety of positions. (Px11). He testified that ZipRecruiter has a function which indicates if jobs are a good or bad match for him. On cross exam, he acknowledged that he didn't have experience in many of the jobs he applied for, but that he had been an ironworker for 22 years and didn't really have experience in anything else.

Based on his layoff from Respondent and his ongoing job search, Petitioner is requesting maintenance benefits from 5/12/21 to present, noting he hasn't received benefits from Respondent during this time period. As to the medical expenses presented in Px10, he testified that, to his knowledge, these bills remain outstanding, but that Respondent is entitled to credit for what was paid through group health coverage.

Petitioner testified had been living in Minooka, Illinois on the date of accident but has since sold his home (on 7/26/21) and moved with his wife to live with his son in his son's home in Oak Grove, Kentucky, because he could no longer afford the home with no income. He is not paying rent to his son. His wife is not currently employed.

On cross-examination, Petitioner reiterated that he has typically obtained jobs through the union hall for 22 years. If enough work was available, he was able to choose jobs, and could choose not to work if he wanted. Typically, jobs through the hall could last for days, weeks or months. His group health and disability benefits are obtained through the union, and he used these benefits to pay for both his pre- and post-accident surgeries. He did not utilize any weekly disability benefits.

Petitioner agreed that jobs with the Respondent mainly involve industrial construction maintenance and repair. He testified maintenance jobs typically only last for a few weeks and everyone is then laid off, i.e. a "reduction in force." After the initial NRG job with Respondent in 2019 ended, Petitioner then didn't return to work until July/August 2019, with Respondent, at Lyondell for new construction of a platform. When he returned to work after the last surgery he returned to Lyondell as a fire watcher on a different project than he had been working on at the time he was injured, which had ended. Petitioner agreed there are periods of time where he does not work but denied ever taking off work for anything other than injury. Petitioner denied being off work for several

months each year, testifying he has never been off work other than due to injury. He noted that he normally works through the winter and that he has only received unemployment three times in his career.

Following both his 2018 and 2019 surgeries, Petitioner acknowledged that Dr. Templin indicated it could take up to a year for nerve damage to fully heal. After he was released following the 2018 surgery, Petitioner reported to the union hall that he was available to work and took the first job that was available in October 2018, with Area Erectors.

Petitioner acknowledged seeing a chiropractor on and off for his back over the years leading up to 2018. He agreed he completed a questionnaire at Dr. Singh's office on 1/15/20 (Rx5, Depx6), asking about injury history, pain location, type of pain, etc. He agreed he completed the documents himself and that he had faxed it to his attorney prior to being evaluated by Dr. Singh. He testified that Dr. Singh asked him how his injury occurred and if he was in pain, and that he didn't speak to any other medical personnel at Dr. Singh's office that day. On redirect exam, as to why he did not indicate his prior chiropractic care on Dr. Singh's questionnaire, Petitioner testified it asked about treatment for his current problem, which he took to mean related to his 8/21/19 injury.

Petitioner agreed that he had worked as an ironworker fire watcher prior to 2021, that the position is required on site by OSHA and individual customer protocols, and that it is a full union scale position. Petitioner has experience performing welding, but only stick welding. Petitioner notified the union hall that he was laid off when he was terminated by Respondent to let them know he wasn't working. He hasn't asked for any union job assignments since his 5/11/21 release, indicating he did not ask for work because he cannot perform the duties of an ironworker. He has not spoken to or retained a vocational counselor. He hasn't applied for unemployment or contacted the unemployment office for any vocational assistance.

Petitioner agreed that, other than the two ours of show-up pay, he was not guaranteed to work 8 hours when he would show up for work, and sometimes he would only work 4 or 5 hours per day. He would have to lift up to 150 pounds occasionally on all ironworking jobs, not just with Respondent. He indicated that assistance is not generally available for this, and as to whether he was supposed to ask for help, he testified: "Not necessarily." He testified the training he underwent with Respondent in April 2021 did not include how to lift safely.

Asked about his return to work in April 2021, Petitioner testified he noticed pain in the low back and right leg and foot after the first day. Prior to this, following the fusion surgery, he still had back pain but no right leg symptoms until he went back to work. He acknowledged this has improved since he stopped working and standing all day long. Petitioner testified that he obtained an associate's degree in computer aided drafting (CAD) in 1992 through Robert Morris college, but he has no other certifications or diplomas and he does not have a CDL drivers' license.

Respondent's environmental health and safety director, Clay West, testified that in his position over 12 years he is familiar with employee wage records, time sheets, etc., as well as records of layoffs. In terms of onsite skilled trades, a labor coordinator will request that particular skill or trade via the union hall, who then dispatches the requested workers. In Illinois, there is a fixed time for projects based on the contract, with most averaging three to six months, but no projects lasting more than a year. Once a customer's project ends, the tradesmen are laid off and referred back to the union hall, which is called a "reduction in force."

Mr. West identified Rx1 as a true and accurate statement regarding Petitioner's 2018 and 2019 payroll history, noting their pay periods run from Monday through Sunday. Rx2 is a summary of Petitioner's timesheets, including the dates he worked for Respondent in 2019, charted directly from timecards via Respondent's enterprise system.

Mr. West knew Petitioner as an ironworker, agreeing he worked for Respondent at the NRG facility in April 2019, though he could not say if that was a maintenance or (new) capital project. He testified that Respondent does not guarantee a particular number of hours per week for ironworkers. They do not require ironworkers to work overtime and do not discipline an ironworker who refuses overtime. Ironworkers for Respondent do sometimes work 10-hour days, agreeing this would involve four-day work weeks, and any time worked in excess of this would be considered overtime, which is voluntary. Respondent does not typically perform iron work during the winter unless it involves maintenance type work.

Mr. West's impression of Petitioner was that he was a good worker and has worked many times for Respondent as a foreman. He testified that ironworkers have both lighter and heavier physical duties with Respondent, with fire watch, material handling and bolt management being examples of lighter jobs that are still paid at union scale. He noted fire watchers are required by OSHA, and so ironworkers are put into these positions by other companies as well. Mr. West testified that Petitioner was offered a fire watcher job in February 2020 pursuant to the restrictions indicated in Dr. Singh's IME and addendum. He testified this offer was made to Petitioner by letter and "there wasn't a response." Earlier in 2021, Petitioner was offered a fire watch job, and Mr. West testified that Petitioner did this job from 4/19/21 through 5/11/21, when the project ended, and he was laid off based on a reduction of force.

Mr. West advised that while he hadn't reviewed the Dictionary of Occupational Titles written job description for an ironworker/structural steel worker (see Rx5, Ex.5), he is generally familiar with the physical job requirements of an ironworker. After reviewing the document during his testimony, he agreed it is essentially accurate for Respondent's ironworkers. While he agreed that ironworkers likely deal with up to 100 pounds of force, "our practices" are to try to limit this to 50 pounds and that workers should obtain help from other workers or a machine for anything heavier, which is conveyed to workers through training all employees receive. He agreed ironworkers frequently work with 25 to 50 pounds and constantly with 10 to 20 pounds, and that the job involves constant standing.

On cross examination, Mr. West testified he has never worked as an ironworker himself and has never performed an actual job analysis regarding Respondent ironworkers. He agreed that Respondent currently has ironworkers performing the noted lighter jobs, such as fire watch, and acknowledged that if Respondent had such jobs available, Petitioner would be able to work today. He could not say at the time of hearing whether the Respondent had any current openings for lighter ironworker jobs in Illinois. He agreed there probably are ironworkers currently working for Respondent performing these lighter jobs who are capable of full duty and could be moved to heavier jobs to open up lighter jobs for someone like Petitioner. He also agreed he would be the person for Respondent who would be hiring the Petitioner in this capacity, but that he hasn't been actively looking to find work for Petitioner since he was laid off in May.

As to the February 2020 job offer to Petitioner, Mr. West testified he prepared the offer letter sent to Petitioner and that the offer was for his regular ironworker job duties. While he didn't recall speaking to Petitioner by phone, he agreed its possible that he did, and that Petitioner indicated whether he would or would not accept it. He could not recall if he reviewed any of Dr. Templin's reports at that time. When he offered the fire watcher job to Petitioner in 2021, Mr. West agreed it involved working 10-hour shifts. He agreed that this would exceed Petitioner's restrictions if the FCE restricted him to 8-hour days. Petitioner did accept the job and did return to work. The 5/11/21 reduction in force letter sent to Petitioner (Px9) was not sent by Mr. West, but he was aware such letter is sent when a Respondent ironworker is laid off or terminated.

On redirect, Mr. West agreed he is involved in the process of finding work for light duty workers and testified to how the process would work within Respondent company. Again, he was not aware at the time of hearing if such light job was currently available, but if he were advised such a position was available, labor and risk coordinators would discuss this to determine if a job offer would be made.

CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner's current lumbar condition of ill-being was and remains causally related to his 8/20/21 accident.

It is clear that the key issue in this case, in terms of the basis for Respondent disputing causal connection, is the Petitioner's preexisting condition and whether the current 8/21/19 accident caused a recurrent disc herniation (and whether such herniation actually existed) or whether the Petitioner's pain was simply due to a lumbar strain with the necessity of the fusion surgery being related to the preexisting condition.

On 8/1/18, about a year prior to the accident (8/1/18) Petitioner underwent an L4/5 discectomy with Dr. Templin, after which he was released to full duty ironwork on 9/11/18. Petitioner testified he sought employment through the union shortly thereafter and was initially hired as an ironworker in October 2018 by Area Erectors. No evidence was presented as to how long this job lasted or if Petitioner worked anywhere else after that job ended and before he began with Respondent in April 2019 on the NPG job. He worked for Respondent thereafter until the 8/21/19 injury. Petitioner's testimony that he sought no further back or right leg treatment between 9/12/18 and 8/21/19 is unrebutted. He also testified he did not miss any time from work due to his low back or right leg during that time and was able to perform all aspects of his job as an ironworker.

On 8/21/19, while working for Respondent, he testified he developed significant back pain and pain down the right leg when he was basically trying to get a 200+ pound metal bar, which was being moved into place by a crane, off of a scaffolding platform. The Arbitrator's understanding is this piece of steel was caught on the scaffolding pan he was standing on at least 10 feet in the air. It is more than understandable to the Arbitrator that the Petitioner would seek to promptly move this bar off of the scaffolding. He testified that while doing this he had immediate low back pain into the right leg with numbness. He testified he screamed out when this happened and then reported the injury to his supervisor. While he did not seek treatment immediately, he indicated he was at work for a day and a half doing nothing before he went to Dr. Templin. There does not appear to be any dispute that the incident occurred as Petitioner described it, or at least that he reported a consistent history of it to the Respondent as he described, given the lack of contrary testimony from Mr. West. Following the 8/19/20 lumbar fusion surgery, Petitioner's testimony and medical records support the fact that his preoperative right leg and foot pain and numbness essentially resolved other than some ongoing foot numbness which Dr. Templin indicated could be an ongoing sequela of the nerve impingement that was decompressed on 8/19/20. Petitioner did have some right leg recurrence when he returned to work in April 2021 and was again on his feet for 10 hours a day but indicated this generally has resolved.

Obviously, the Petitioner had a preexisting low back condition, primarily at L4/5, for which he underwent surgery just a year prior to the 8/21/19 accident. He had a discectomy which removed several disc fragments. The Petitioner had very similar complaints in July 2018 of low back pain radiating into the right leg as he had after the 8/21/19 accident. He had no physical therapy at all after the 2018 surgery, which the Arbitrator

acknowledges is unusual following back surgery, and was released to return to work shortly thereafter in September 2018. However, the Respondent takes the Petitioner as it finds him at the time of hire.

A key part of this dispute between the parties is whether Petitioner's post-8/21/19 MRI showed evidence of recurrent disc herniation impinging the right L4 nerve root or whether there was nothing going on at that level other than the results of the prior 2018 surgery. As to the films, both the radiologist Dr. Jester and orthopedic surgeon Dr. Templin determined there was a recurrent L4/5 disc herniation, while Section 12 examiners orthopedic surgeon Dr. Singh and neuroradiologist Dr. Meyer opined that the films did not show a recurrent herniation. Dr. Meyer indicated that any right L4 stenosis was due to scar tissue and advancing degeneration. Dr. Sharma, a pain physician, specifically indicated that a disc herniation was seen at right L4/5 impinging on the nerve, though it is unclear what his expertise is with regard to reading lumbar MRI films as a pain physician versus a radiologist or surgeon.

The Arbitrator is put into the position of determining the accuracy of differing opinions from otherwise qualified physicians regarding what is depicted in their review of the exact same MRI films. While this is not an easy determination for a non-physician to make, the Arbitrator finds, based on the greater weight of the evidence, that the Petitioner sustained a recurrent disc herniation at L4/5 as a result of the 8/21/19 accident. This is supported by one very significant piece of evidence in particular – the 8/19/20 operative report of Dr. Templin, which specifically stated that multiple calcified disc fragments were removed that were impinging the L4 nerve root. No matter what is depicted in the MRI films, it is hard to imagine better evidence of the existence of a herniated spinal disc than a visual analysis during surgery were such disc fragments were found and removed. This finding is further supported by a chain of events analysis, in that the Petitioner reported immediate onset of radicular right leg and foot complaints after the accident, and immediate relief of these symptoms following the surgery. The Petitioner had been working a significantly heavy job for almost a year prior to the 8/21/19 accident. There is no indication that he had been having any difficulty performing his job between September 2018 and 8/21/19. This includes a significant period of time during which he was in the Respondent's employ, presumably putting Respondent in a position to know if Petitioner had been unable to do his job or if he had been producing a lesser amount of work than other workers. There is no evidence of that he had any problems performing his work prior to 8/21/19.

Dr. Singh's opinions in this case were not particularly persuasive to the Arbitrator. The Petitioner's symptoms after this work accident were similar to what his complaints had been in 2018 when the L4/5 level was addressed with a successful surgery. It makes sense that L4/5 was again the culprit here given that similarity. Despite Petitioner working steadily leading up to 8/21/19 and complaining of immediate pain and radiation into the right leg following a mechanism of injury that seems quite competent to result in a back problem, Dr. Singh concluded that Petitioner had nothing beyond a lumbar strain and needed no more than 4 weeks of therapy and off work status. The greater weight of the evidence in this case indicates the Petitioner consistently complained of significant symptoms in the back and right leg after the work accident, including well after four weeks.

While Dr. Meyer has solid credentials in his field as a radiologist, all he could testify to was that he did not see a recurrent herniation on film. Again, the Arbitrator finds it difficult to see how this opinion can be accepted as more weighty evidence of a lack of recurrent L4/5 herniation over Dr. Templin's specific finding of calcified disc fragments impinging the L4 nerve root which he removed during the fusion surgery. Dr. Meyer also confirmed that there was evidence of L4 stenosis, which he opined was due to scar tissue and advancing degeneration, which could result in symptoms like the Petitioner complained of. Thus, while he disagreed that a recurrent herniation was seen on the post-accident MRI, he agreed that there were findings of stenosis at L4/5, and he had no knowledge of what Dr. Templin indicated he found during the most recent surgery.

Short of Dr. Templin mistakenly stating he found calcified discs around the nerve, or Dr. Templin falsely stating this, for which there is no evidence, the best and strongest evidence of Petitioner's post-accident L4/5 condition was the visualization that occurred during surgery. It certainly seems possible that disc fragments that existed from the original 2018 herniation could have somehow come loose at L4/5 without a true recurrent "herniation" resulting from the accident, settling at the right L4 nerve root. However, even in that case, the timeline makes it clear that the onset of symptoms came at the time of the 8/21/19 work accident. Thus, the accident either caused the additional herniated disc fragments or aggravated the L4/5 condition to a point where treatment was needed. Again, the Petitioner's complaints after the work accident remained very consistent until undergoing the fusion surgery.

The Arbitrator finds that the greater weight of the evidence significantly favors the finding that the Petitioner's lumbar condition of ill-being is causally related to the 8/21/19 accident.

WITH RESPECT TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner claims, and the parties stipulated, that he earned $16,456.00 during the year preceding the injury with Respondent. Petitioner argues that his average weekly wage was $1,736.78. Respondent disputes this calculation and calculates the average weekly wage at $1,142.07. Respondent submitted Petitioner's wage records for 2018 and 2019 (Rx1) and Petitioner's timesheets for 2019 (Rx2).

Petitioner began working for Respondent in April 2019 and worked for Respondent continuously through the date of accident. He testified that as a journeyman union ironworker he earned an hourly rate of $44.00 per hour at the time of the injury. This was unrebutted. Petitioner testified that he worked 40 hours per week in the full performance of his job as a journeyman ironworker for Respondent unless circumstances outside of his control prevented him from doing so. When he began working for Respondent in April 2019 he worked at NRG, and testified he was hired to work eight hours per day and five days per week. In the beginning of August 2019, he began working at Lyondell in Morris, Illinois, where he was hired to work ten hours per day, four hours per week. Petitioner agreed on cross-examination that these hours were not guaranteed but indicated that the only circumstances under which he did not work a full week were due to weather, availability of materials or the scheduling of work based on other contractors completing their work. He testified that he has never been off work as an ironworker for several months at a time, normally works through the winter and has only collected unemployment benefits three times in his 22 years performing ironwork.

In calculating the average weekly wage, the Arbitrator finds that the third method of calculation under Section 10 of the Act is appropriate. The third method applies to those situations where the employee has been working for the employer less than a year prior to the date of the accident. Under Section 10 of the Act, using the third method, the Arbitrator takes the earnings during employment of $16,456.00, and divides them by the number of weeks and parts thereof during which the employee actually earned such wages. Based on Rx1 and Rx2, the Arbitrator calculates the wages as follows: $16,456 in earnings divided by 9.475 weeks (379 hours divided by a regular 40-hour work week) equals $1,736.78 per week. The Arbitrator finds that Petitioner's average weekly wage was $1,736.78 at the time of his injury.

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:

Respondent disputes the medical bills on the basis of liability. Based on the Arbitrator's findings regarding causal connection, the Arbitrator finds that Respondent is liable for the outstanding medical bills totaling $71,015.00 pursuant to Sections 8(a) and 8.2 of the Act.

Respondent is entitled to a credit under Section 8(j) of the Act for payments made by the group carrier. The Arbitrator further finds that Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

The Arbitrator notes that the parties have indicated in their proposed decisions that the Respondent's 8(j) credit totals $147,968.77. The Respondent is also entitled to credit for any payments made towards the awarded bills via direct workers' compensation payments, again so long as Respondent holds Petitioner harmless with regard to same.

The Arbitrator notes that the evidence presented makes it unclear if any of the remaining balances constitute a lack of payment of the expenses or possible balance billing over and above that allowed by Section 8.2 of the Act, the Medical Fee Schedule. Suffice it to say, the Petitioner is entitled to the payment of all of the expenses presented as Px10, pursuant to Sections 8(a) and 8.2, and the Respondent is entitled to credit for any and all of those expenses that have been paid by Respondent, and Respondent shall hold the Petitioner harmless with regard to any expenses for which Respondent takes such credit.

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

Petitioner claims he was temporarily totally disabled from 10/14/19 through 4/14/21, and from 4/16/21 through 4/18/21. Respondent disputes this and claims no liability after 9/25/19, based on the opinion of Dr. Singh that Petitioner reached MMI on that date and was capable of full duty work. The Arbitrator has already determined that the Petitioner's ongoing condition remains causally related to the work accident, and that he had not reached MMI as of 9/25/19.

Dr. Templin kept Petitioner off work from 8/27/19 until 3/16/21. The Petitioner testified, supported by Rx1, that he continued to receive his regular wages from Respondent through 10/23/19, though he was not actually working during that time. When he reached MMI he was provided with permanent work restrictions which prevented him from returning to work as an ironworker. Petitioner testified he returned to work for Respondent on 4/15/21 for a period of two hours for training, and for eight hours of training on 4/17/21, before returning to work on fire watch on 4/19/21. He testified he worked 10-hour days at that point until he received a 5/11/21 termination letter.

Based on the above, the Arbitrator finds that the Petitioner is entitled to TTD from 10/24/19 through 4/14/21, as well as on 4/16/21 and 4/18/21. As noted, he returned to work on 4/19/21.

Petitioner claims temporary partial disability for 4/15/21 based on Petitioner only being paid two hours of work for the training he participated in that day. The Petitioner also worked a partial day on 4/17/21, participating in training for eight hours. The evidence did not make clear if the Petitioner's workday on 4/15/21 or 4/17/21 was based on an eight hour or a ten hour shift. As such, the Arbitrator finds the Petitioner is entitled to six hours of wages as TPD for the time lost on 4/15/21, but has failed to prove entitlement to TPD on 4/17/21.

As noted, Petitioner testified he returned to work on fire watch as of 4/19/21 and appears to have continued to work in this capacity until he received correspondence on 5/11/21 that he was being laid off due to the ending of the job he was working on. Petitioner claims he is entitled to maintenance starting on 5/12/21. The Arbitrator agrees and finds that Petitioner is entitled to maintenance benefits from 5/12/21 through the date of hearing, 8/20/21. During this period of time, the Petitioner remained under work restrictions that prevented him from returning to work as an ironworker. He also participated in a self-directed job search during this period of time. It does not appear that Respondent ever offered Petitioner vocational rehabilitation services during that time, which comports with its dispute regarding liability after 9/25/19 based on Dr. Singh's determination of MMI. As noted, however, the Arbitrator finds the opinions of Dr. Templin to be more persuasive than that of Dr. Singh.

Based on the testimony elicited, the Respondent also appears to argue that positions were available in the ironworker industry that are lighter duty jobs, including fire watch, bolt management and material handling. However, the Arbitrator finds that the greater weight of the evidence indicates that these jobs were being filled by regular ironworkers, not necessarily ironworkers who are on light duty. It seems to the Arbitrator that the Petitioner, in attempting to seek work through the union on a light duty basis, would not allow him to compete for jobs with unrestricted ironworkers. All ironworkers earned the same wage regardless of whether they performed regular or lighter ironworker jobs. The Respondent, via Mr. West, also indicated that they were not actively seeking to place the Petitioner in a lighter job on one of their jobs subsequent to 5/11/21. This further bolsters the finding that the Petitioner would have a difficult time finding an ironworker's job while being under the work restrictions he is currently being held to by Dr. Templin.

The Arbitrator finds that the Petitioner is entitled to TTD benefits from 8/27/19 through 4/14/21, as well as on the dates of 4/16/21 and 4/18/21. Petitioner is entitled to 6 hours of TPD benefits, based on a $44.00 per hour wage, on 4/15/21. Petitioner is entitled to maintenance from 5/12/21 through 8/20/21.

The Respondent is entitled to a stipulated credit against the TTD/TPD/maintenance awards totaling $41,606.36.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the Respondent's actions in this case do not rise to the level of unreasonable and vexatious conduct within the meaning of Section 19(k) of the Act. That being said, it was a close call in this case. The Respondent certainly had a basis to dispute this matter based on the opinions of Dr. Singh and Dr. Meyer indicating they saw no evidence of a re-herniation of the L4/5 disc on MRI. Dr. Meyer in fact testified that it appeared to him that there was a level of foraminal stenosis at that level, but that this was based on scar tissue and ongoing degeneration. This is a reasonable argument given the Petitioner had previously undergone surgery at the same level, L4/5, in 2018.

However, once Dr. Templin's operative report was issued, it became clear that the doctor specifically noted pieces of calcified herniated disc were causing impingement on the L4 nerve root, and that these fragments were removed. At that point, it is difficult to support the Respondent's continued reliance on the opinions of Dr. Singh and Dr. Meyer that there was no re-herniation at the L4/5 level. As noted above, there is no clearer basis for an opinion of what exists in a spine than what is viewed visually during a surgery, particularly where there were specific findings in opposition to the MRI views of the two noted Section 12 examiners.
It also must be noted, however, that this case occurred in the context of a lumbar surgery at the same level just about one year prior to the accident date in this case. Dr. Meyer's opinions in particular were credible in terms of what he saw in the MRI and his specific explanation of what he based that opinion on in terms of telling the difference between scar tissue and disc material. He was the only physician in this case who truly explained the

basis of his reading of the MRI films. The Arbitrator does not find that there was unreasonable and vexatious conduct on the part of Respondent within the meaning of Section 19(k). However, the Arbitrator notes that penalties under Section 19(l) of the Act, pursuant to Illinois law, is more in the nature of a late fee. In this case, once that operative report specified that there were herniated disc fragments impinging on the L4 nerve root, particularly given the Petitioner's mechanism of injury involved heavy force and his immediate symptoms involved right leg pain and numbness, it should have been clear to Respondent that the opinions of Dr. Singh and Dr. Meyer were compromised. No evidence has been presented which would support some lack of credibility in the specific surgical findings of Dr. Templin regarding L4/5 disc fragments.

Section 19(l) states in part: "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."

The Arbitrator finds that there was a failure to pay benefits under Sections 8(a) and 8(b) following the 8/19/20 surgery, for the reasons noted above. The Respondent has not provided sufficient evidence, in the Arbitrator's view, to rebut the presumption of unreasonable delay once the operative report specified the existence of the re-herniation and impingement on the L4 nerve root. As such, the Arbitrator finds that the Petitioner is entitled to Section 19(l) penalties based on the time period from the 8/19/20 surgery through the 8/20/21 hearing date, a total of 365 days. This results in a total of, based on $30 per day, $10,95. Pursuant to Section 19(l), and the maximum penalty of $10,000, the Petitioner is entitled to penalties totaling $10,000.00. Pursuant to Section 16, the Petitioner is also entitled to attorney fees at 20% of this amount, $2,000.00.

WITH RESPECT TO ISSUE (O), IS PETITIONER ENTITLED TO VOCATIONAL REHABILITATION SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the evidence in this matter is not sufficient to make a determination of the Petitioner's entitlement to vocational rehabilitation benefits pursuant to the factors enunciated by the Illinois Supreme Court in *National Tea Co. v Industrial Comm'n*, 97 Ill. 2d 424, 454 N.E. 2d 672 (1983). However, it is abundantly clear to the Arbitrator that the Petitioner is a man who has worked as an ironworker since for 22 years. He has been able to obtain jobs in that capacity by notifying his union that he was ready, willing and able to work, at which point he would be either placed into a job or would be allowed to choose from available jobs. This is significantly different than having to go out into the general job market to seek employment, particularly in the internet age. It is obvious from his job search that he likely would need assistance in pinpointing jobs that he would be able to do given his restrictions. The Arbitrator finds that the parties shall perform a vocational evaluation with an expert in the field in order to determine if vocational rehabilitation is appropriate in this case. If the parties cannot agree on a vocational expert to perform such evaluation, then a vocational assessment plan should be prepared and presented to the Arbitrator pursuant to Commission Rule 9110.10:

"a) An employer's vocational rehabilitation counselor, in consultation with the injured employee and, if represented, with his or her representative, shall prepare a written assessment of the course of medical care and, if appropriate, vocational rehabilitation required to return the injured worker to employment. The vocational rehabilitation assessment is required when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which he or she was engaged at the time of injury. When the period of total incapacity for work exceeds 365 days, the written assessment required by this subsection shall likewise be prepared.

b) The assessment shall address the necessity for a plan or program that may include medical and vocational evaluation, modified or limited duty, and/or retraining, as necessary.

c) At least every 4 months thereafter, or until the matter is terminated by Order or Award of the Commission or by written agreement of the parties approved by the Commission, the employer, or his or her representative, in consultation with the employee and, if represented, with his or her representative, shall:

1) if the most recent previous assessment concluded that no plan or program was then necessary, prepare a written review of the continued appropriateness of that conclusion; or

2) if a plan or program had been developed, prepare a written review of the continued appropriateness of that plan or program, and make in writing any necessary modifications.

d) A copy of each written assessment, plan or program, review and modification shall be provided to the employee and/or his or her representative at the time of preparation, and an additional copy shall be retained in the file of the employer and, if insured, in the file of the insurance carrier. Copies shall be made available for review by the Commission, on its request, until the matter is terminated by Order or Award of the Commission or by written agreement of the parties approved by the Commission.

e) The rehabilitation plan may be prepared on a form furnished by the Commission.

f) Nothing in this Section abridges the rights of the parties."

(50 ILLINOIS ADMINISTRATIVE CODE 9110, Section 9110.10)

The Arbitrator directs the parties to have a vocational evaluation performed pursuant to this Section of the Commission Rules to determine if vocational rehabilitation is appropriate per *National Tea*. If the parties cannot agree on an appropriate vocational counselor to perform the evaluation, the written assessment shall be presented to the Arbitrator and an appropriate vocational counselor shall be determined by the Arbitrator.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	09WC043763
Case Name	BURNS, RANDAL v. CITY OF CHICAGO
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0202
Number of Pages of Decision	24
Decision Issued By	Thomas Tyrrell, Commissioner

Pro Se Petitioner	Randal Burns
Respondent Attorney	Matthew Daley

DATE FILED: 5/31/2022

/s/Thomas Tyrrell, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Randal Burns,

Petitioner,

vs. NO: 09 WC 43763

City of Chicago,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, earnings, temporary total disability, and nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator. The Commission finds Petitioner's current condition of ill-being regarding his cervical spine was not causally related to the work accident subsequent to October 15, 2010. The Commission also modifies the Arbitrator's award of medical expenses to include the October 15, 2010, office visit with Dr. Arayan. Finally, the Commission corrects certain scrivener's errors in the Arbitration Decision. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Findings of Fact

In the interest of efficiency, the Commission primarily relies on the Arbitrator's detailed recitation of facts. On October 5, 2009, Petitioner worked as a Communicable Disease Control Investigator for Respondent. As part of his job duties, Petitioner traveled to various locations throughout the city to perform HIV and tuberculosis tests. He also delivered medicine to patients and drove patients to the clinic. Petitioner testified that he usually drove a van owned by Respondent. Petitioner denied having any problems or complaints regarding his lumbar spine, cervical spine, hips, knees, or shoulders prior to the October 5, 2009, work accident.

On the date of accident, Petitioner was on the way to a patient's home when he was involved in a motor vehicle accident while driving a car owned by Respondent. He testified that a van involved in a high-speed police chase rear-ended his car. Petitioner testified that following the collision, he immediately felt pain in his right wrist, right knee, neck, and back. Dr. Goldberg first examined Petitioner on October 7, 2009. After examining Petitioner, he diagnosed Petitioner as

having a right knee contusion with possible intraarticular pathology, a right wrist sprain, multiple contusions, cervical radiculopathy, right lumbar radiculopathy, and sprains/strains of the cervical, thoracic, and lumbar spine. Petitioner began treatment with Drs. Nam, Gelman, and Malek for further treatment of his right knee, right wrist, and cervical and lumbar spine complaints. An October 23, 2009, right knee MRI had the following impression: 1) small effusion, chondromalacia patella, and osteoarthritic changes with a high-riding patella; and 2) degenerative intrameniscal signal changes without evidence of a discrete tear. The MRI of the right wrist taken that same day had the following impression: 1) diastases of the scapholunate interval measuring approximately 3 mm; 2) small wrist joint effusion or synovitis; and 3) cystic changes within the proximal capitate with diffuse osteoarthritic changes. Dr. Gelman diagnosed Petitioner with a right scaphoid lunate ligament injury and recommended surgery.

Petitioner attended physical therapy for his right knee and cervical and lumbar spine complaints. Dr. Malek interpreted a December 23, 2009, lumbar spine MRI as showing evidence of 2 mm disc bulges at L3-L4, L4-L5, and L5-S1 with evidence of moderate foraminal stenosis at L5-S1. He interpreted a cervical lumbar spine MRI taken that same day as showing evidence of posterior disc herniation at C3-C4 with impingement of the ventral aspect of the cord, a 4-5 mm posterior disc herniation at C3-C4, and a 3 mm posterior disc herniation at C5-C6 with a right paracentral protrusion at C6-C7.

On March 2, 2010, Dr. Gelman performed a right wrist arthroscopy with arthroscopic debridement. The postoperative diagnosis was a right wrist scapholunate ligamentous injury with possible SLAC (scapholunate advanced collapse) wrist. Dr. Gelman told Petitioner that the operation revealed a complete destruction of the articular surface of the scaphoid where it articulates with the radius, some destruction above the lunate, and a complete dissociation of the scaphoid and lunate. He recommended Petitioner undergo a SLAC wrist reconstructive surgery. Dr. Goldberg determined Petitioner reached maximum medical improvement ("MMI") regarding his right knee condition on March 16, 2010. Petitioner then began treatment with Dr. Arayan, a pain management doctor, on April 2, 2010. Petitioner complained of back pain and neck pain radiating into the right shoulder and upper extremity. Dr. Arayan prescribed additional physical therapy for Petitioner's neck and back complaints. He also performed trigger point injections into Petitioner's right rhomboid, latissimus dorsi, and thoracic paraspinal muscles. Petitioner later reported that the injections only provided temporary relief. Due to Petitioner's complaints of ongoing cervical pain radiating into the right shoulder, Dr. Arayan recommended Petitioner undergo a series of cervical ESIs. Petitioner underwent a series of cervical ESIs in May and June 2010. Petitioner reported the cervical injections significantly improved his complaints.

On May 10, 2010, Dr. Gelman performed a SLAC reconstruction of the right wrist. The postoperative diagnosis was a SLAC deformity of the right wrist. On July 6, 2010, Dr. Gelman noted that Petitioner was recovering well. He wrote: "He does have some stiffness as expected at this point, and he is well aware that he will never regain full motion of the wrist. However, his pain is markedly decreased, and it only aches when he really tries to stress the motion, especially with extension and flexion." (PX 3). He anticipated Petitioner would achieve MMI on August 23, 2010, and cleared Petitioner to return to work without restrictions as of that date. Petitioner was to return on an as needed basis.

On July 9, 2010, Petitioner told Dr. Arayan that his cervical pain no longer radiated into his upper extremities; however, he complained of weakness in the right upper extremity. Petitioner also complained of continued right knee and midback pain. Dr. Arayan performed trigger point injections into the right rhomboid, right thoracic paraspinal, and right latissimus dorsi muscles. In August 2010, Petitioner reported experiencing some relief from the trigger point injections. Petitioner denied having any pain radiating from his neck into his upper extremities. Dr. Arayan prescribed an additional course of physical therapy due to Petitioner's ongoing neck and back complaints. By October 1, 2010, Petitioner had achieved almost all the goals established by his physical therapist. That day, he rated his neck pain at 2-3/10 and his back pain at 0/10. He reported to Dr. Arayan that he was no longer using any pain medicine and had no problems with his neck and back while driving or backing up his car. Petitioner was able to turn his head without any problems. Dr. Arayan's examination revealed cervical and lumbar spine flexion and extension with no pain and a normal gait. The doctor noted that Petitioner's bilateral shoulder abduction, elbow flexion, and elbow extension were all 5/5. Dr. Arayan cleared Petitioner to return to work full duty on October 4, 2010. On October 15, 2010, Petitioner reported he was tolerating his return to working full duty. Petitioner rated his pain at 0/10 and Dr. Arayan placed Petitioner at MMI. Petitioner was to continue working full duty.

Petitioner visited the ER on December 1, 2010, with complaints of increased neck and right shoulder pain as well as left hip pain. He was diagnosed with an acute exacerbation of chronic pain. On December 30, 2010, Petitioner returned to Dr. Arayan and complained of neck pain he rated at 6/10. He told the doctor that he tolerated working full duty until mid-November 2010 when he had a reoccurrence of neck pain after he slept on a couch for two nights. Petitioner denied any pain radiating into his upper extremities. He reported having difficulty turning his head while parking his car. Dr. Arayan recommended left facet joint injections and told Petitioner to continue working full duty. Petitioner returned to Dr. Arayan in August 2011 with complaints of neck and right shoulder pain. He told the doctor that while on a work trip in April 2011, he first noticed neck and right shoulder pain when he raised his arm to write on a black board. Petitioner rated his pain at 7/10 and reported difficulty raising the right arm. Petitioner testified that while he gave this history regarding his right shoulder pain to Dr. Arayan, he actually felt right shoulder pain before the April 2011 incident. He testified that his right shoulder pain changed following the April 2011 incident. An October 31, 2011, right shoulder MRI had the following impression: 1) a full-thickness rotator cuff tear or tears of the distal supraspinatus tendon at its insertion; 2) high-riding humeral head with spur along the undersurface of the acromion; 3) small joint effusion with fluid in the subacromial/subdeltoid bursa; 4) thickening and increased signal intensity in the intra-articular long head of the biceps tendon consistent with tendinosis; 5) a fine linear defect within the anterior glenoid labrum suspicious for a nondisplaced anterior labral tear; and 6) degenerative cyst formation on the humeral head. Petitioner complained of continued right shoulder and neck pain to Dr. Arayan the following day and reported new complaints of left hip pain and low back pain radiating into the left leg.

Petitioner began treatment with Dr. Sclamberg for his right shoulder complaints in late October 2011. He told the doctor that he had experienced pain in the right shoulder with diminished range of motion and strength since the October 2009 work injury. Dr. Sclamberg diagnosed a right rotator cuff tear and opined that it was related to the work injury. In November 2011, Dr. Sclamberg performed right shoulder arthroscopy with a rotator cuff repair, subacromial

decompression, distal clavicle excision, and synovectomy. The postoperative diagnoses were: 1) right shoulder impingement syndrome with rotator cuff tear; 2) hypertrophic synovitis; and 3) distal clavicular hypertrophy. Petitioner continued to follow up with Dr. Sclamberg as well as several other doctors regarding numerous complaints over the years involving his neck, back, bilateral shoulders, bilateral knees, and left hip. He has undergone extensive additional treatment for his lumbar spine complaints including several epidural steroid injections. In September 2017, he underwent lumbar fusion surgery at L3-L4. The postoperative diagnoses were degenerative disk disease at L3-L4, pain and lumbago, and lumbar radiculopathy. Petitioner also complained of bilateral knee pain over the years. In March 2016, Petitioner underwent a left anterior total hip replacement surgery. The postoperative diagnosis was left hip osteoarthritis secondary to avascular necrosis. Petitioner underwent a left reverse total shoulder arthroplasty with extensive capsular release in November 2019. Petitioner testified that all his complaints relating to his neck, back, bilateral shoulders, bilateral knees, and left leg are related to his October 2009 work injury.

Petitioner continues to work for Respondent as a Communicable Disease Control Inspector; however, his work now focuses on HIV and STIs. Petitioner testified that most recently he has been off work since April 2018 due to his various ailments. Petitioner testified that he continues to have right wrist pain because he walks with a cane in his right hand due to his left leg condition. He testified that he continues to feel constant pain in his low back. He testified that he continues to experience neck pain and complained of pain on the right side of the base of his neck radiating into his upper back. Petitioner testified that his right shoulder remains sore and that while the 2019 left shoulder surgery improved his condition, he continues to feel some left shoulder pain. Petitioner testified that he experiences occasional right hip pain and feels constant left hip pain. Petitioner testified that the left hip pain at times feels like a burning sensation that travels from his hip to his toes. He testified that even his toes hurt on his bilateral feet. He testified that he continues to suffer from bilateral knee pain. Petitioner testified that his entire life has changed due to his injuries and that he is in constant pain.

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 clarifies the Arbitrator's conclusion regarding the causal connection of Petitioner's current condition of ill-being regarding his cervical spine to the October 5, 2009, work accident. The Commission also modifies the Arbitrator's award of medical expenses. Finally, the Commission corrects certain scrivener's errors in the Arbitration Decision. The Commission otherwise affirms and adopts the remainder of the Arbitration Decision.

After reviewing the evidence, the Commission affirms the Arbitrator's conclusions regarding the issues of earnings, temporary total disability, and permanent partial disability. The Commission also affirms the Arbitrator's conclusion that Petitioner's ongoing complaints regarding his lumbar spine, right knee, bilateral shoulders, and bilateral hips are not causally related to the October 5, 2009, work injury. However, the Commission must clarify the Arbitrator's conclusion regarding the causal connection of Petitioner's cervical condition to the work accident. The Arbitrator correctly noted that Dr. Singh, one of Respondent's Section 12 examiners, opined

in January 2010 that Petitioner's cervical condition was causally related to the work accident and that cervical epidural injections were reasonable. The Arbitrator then concluded that Petitioner's cervical spine symptoms *were* causally related to the work accident. The Arbitrator also did not award any medical expenses relating to Petitioner's ongoing cervical spine complaints after October 2010. However, the Arbitrator failed to directly address whether Petitioner's ongoing cervical complaints are causally related to the October 5, 2009, work accident.

After considering the totality of the evidence, the Commission finds Petitioner's cervical condition was not causally related to the work accident subsequent to October 15, 2010. After undergoing months of conservative treatment for his cervical complaints, Petitioner had achieved almost all the goals set by his physical therapist by October 1, 2010. On that date, Petitioner reported experiencing decreased neck pain. Petitioner was no longer using any pain medication and could turn his head without any issues. He also had no problems when driving or backing up his car. Dr. Arayan's examination revealed Petitioner had cervical spine flexion and extension with no pain. The doctor cleared Petitioner to return to work without any restrictions beginning October 4, 2010. Petitioner then returned to Dr. Arayan on October 15, 2010, and reported having no pain. Petitioner told the doctor that he was tolerating his return to full duty work. Dr. Arayan placed Petitioner at MMI that day. The credible evidence shows that Petitioner made no complaints of symptoms regarding his cervical spine following the October 15, 2010, visit with Dr. Arayan until he visited the ER on December 1, 2010. On that day he complained of increased neck pain. When Dr. Arayan examined Petitioner on December 30, 2010, Petitioner reported that he tolerated working full duty until mid-November 2010 when his neck pain returned. Petitioner told the doctor that his neck pain returned after he slept on his couch for two nights. Petitioner rated his neck pain at 6/10 and reported having difficulty when turning his head while parking his car.

It is clear from the credible evidence that Petitioner's cervical spine complaints completely resolved by October 15, 2010, and did not return until he reportedly slept on his couch for two nights approximately one month later. The reoccurrence of Petitioner's neck pain is unrelated to the work accident. Instead, Petitioner's nights spent sleeping on the couch was the sole cause of his cervical complaints in November 2010. The Commission notes that the severity of Petitioner's cervical complaints in December 2010 were noticeably increased compared to his complaints in October 2010. The Arbitrator does not explicitly state that the causal connection of Petitioner's cervical spine complaints to the October 5, 2009, work accident ceased as of October 15, 2010. However, it is clear from the Arbitrator's denial of all medical expenses after October 2010 relating to Petitioner's cervical spine that the Arbitrator found there was no causal connection between Petitioner's cervical complaints and related treatment to the work incident after October 2010. The Commission therefore clarifies the Arbitration Decision and finds that Petitioner's cervical condition and related treatment after October 15, 2010, are not causally related to the October 5, 2009, work injury.

As the Commission has clarified that Petitioner's cervical spine condition after October 15, 2010, is not causally related to the work injury, the Commission must also modify the Arbitrator's award of medical expenses. The Arbitrator found that medical expenses for treatment Petitioner underwent only through October 3, 2010, are causally related to the October 5, 2009, work injury. However, while Petitioner returned to work without restrictions on October 4, 2010, Dr. Arayan did not place Petitioner at MMI until the October 15, 2010, office visit. Thus, the Commission

finds the medical expenses related to the October 15, 2010, office visit with Dr. Arayan are causally to the work injury.

Finally, the Commission corrects certain scrivener's errors in the Arbitration Decision. First, on the Arbitration Decision Form, the Arbitrator marked that Petitioner is **single**. In the Order section of the Decision Form, the Arbitrator wrote that Respondent shall pay temporary total disability benefits of $608.**03** a week for 51-5/7 weeks. On page five (5) of the Decision, the Arbitrator wrote that medical treatments from 2012 through the date of hearing are not causally related to the work injury of October **9**, 2009. On page eleven (11) of the Decision, the Arbitrator wrote that Petitioner is owed temporary total disability of $608.**03** per week. Finally, on page thirteen (13) of the Decision, the Arbitrator wrote that Petitioner reached MMI for "all his work-related **accident** as of October **3, 2009**. The Commission hereby modifies the above-referenced sentences to read as follows:

> On the date of accident, Petitioner was 50 years of age, **married** with 0 dependent children. (Decision Form).
>
> Respondent shall pay Petitioner temporary total disability benefits of $608.**00**/week for 51-5/7 weeks, commencing 10-6-09 through 10-3-10, as provided in Section 8(b) of the Act. (Decision Form).
>
> All such treatments, for reasons stated *infra* are not causally related to the work injury of October **5**, 2009. (pg. 5 of the Decision).
>
> Based on the Arbitrator's findings regarding issues (G) and (F) *supra*, the Arbitrator finds that Petitioner is owed temporary total disability of $608.**00** per week from October 6, 2009, to October 3, 2010, for a total of 51-5/7 weeks, less any credit for amounts previously paid by Respondent. (pg. 11-12 of the Decision).
>
> The Arbitrator finds Petitioner has reached maximum medical improvement for all his work-related **injuries** as of October **15, 2010**, and as such awards nature and extent per issue "L" *supra*. (pg. 13 of the Decision).

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 June 29, 2020, is modified as stated herein.

IT IS FURTHER ORDERED that Petitioner's current condition of ill-being is partially causally related to the October 5, 2009, work accident. The causal connection of Petitioner's

cervical spine condition to the work accident ceased as of October 15, 2010.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $608.00/week for 51-5/7 weeks commending October 6, 2009, through October 3, 2010, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical charges incurred through October 15, 2010, pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner the sum of $547.20/week for a period of 173.95 weeks, because the work accident caused Petitioner to sustain a 50% loss of use of the right hand (102.50 weeks) pursuant to Section 8(e)9 of the Act, a 10% loss of use of the whole person for Petitioner's cervical spine (50 weeks) pursuant to Section 8(d)2 of the Act, a 3% loss of use of the whole person for the lumbar spine (15 weeks) pursuant to Section 8(d)2 of the Act, and a 3% loss of use of the right leg (6.45 weeks) pursuant to Section 8(e)12 of the Act.

IT IS FURTHER ORDERED that Respondent shall receive credit for all amounts paid, if any, to or on behalf of Petitioner on account the October 5, 2009, work injury.

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

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

May 31, 2022

o: 3/29/22
TJT/jds
51

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BURNS, RANDAL
Employee/Petitioner

Case# **09WC043763**

CITY OF CHICAGO
Employer/Respondent

On 6/29/2020, 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:

0307 ELFENBAUM EVERS ZIELINSKA PC
KAROLINA M ZIELINSKA
900 W JACKSON BLVD SUITE 3-E
CHICAGO, IL 60607

5099 ODELSON & STERK
MATTHEW 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

Randal Burns
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **09** WC **43763**

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 **Christopher A. Harris**, Arbitrator of the Commission, in the city of **Chicago**, on **February 25, 2020**. After reviewing all the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Prospective medical §8(a)**

FINDINGS

On **October 5, 2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**47,424.00**; the average weekly wage was $**912.00**

On the date of accident, Petitioner was **50** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**31,529.16** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**31,529.16**.

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 $608.03/week for 51-5/7 weeks, commencing 10-6-09 through 10-3-10, as provided in Section 8(b) of the Act. Respondent shall receive credit for TTD it paid in the amount of $31,529.16.

Respondent shall pay all reasonable and necessary medical services provided through October 3, 2010 pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act, or as otherwise negotiated. Respondent shall receive a credit for any amounts previously paid pursuant to Section 8(j) of the Act.

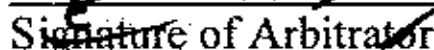
Respondent shall pay Petitioner the sum of $**547.20**/week for a period of **173.95** weeks, because the injuries sustained caused a 50% loss of use of the right hand (102.50 weeks) per Section 8(e)9 of the Act; a 10% loss of use of the person for Petitioner's cervical spine (50 weeks) per Section 8(d)2 of the Act; a 3% loss of use of the person for Petitioner's lumbar spine (15 weeks) per Section 8(d)2 of the Act; and a 3% loss of use of the right leg for Petitioner's right knee (6.45 weeks) per Section 8(e)12 of the Act.

No prospective medical treatment is awarded.

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

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

June 26, 2020


Signature of Arbitrator

Date

JUN 2 9 2020

Findings of Fact

At the time of the accident, Petitioner was a 50-year-old employee of the City of Chicago's Department of Public Health working as a Communicable Disease Control "CDC" Investigator. (Transcript "Trans." at 13). As a CDC Investigator, Petitioner's job duties consisted of driving from location to location in order to interview, test and sometimes transfer tuberculosis patients. (Trans. at 14). Petitioner primarily used a City of Chicago van to travel from the clinic to other locations and to transport patients. (Id. at 14-15). Petitioner had worked for the City of Chicago for almost 10 years at the time of his accident. (Respondent's Exhibit "Resp. Ex." 2). He was working without any medical restrictions. No medical records were submitted prior to his work accident of October 5, 2009. Petitioner testified his health was fine prior to him leaving for work on October 5, 2009. (Trans. 19-20).

On October 5, 2009, Petitioner was involved in a motor vehicle accident while traveling to see a patient in the Roseland area. (Id. at 20). Petitioner was driving a City of Chicago work van when he was struck on the rear driver's side by another van being pursued by a Chicago Police Department squad car. (Id. at 20-21). Petitioner stated the van struck him twice, first hitting the bumper of his vehicle and then the back wheel. (Id. at 21). Photos of the accident were introduced by Petitioner into evidence. (Pet. Ex. 26). The parties do not dispute the accident. (Arb. Ex. 1).

Petitioner was taken via ambulance to Roseland Hospital's ER where he was examined, and x-rays taken. (Trans. at 24.) Petitioner testified he first felt pain in his neck, back, right wrist and right knee following this work-related motor vehicle accident. (Id. 23-24). Petitioner was discharged and told to follow-up with his doctor. (Id. at 24).

Post-Accident Medical Treatment - 2009

On October 7, 2009, Petitioner presented to Dr. Alvin Goldberg ("Dr. Goldberg") for a follow up after his ER visit. (Trans. at 24; and Petitioner's Exhibit "Pet. Ex." 1). Petitioner complained of headaches and dizziness, neck pain with pain radiating into the scapular area, upper and mid back stiffness, low back pain with pain radiating down his right lower extremity, pain in his right wrist, and pain and stiffness in the right knee. (Pet. Ex. 1 at 2). After physical examination, Dr. Goldberg assessed Petitioner with a contusion of the right knee, possible intraarticular pathology, right wrist sprain, multiple contusion injuries, cervical radiculopathy, lumbar radiculopathy on the right side, and sprains/strains of the cervical, thoracic, and lumbar spine. (Id.). Dr. Goldberg recommended initiation of physical therapy and referred Petitioner to neurosurgeon Dr. Michel Malek, M.D. ("Dr. Malek"). (Id.). Petitioner was kept off of work. (Id.). Photographs were taken of Petitioner's back and introduced into evidence. (Trans. at 25-26; Pet. Ex. 25.)

Petitioner presented to Dr. Malek on October 15, 2009. (Pet. Ex 1 at 3). Petitioner continued to complain of neck and low back pain, with his low back pain radiating down the lower right extremity and his neck pain radiating to the scapular area. (Id.). Petitioner also reported weakness and pain in the right arm and wrist. (Id.). Dr. Malek recommend continued physical therapy for the cervical and lumbar spine and referred Petitioner to orthopedic surgeon Dr. Ellis K. Nam ("Dr. Nam") for right knee treatment, and orthopedic surgeon Dr. Jack Gelman ("Dr. Gelman"), for right wrist treatment. (Id.). Dr. Malek also ordered MRIs of the cervical and lumbar spine. (Id.). On October 23, 2009, Petitioner underwent an MRI of the right wrist at Preferred Open MRI, which showed diastases of the scapholunate interval measuring approximately 3mm. (Pet. Ex. 3 at 5). Petitioner likewise underwent an MRI of the right knee indicating degenerative

changes, a small effusion, chondromalacia of the patella and osteoarthritic changes. (Pet. Ex. 2 at. 12; Resp. Ex. 7).

Petitioner attended physical therapy for his neck, back, right knee and right wrist from October 21, 2009 until March 18, 2010. (Pet. Ex 4 at 1-71). In each visit, it was noted that Petitioner tolerated therapy procedures well, and made slow but progressive improvement with treatment. (Id.). Exercises included active range of motion to the right forearm, elbow, cervical spine and thoracic spine for 15 minutes, and performed flexion, extension, radial deviation, ulnar deviation, abduction, adduction, internal rotation and external rotation exercises. (Id. at 70, 71). These exercises would be performed in the sitting position and utilized the neck, knee and shoulders. (Id.). Although Petitioner would have increased pain after his therapy sessions, there was no indication that said pain applied to Petitioner's shoulders. (Id.).

On November 7, 2009, Petitioner presented to Dr. Nam. (Pet. Ex. 2 at 5). The treatment notes indicated Petitioner's right wrist MRI showed evidence of increased widening along the scapholunate interval. (Id.). The right knee MRI indicated some effusion and no discrete tearing. (Id.). Petitioner was diagnosed with a right knee contusion and was referred to a hand surgeon, Dr. Gelman, for right wrist treatment. (Id.). On November 17, 2009, Dr. Gelman diagnosed Petitioner as having a scapholunate ligament injury and recommended surgery consisting of a scapholunate ligament repair. (Pet. Ex. 3 at 1).

On December 23, 2009, Petitioner underwent MRIs of the lumbar and cervical spine. (Pet. Ex.5 at 2-3; Pet Ex. 1 at 11). The lumbar spine MRI indicated, in part: "L3-4: 2mm disc bulge with mild neural foraminal narrowing exacerbated by facet hypertrophy"; and "L4-5: 2mm annular bulge with mild neural foraminal narrowing exacerbated by facet hypertrophy"; and "L5-S1: 2mm annular disc bulge with mild to moderate neural foraminal stenosis exacerbated by facet hypertrophy" (Pet. Ex. 5 at 2). The impression of the radiologist, Dr. Gregory Goldstein, M.D., was of an annular disc bulging from L3-S1 with neural foraminal narrowing. (Id. at 3). The cervical spine MRI showed: 1) a 4-5mm posterior central herniation at C3-C4 impinging upon the ventral aspect of the cervical cord; 2) a 3mm posterior central herniation at C5-C6; 3) a right paracentral protrusion at C6-7; and 4) diffuse cervical spondylosis. (Pet. Ex. 1 at 11).

Medical Treatment and Section 12 Examinations - 2010

On January 5, 2010, Dr. Daniel J. Nagle, M.D. ("Dr. Nagle") conducted a Section 12 examination of Petitioner's right hand at Respondent's request. (Pet. Ex. 22). Dr. Nagle opined that Petitioner presented with a SLAC injury and disruption of the scapholunate ligament in the wrist which was aggravated by the work accident of October 5, 2009. Dr. Nagle recommended surgical intervention and left-handed duties only pending treatment. (Id.).

On January 8, 2010, Dr. Kern Singh, M.D. ("Dr. Singh") conducted a Section 12 examination of Petitioner's lumbar and cervical spine at the request of Respondent. (Pet. Ex. 23; Resp. Ex. 3). Petitioner complained of neck pain and right-sided shoulder pain at the IME visit. (Id.). Petitioner also noted low back pain and stated it bothered him more than his neck. (Id.). Dr. Singh noted "negative" for all Waddell Findings including symptom magnification. (Id.). Dr. Singh stated he reviewed the MRI of the lumbar spine and he found it revealed no evidence of herniations or spinal stenosis. (Id.). Dr. Singh likewise reviewed the MRI of the cervical spine and found it revealed a disc herniation at C3-4 and a right-sided disc protrusion at C4-5. (Id.). Dr. Singh recommended light duty restrictions and cervical epidural injections for Petitioner's cervical spine. (Id.). Dr. Singh did not believe any additional medical treatment was warranted for

Petitioner's lumbar spine. (Id.). Dr. Singh made no comments or recommendations about condition of Petitioner's shoulder complaints. (Id.).

Petitioner presented to Dr. Nikhil N. Verma, M.D. ("Dr. Verma") on January 8, 2010 for a Section 12 examination of his right knee at the request of Respondent. (Resp. Ex. 4). In his initial report, Dr. Verma indicated he was not provided with the MRI images and wished to see them prior to providing his opinion. (Id.). On February 16, 2010, Dr. Verma drafted an addendum after reviewing the MRI images. (Resp. Ex. 5). Dr. Verma diagnosed Petitioner with a knee contusion, opined no further medical treatment was necessary for Petitioner's right knee, and placed Petitioner at maximum medical improvement (MMI) for his right knee. (Resp. Ex. 4, 5).

On March 2, 2010, Petitioner underwent his first right wrist surgery at Fullerton Surgery Center performed by Dr. Gelman. (Pet. Ex. 3 at 18; Pet. Ex. 21 at 1-2). Petitioner followed up with Dr. Gelman post-operatively on March 11, 2010. (Pet. Ex. 3 at 40). Dr. Gelman advised Petitioner he had a complete destruction of the articular surface of the scaphoid and a complete dissociation of the scaphoid and lunate. (Id.). Dr. Gelman gave Petitioner the option of living with the pain, undergoing a SLAC wrist reconstruction surgery, or undergoing a complete wrist fusion. (Id.). Dr. Gelman noted these types of surgeries would decrease his wrist motion and strength permanently. (Id. at 40, 57).

On March 16, 2010, Petitioner presented to Dr. Goldberg for a follow up for his right knee. (Pet. Ex. 1 at 16). Petitioner complained of continued right knee pain and physical examination showed range of motion 1-135 degrees, mild pain with patellofemoral compression and mild medial lateral joint line pain. (Id.). Dr. Goldberg noted that Dr. Nam had released Petitioner to return to work full duty for his right knee starting on March 8, 2010. (Id.). Dr. Goldberg stated that Petitioner had reached maximum medical improvement for his right knee. (Id.).

On April 2, 2010, Petitioner sought care with Dr. Rizwan Arayan, M.D. ("Dr. Arayan"), at Chicago Sports & Spine Pain Management Physicians. (Pet. Ex. 9). Petitioner sought treatment from Dr. Arayan for his right mid-back, neck, right knee, and right wrist. (Id. at 2). Petitioner indicated he injured himself while working on October 5, 2009. (Id.). He initially complained of back pain and swelling in the right mid-back, and of radiating pain from his neck into his right shoulder. (Id.). Dr. Arayan administered eight (8) trigger point injections at this visit – two into the rhomboid muscle that connects spine to shoulder blades, two in the latissimus dorsi, and four into the thoracic paraspinal muscles. (Id.). Dr. Arayan recommended cervical injections and referred Petitioner to anesthesiologist, Dr. Friedl Fisher. (Pet. Ex. 9 at 2-4). On April 6, 2010, Petitioner started physical therapy at Accelerated Rehabilitation Centers. (Pet. Ex. 8).

On May 10, 2010, Dr. Gelman performed a second wrist surgery consisting of a SLAC reconstruction on Petitioner. (Pet. Ex. 3 at 20; Pet. Ex. 21 at 3-4). Respondent authorized this surgery. Petitioner continued therapy at Accelerated Rehabilitation Centers post second surgery through September 9, 2010. (Pet. Ex. 8 at 106-122).

On May 4 and May 24, 2010, Petitioner underwent a series of CESI[1] injections at Chicago Sports & Spine performed by Dr. Fisher. (Pet. Ex. 9 at 16-17). Respondent's Section 12 examiner, Dr. Singh, agreed the injections were necessary and causally related to Petitioner's work accident. (Pet. Ex. 23). Petitioner testified these injections helped him. (Trans. at 34). Dr. Arayan's notes corroborate Petitioner's trial testimony, indicating that the first and second CESI significantly improved Petitioner's radicular pain. (Pet. Ex. 9 at 21). On June 23, 2010, Petitioner again presented to Dr. Arayan noting some neck pressure in the cervical spine. (Id.).

[1] Cervical epidural steroid injection.

On July 5, 2010, Petitioner followed up with Dr. Gelman post SLAC reconstruction surgery. (Pet. Ex. 3 at 57). Dr. Gelman noted Petitioner was doing very well but would never regain full motion in his wrist. (Id.). Dr. Gelman advised Petitioner he could resume full duty work as of August 23, 2010 at which time he would be MMI for his right wrist. (Id.).

On July 9, 2010, Petitioner presented to Dr. Arayan with complaints of 4/10 neck pain with pressure. (Pet. Ex. 9 at 18). Petitioner described his pain as not radiating into the upper extremities, but that he did have upper extremity weakness. (Id.). Petitioner also noted right knee pain and right wrist pain. (Id.). Petitioner underwent trigger point injections. (Id. at 19.). On August 2, 2010, Petitioner continued physical therapy for his neck and back at Accelerated Rehab. (Pet. Ex. 8).

On October 1, 2010, Petitioner presented to Dr. Arayan for a follow up. (Pet. Ex. 9 at 25). Petitioner reported his neck and back pain were overall 80-85% better. (Id.). Petitioner described his neck pain as a dull sensation, 2-3/10 pain with no radiating symptoms. (Id.). Dr. Arayan recommended Petitioner complete his physical therapy and keep doing home exercises. (Id.). Dr. Arayan further noted that Petitioner could return to work full duty as of October 4, 2010. (Pet. Ex. 9). Petitioner testified he returned to work on October 4, 2010. (Trans. at 53).

Petitioner had another follow-up visit to Dr. Arayan on October 15, 2010, where it was confirmed that Petitioner returned to work without restrictions and had appeared to be doing well. (Pet. Ex. 9 at 27-28). Dr. Arayan discharged Petitioner from pain management. (Id.). Respondent paid Petitioner temporary total disability benefits from October 6, 2009 until October 3, 2010, after which Respondent denied any and all further medical care or other benefits. (Resp. Exs. 10, 11).

After being released from care in October 2010, Petitioner continued to have complaints of neck and back pain. On December 30, 2010, Petitioner returned to Dr. Arayan with complaints of neck pain. (Pet. Ex. 9 at 29). Petitioner advised Dr. Arayan that his pain returned in November after he slept on a couch for two nights. (Id.). Dr. Arayan referred Petitioner to Dr. Fisher for left facet joint injections. (Id. at 30). Petitioner returned to see his primary care provider on February 11, 2011 and April 21, 2011 while waiting for approval for treatment. (Pet. Ex. 11). Respondent maintained its denial of additional medical care.

On August 11, 2011, Petitioner returned to Dr. Arayan with complaints of right shoulder pain. (Pet. Ex. 9 at 31). The notes from this visit reflect that Petitioner, "reported pain started after work trip in April 2011 when he raised arm to write on a chalk board." (Id.). At trial, Petitioner testified he does recall describing a scenario to Dr. Arayan, but remembered being on a work trip in April of 2011 and trying to raise his right arm with corresponding pain. (Trans. at 35). Petitioner testified he had right shoulder problems the day before he tried writing on a blackboard, and he recalled he had not felt the pain in his shoulder for a while after receiving his initial trigger point injections. (Id. at 36). Dr. Arayan ordered a right shoulder MRI and referred him to a shoulder specialist. (Id.; Pet. Ex. 9 at 32).

On October 21, 2011, Petitioner presented to Dr. Steven Sclamberg ("Dr. Sclamberg") at Chicago Pain and Orthopedic Institute on referral from Dr. Arayan for treatment of the right shoulder. (Pet. Ex. 6 at 5-6). Dr. Sclamberg determined that the right shoulder issues were related to accident because he saw photos post-accident of ecchymosis and contusion on right scapula. (Id.; Pet. Ex. 7.) Dr. Sclamberg recommended a right shoulder arthroscopy with rotator cuff repair. (Pet. Ex. 6 at 6). On November 14, 2011, Petitioner presented to his primary care doctor, Dr. Howard McNair, at Little Company of Mary for his pre-operative evaluation for clearance for right shoulder surgery. (Pet. Ex. 11 at 37).

On November 18, 2011, Petitioner underwent right shoulder surgery with Dr. Sclamberg consisting of arthroscopy with rotator cuff repair, subacromial decompression, distal clavicle excision and synovectomy. (Pet. Ex. 6, 8; Pet. Ex. 21 at 5-6). Petitioner began post-operative therapy at MidCity Spine and Ortho Rehabilitation on December 9, 2011. (Pet. Ex. 10 at 101-102).

On January 6, 2012, Respondent sent a letter to Petitioner's attorney at the time, Mr. Patrick Serowka, advising that Respondent was denying Petitioner's shoulder claim and all accompanying benefits related to the same. (Resp. Ex. 10).

Petitioner continued seeking medical treatment from various treating physicians from 2012 through to the present. All such treatments, for reasons stated *infra* are not causally related to the work injury of October 9, 2009 and therefore will not be discussed here. (See Pet. Exs. 10-12 ,15, 16, 21)

Evidence Deposition of Petitioner's Shoulder Surgeon, Dr. Sclamberg

Dr. Sclamberg testified via evidence deposition on July 16, 2012. Dr. Sclamberg is a shoulder specialist that has handled several thousand rotator cuff tear cases in his career. (Pet. Ex. 7 at 22). Dr. Sclamberg opined Petitioner's right shoulder problem was related to his work-related, motor vehicle accident of October 5, 2009. (Id. at 9). Dr. Sclamberg opined Petitioner had bruising and ecchymosis about his right scapula following the accident which was visible in photographs. (Pet. Ex. 7 at 9; Pet. Ex. 25). He testified the accident was a competent cause of his rotator cuff tear as Petitioner described it. (Pet. Ex 7 at 9). On cross examination, Dr. Sclamberg agreed it would be atypical for someone to have no pain and full strength in their upper extremity if one has a rotator cuff tear. (Id. at 18). Dr. Sclamberg testified that lifting one's arm to write on a chalkboard should not cause a rotator cuff tear. (Id. at 22). Dr. Sclamberg also testified that when he made his diagnoses of Petitioner's condition, he had not reviewed prior records from Dr. Arayan – including the reference to Petitioner's alleged shoulder pain raised in his initial intake note on April 2, 2010 (Resp. Ex. 6 at 8; Pet. Ex. 9 at 2).

Dr. Sclamberg testified that he stood behind his causal connection opinion regarding Petitioner's right shoulder, notwithstanding Dr. Arayan's August 11, 2011 office note which stated that Petitioner first noticed neck and right shoulder pain at a work meeting in April of 2011 when he raised his right arm to write on a blackboard. (Id. at 20-21; Pet. Ex 9 at 33).

Dr. Sclamberg testified Petitioner required a surgery which he performed on November 18, 2011 consisting of a right shoulder arthroscopy with rotator cuff repair which was related to his work accident. (Pet. Ex. 7 at 10). Petitioner presented to physical therapy following his surgery which Dr. Sclamberg testified was reasonable and necessary due to his surgery and injury. (Id. at 11). Dr. Sclamberg last examined Petitioner on June 22, 2012 at which time Petitioner had some abnormal motion and some limited strength but was doing well post-operatively. (Id. at 11-12).

Petitioner's Testimony Regarding His Current Complaints

Right hand/wrist: Petitioner has not been back to the doctor for his right wrist since he was released after his second surgery. (Trans. at 57). He is not taking any medication specific for his wrist. (Id.). Petitioner still has surgical hardware installed in his right hand, which can be seen on x-ray. (Id at 31-32; Pet. Ex. 27). He continues to experience right wrist pain, especially because he is right-hand dominant and holds his cane with his right hand and supports his body weight with

it when he walks. (Trans. 56-57). The hardware bothers him at times and it starts aching when he walks and puts his weight on his wrist. (Id. at 57).

Cervical spine: Petitioner's neck continues to hurt. (Id. at 58). He has pain on the right side at the base of his neck going down to the upper part of his back. (Id.). He has not had neck treatment other than the injections since May and June of 2010. (Id. at 58-59).

Lumbar spine: Petitioner testified his lower back is always in pain. (Id. at 58). He is actively treating with Dr. Siemionow for his back and is not being prescribed any specific medication for his back. (Id.).

Right knee: Petitioner testified his right knee symptoms have grown worse since 2013. (Id. at 40). He feels pressure in his knee when he walks upstairs, and his leg gives out when he walks down the stairs. (Id.).

Right shoulder: Petitioner testified that his right shoulder is still sore. (Id. at 59).

Left shoulder: Petitioner underwent surgery for his left shoulder in November of 2019. (Id.). His left shoulder is still painful and uncomfortable but has improved and the pain is not as severe. (Id. 59-60). Petitioner was discharged from care for his left shoulder. (Id. at 47, 60).

Bilateral hips: Petitioner is not actively in treatment for his right hip. (Trans. at 60). He testified to having "good days and bad days". (Id.). Petitioner testified his left hip always hurts. (Id.). Sometimes he suffers a a burning sensation from his hip down to his toes. (Id.). He is not in active treatment for his left hip. (Id. at 61). He was released from care after his second revision surgery. (Id.).

<u>Petitioner's Time Off Work and Temporary Total Disability</u>

Petitioner was off work from October 5, 2009 through October 3, 2010. (Trans. at 53). He was paid temporary total disability benefits of $1,216.00 per week during this time. (Id.; Resp. Ex. 8). Petitioner returned to work on October 4, 2010 and continued to work until August 10, 2011. (Trans. at 53). On August 11, 2011, Dr. Arayan took Petitioner off work due to complaints involving his right shoulder. (Id. at 54; Pet. Ex 9 at 31-40). Dr. Sclamberg took over Petitioner's right shoulder treatment in October 2011 and kept Petitioner off work until June 21, 2012. (Trans. at 54; Pet. Ex. 6 at 5-20). Petitioner was not paid any TTD benefits while he was off work from August 11, 2011 through June 21, 2012 due to his right shoulder.

On June 22, 2012, Dr. Sclamberg returned Petitioner to work full duty. (Trans. at 54). Petitioner returned to work for the City of Chicago but was transferred to an assignment at Cook County jail as a STD/HIV Investigator. (Id.). Petitioner continued to work full duty from June 22, 2012 until his left hip surgery of March 21, 2016. (Id. at 55; Pet. Ex. 21 at 7-9).

On March 21, 2016, Petitioner was taken off work due to his left hip surgery. Petitioner remained off work from March 21, 2016 through March 30, 2017. (Trans. at 55). He underwent a right hip surgery on August 29, 2016. (Pet. Ex. 21 at 10-12). He was released back to work as of March 31, 2017 by Dr. Makda. Petitioner was not paid any TTD benefits while he was off work from March 21, 2016 through March 31, 2017.

On September 21, 2017, Petitioner was taken off work by Dr. Jackson following his lumbar spine surgery. (Trans. 55; Pet. Ex. 21 at 13-15). Petitioner was returned to work on January 5, 2018

by Dr. Jackson. (Trans. 55; Pet. Ex. 15 at 19). Petitioner was not paid any TTD benefits while he was off work from September 21, 2017 through January 5, 2018.

On April 16, 2018, Petitioner was taken off work by Dr. Butler due to his left hip. Petitioner underwent a left hip revision surgery on December 17, 2018 and remained off work. (Trans at. 56; Pet. Ex. 21 at 16-17). Petitioner has not returned to work following his left hip revision surgery of December 17, 2018 and remains off work today. (Trans. at 56). Petitioner was not paid any TTD benefits while he was off work from April 16, 2018 through the date of hearing, February 25, 2020.

Petitioner's Average Weekly Wage

Petitioner testified he held a salaried position as a CDC Investigator at the time of his accident. (Trans. at 16). Petitioner signed, and recalled signing under oath, a "Report of Occupational Injury or Illness" the day after the work injury, wherein Section 10 of that form indicated that his monthly wage was $3,952.00. (Resp. Ex. 2; Trans. at 66). Petitioner provided a paycheck stub purporting to be for a pay period ending on July 15, 2009[2], where the gross payment for that period was $1,976.00. (Pet Ex. 28).

CONCLUSIONS OF LAW

The Arbitrator repeats the findings set forth above as if fully set forth herein.

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

After hearing the testimony of Petitioner and reviewing the medical records, the Arbitrator finds Petitioner's current condition of ill-being is in part causally related to the accident of October 5, 2009, and not causally related, in part, as follows:

Right Hand/Wrist

The Arbitrator finds Petitioner's right hand/wrist condition to be causally related to Petitioner's work accident of October 5, 2009. All the doctors agreed (Petitioner's treating physicians including Dr. Goldberg, Dr. Nam and Dr. Gelman, as well as Respondent's IME, Dr. Nagle) that Petitioner's right wrist scapholunate ligament tear injury was causally related to his accident of October 5, 2009. (Pet. Ex. 2 at 5; Pet. Ex. 3 at 2; Pet. Ex. 22). Dr. Gelman noted Petitioner had recovered well but would never again regain full motion in his wrist and released him to full work duty as of August 23, 2010. (Pet. Ex. 3 at 57). Petitioner required multiple surgeries to correct his right wrist condition and currently has hardware implanted in his hand. As such, the Arbitrator finds Petitioner's right wrist condition to be causally related to his October 5, 2009 work injury.

Cervical Spine

The Arbitrator finds Petitioner sustained multiple herniated discs at C3-4 and C5-6, a disc protrusion at C6-7 and cervical radiculopathy as a result of his work-related accident of October

[2] Neither Petitioner nor Respondent offered into evidence any paycheck stub or ledger of wage payments from a period contemporaneous with the date of injury.

5, 2009. Petitioner's cervical spine MRI of December 23, 2009 indicated: 4-5mm posterior central herniation at C3-4 impinging upon the ventral aspect of the cervical cord; 3mm posterior central herniation at C5-6 and right protrusion at C6-7; diffuse cervical spondylosis and multilevel disk disease." (Pet. Ex. 1 at 10). Petitioner required physical therapy as well as three cervical epidural steroid injections in order to obtain symptom relief. (Pet. Ex. 9 at 8-17). Respondent's Section 12 examiner, Dr. Singh, agreed that Petitioner's cervical disc herniations were causally related to his work injury and that Petitioner would benefit from cervical epidural injections. (Resp. Ex. 3). The Arbitrator finds Petitioner's cervical spine symptoms were causally related to his work accident of October 5, 2009.

Lumbar Spine

The Arbitrator finds Petitioner sustained a lumbar strain and disc bulges at L3-L4, L4-L5 and L5-S1 as a result of his work accident of October 5, 2009. (Pet. Ex. 1 at 10; Pet. Ex. 5 at 2-3). Petitioner's treating physicians, Dr. Goldberg and Dr. Malek, diagnosed Petitioner with annular disc bulges from L3-S1 with radicular components for which Petitioner underwent therapy. (Pet. Ex. 1 at 10; Pet. Ex. 5 at 5). Respondent's Section 12 examiner, Dr. Singh, agreed that Petitioner's lumbar strain was causally related to his work injury but disagreed that Petitioner sustained herniated discs. (Resp. Ex. 3). The Arbitrator relies on Petitioner's treating physicians and the radiologist's, Dr. Goldstein's, reading of Petitioner's December 23, 2009 lumbar spine MRI and finds Petitioner did sustain annular disc bulges in addition to a lumbar strain at the time of his October 5, 2009 work accident which necessitated medical care including physical therapy, caudal injections and ESIs.

However, based on the lack of evidence demonstrating a causal connection between Petitioner's subsequent disc bulging and later necessity for a lumbar fusion eight years post-accident, the Arbitrator finds that any and all treatment, injuries, therapy or conditions related to Petitioner's lumber spine incurred after the MMI date of October 3, 2010, are not causally connected to the October 5, 2009 work injury.

Right Knee

The Arbitrator finds Petitioner sustained a right knee contusion as a result of his work accident of October 5, 2009. (Pet. Ex. 1 at 16). The Arbitrator relies on the MRI dated October 23, 2009, the opinion of Petitioner's treating physician, Dr. Nam, and the opinion of IME examiner, Dr. Verma that Petitioner sustained a right knee contusion as a result of his work accident of October 5, 2009. (Pet. Ex. 1 at 2, 6; Pet. Ex. 2 at 5; Resp. Ex. 4; Resp. Ex. 5). Lastly, Petitioner successfully completed his course of physical therapy relative to his right knee, was released back to work, and determined to be at MMI for his right knee on March 8, 2010. (Pet. Ex. 1 at 16). This conclusion was adopted by Dr. Arayan on August 6, 2010. (Pet. Ex. 9 at 21).

Petitioner did not begin to complain of right knee pain again until speaking with Dr. Arayan in April 2013 – nearly three years after his initial discharge. (Pet. Ex. 9 at 60-61). Although Petitioner opined to Dr. Primus that the ongoing knee symptoms were related to the October 5, 2009 accident, and obtained an MRI reflecting a mild patellar chondromalacia with partial tearing on April 4, 2013, such results were not present in the 2009 MRI of the same affected area. (Pet. Ex. 13 at 3-12). The lack of tear in the 2009 MRI, coupled with Petitioner's successful completion of physical therapy in 2010, leads the Arbitrator to not find Petitioner's position credible insofar

as the condition of his right knee post August 6, 2010 being causally related to the October 5, 2009 work injury.

Right Shoulder

The Arbitrator finds that the Petitioner's current cause of ill-being as it relates to the right shoulder is not causally related to the work accident of October 5, 2009. From October 5, 2009 through October 3, 2010, the records in evidence credibly show that the Petitioner did not injure his right shoulder in the accident, but more specifically, did not appear to have torn his rotator cuff.

First, the initial reports of injury do not indicate any injury to the right shoulder. (Pet. Ex. 1; Resp. Ex. 1, Resp. Ex. 2). Dr. Goldberg's exam on October 7, 2009 is negative for right shoulder complaints. (Pet. Ex. 1 at 1). Although at this initial examination Petitioner indicated that his neck pain radiated into his scapular area, no individual complaints were made by the Petitioner as to shoulder pain – or any pain which would have indicated a torn rotator cuff. (Id.). In fourteen visits to Dr. Goldberg between October 7, 2009 and March 31, 2010, there is no mention of any shoulder pain by Petitioner or otherwise notated by Dr. Goldberg. (Id. at 18). Dr. Nam and Dr. Malek's medical records of Petitioner are similarly silent as to Petitioner's alleged shoulder complaints or any indication of a torn rotator cuff. (Pet. Ex. 2 at 1-6; Pet Ex. 5 at 4-12).

The Arbitrator notes that Petitioner complained of neck pain and 4/10 right-sided shoulder pain during his IME examination with Dr. Singh on January 18, 2010. (Resp. Ex. 3). Dr. Singh's records do not reflect any examination being conducted on Petitioner relative to his shoulder and renders no causal connection analysis relative to the shoulder and the October 5, 2009 work injury. (Resp. Ex. 3). It is therefore notable, and detrimental to Petitioner's credibility, that Petitioner then failed to discuss his 4/10 shoulder pain at any one of the six subsequent appointments he had with Dr. Goldberg; or with the two remaining appointments he had with Dr. Malek.

Petitioner did indicate to Dr. Arayan on April 2, 2010 that he had neck pain radiating into his right shoulder but appears to not have indicated the 4/10 shoulder pain he conveyed to Dr. Singh. (Pet. Ex. 2 at 2). Dr. Arayan noted in the records that in each of Petitioners' visits from April 2, 2010 through October 15, 2010, manual muscle abduction testing was done on Petitioner's right shoulder with 5/5 results each time. (Pet. Ex. 9 at 2-27).

Petitioner relied upon the narrative report of Dr. Sclamberg to establish as a causal connection for the right shoulder surgery for Petitioner's discovered rotator cuff tear in 2011. (Pet. Ex. 7). The record reflects that Dr. Sclamberg first examined the petitioner on October 21, 2011 - two years after the accident. (Pet. Ex. 6 at 5; Resp. Ex. 7 at Dep. Ex. 1). Dr. Sclamberg then prepared a narrative report dated February 13, 2012, wherein he opined that the condition of ill being in Petitioner's shoulder was causally related to the October 5, 2009 accident. (Id.).

At deposition, Dr. Sclamberg testified that an MRI revealed a full thickness tear of the supraspinatus tendon. (Resp. Ex 6 at 8). Dr. Sclamberg testified that he believed the right shoulder injury was related to the accident two (2) years prior because Petitioner had no prior shoulder complaints, and there appeared to be bruising in the right shoulder area. (Id.; Pet. Ex. 25). On cross examination however, Dr. Sclamberg acknowledged not having reviewed Dr. Arayan's reports when treating the Petitioner for shoulder pain. (Id. at 16). Dr. Sclamberg further testified that it would be atypical for someone to have a full thickness tear of the rotator cuff and have full strength and no pain. (Id. at 18). More poignantly, Dr. Sclamberg testified that he had treated thousands of rotator cuff injuries and had never had a patient with no prior pain complaints and full strength in the extremity - it would be atypical for a person to mask such pain for several years.

(Id. at 22-23, 28). Dr. Sclamberg testified that he was unaware that Petitioner was working full duty in the interval of October 2010 through August 2011. (Id. at 20).

Lastly, it was noted in Dr. Arayan's records, and Petitioner testified, that Petitioner was on a work trip in April 2011 when he felt the onset of shoulder pain. (Pet. Ex. 9 at 31; Trans. at 36). The Petitioner indicated that the pain was, "different because I hadn't felt the pain in my shoulder for a while after they gave me the injections in my neck." (Id.). In addition to the lack of evidence of such pain during the period following the work injury, the April 2011 injury referred to by Petitioner and documented by Dr. Arayan presents a break in the causal connection. Dr. Sclamberg was not given this information when he examined Petitioner and rendered his causation opinion as to Petitioner's shoulder. (Resp. Ex. 6 at 19-23).

In light of a potential intervening accident, a consistent absence of right shoulder complaints in the first two years after the work injury, repeated examinations by Dr. Arayan finding that the shoulder was normal, and the testimony that a person would not be able to mask a rotator cuff tear after two years, the Arbitrator finds that Dr. Sclamberg's causation opinion relative to the right shoulder is not credible, and that therefore any condition of ill health pertaining to the shoulder is not causally related to the October 5, 2009 accident.

Left Shoulder

The Arbitrator finds Petitioner's left shoulder complaints are not causally related to his work accident of October 5, 2009. The Arbitrator relies on the lack of any corroborating medical records detailing any left shoulder symptoms/treatment in the days, weeks, and months following Petitioner's motor vehicle accident of 10/5/09. The Arbitrator notes Petitioner's medical records do not mention any left shoulder pain until October 2014, five years after the accident. (Pet. Ex. 9). As such, all medical treatment and disability pertaining to Petitioner's left shoulder is denied.

Bilateral Hips

The Arbitrator finds Petitioner's bilateral hip complaints and three hip surgeries are not causally related to his work accident of October 5, 2009. Petitioner does not begin to complain of bilateral hip pain until his visit to Dr. Desai on February 1, 2016. (Pet. Ex. 11 at 255). There is also a noted absence of any corroborating medical records detailing any right or left hip symptoms/treatment in the days, weeks, and months following Petitioner's motor vehicle accident. The Arbitrator finds Petitioner's mention of hip pain in the medical records too remote in time from the work accident and notes the lack of causal connection opinions in the record regarding Petitioner's bilateral hip complaints and its relationship to the October 5, 2009 accident. As such, all medical treatment and benefits pertaining to Petitioner's right and left hip is denied.

G. Petitioner's Earnings / Average Weekly Wage.

The Arbitrator repeats the findings set forth in support of (F) as if fully set forth herein.

Petitioner testified he held a salaried position as a CDC Investigator at the time of his accident. (Trans. at 16). Petitioner testified to signing a "Report of Occupational Injury or Illness" the day after the work injury, wherein Section 10 of that form indicated that his monthly wage was $3,952.00. (Resp. Ex. 2; Trans. at 66). This is the only evidence submitted wherein the **frequency** of payments is concretely known – that Petitioner would receive gross $3,952.00 per month as his salary. Petitioner provided a paycheck stub purporting to be for the period ending on July 15,

2009[3], where the gross payment for that period was $1,976.00. (Pet Ex. 28). In reading these two pieces of evidence together so as to present a consistent extrapolation of Petitioner's AWW, the Arbitrator concludes that Petitioner's pay was bi-monthly, in the gross amount of $1,976.00 each period (Pet. Ex. 28) – totaling a monthly amount of $3,952.00. (Resp. Ex. 2). The Arbitrator concludes that Petitioner's AWW at the time of the work injury was therefore $912.00.[4]

J. Were the medical services provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator repeats the findings set forth in support of (F) and (G) as if fully set forth herein.

The Arbitrator finds that the medical services provided to Petitioner from the date of the work injury through October 3, 2010 were reasonable and necessary as it relates to the treatment for the right wrist, right knee contusion, lumbar spine and cervical spine. The Arbitrator finds the following *outstanding*, unpaid medical bills were reasonable, necessary and causally related to Petitioner's October 5, 2009 work accident, and are to be paid to Petitioner pursuant to the fee schedule or as otherwise negotiated:

1. Dr. Alvin Goldberg at OCC Medicine Center of Chicago for DOS 10/7/09 to 3/31/10 totaling (Pet Ex. 17 at 6-31) — $31,265.00

2. Dr. Michel Malek DOS 11/11/09 – 10/4/10 totaling (Pet. Ex. 17 at 47) — $720.00

Total Additional Medical Bills Payable: $31,985.00

The Arbitrator does not award the payment of any additional medical bills other than those specifically listed above. Any remaining outstanding medical care was not causally related to Petitioner's October 5, 2009 work accident or was otherwise outside of the two-physician referral chain permitted by Section 8(a)2 of the Act. Respondent shall receive a credit for any and all amounts previously paid pursuant to Section 8(j) of the Act.

K. TTD Benefits

The Arbitrator repeats the findings set forth in support of (F), (G) and (J) as if fully set forth herein.

Petitioner was off work from the date of work accident, October 5, 2009, through his release to return to work on all causally related injuries, October 3, 2010. (Trans. 53). During this time, the parties stipulated that Respondent paid Petitioner temporary total disability benefits in the total amount of $31,529.16. (Arb. Ex. 1; Trans. at 53). Petitioner returned to work on October 4, 2010. (Trans. at 53). Based on the Arbitrator's findings regarding issues (G) and (F): *supra*, the Arbitrator finds that Petitioner is owed temporary total disability of $608.03 per week from

[3] Neither Petitioner nor Respondent offered into evidence any paystub or pay ledger from a period contemporaneous with the date of injury.

[4] $3,952.00 per month x 12 months = $47,424.00 / 52 weeks = $912.00 per week.

October 6, 2009 to October 3, 2010 a total of 51-5/7 weeks, less any credit for amounts previously paid by Respondent. (Arb. Ex. 1).

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

The Arbitrator repeats the findings set forth in support of (F), (J) and (K) as if fully set forth herein.

Based on the Arbitrator's findings regarding issue "F" *supra*, the Arbitrator awards permanent partial disability for Petitioner's right hand/wrist, cervical spine, lumbar spine, and right knee. For purposes of determining permanent partial disability, the Arbitrator notes this accident occurred before September 1, 2011. As such, the five enumerated criteria will not be specifically referenced.

1. **Right hand/wrist:** Petitioner sustained a right wrist scapholunate ligament tear as a result of his work accident of October 5, 2009 which required two separate surgeries – 1) a right wrist arthroscopy with arthroscopic debridement; and 2) a SLAC reconstruction of the right wrist consisting of an excision of scaphoid and midcarpal fusion. (Pet. Ex. 21 at 1-4). Petitioner suffered a complete destruction of the articular surface of the scaphoid and a complete dissociation of the scaphoid and lunate. (Pet. Ex. 3 at 40). Dr. Gelman opined Petitioner's surgeries would permanently decrease his wrist motion and strength. (Id.). Dr. Gelman noted Petitioner had recovered well but would never again regain full motion in his wrist and released him to full work duty as of August 23, 2010. (Pet. Ex. 3 at 57). Petitioner has surgical hardware in his right-hand which Petitioner testified continues to bother him and aches when he walks with his cane and puts his weight on his right wrist. (Pet. Ex. 27; Trans. at 56-57). Due to Petitioner's severe, ongoing, post-operative disability, the Arbitrator awards 50% loss of use of the hand or 102.5 weeks at a PPD rate of $547.20, for Petitioner's right wrist injury.

2. **Cervical Spine:** Petitioner sustained multiple herniated cervical discs with impingement of the spinal cord as a result of his work accident. His treating physicians, Dr. Goldberg and Dr. Malek, as well as Respondent's Section 12 examiner, Dr. Singh, all agreed Petitioner suffered from a work-related central disc herniation at C3-C4 and a right sided disc herniation at C4-C5. (Pet. Ex. 23). Petitioner began physical therapy at Accelerated Rehabilitation. (Pet. Ex. 8 at 52-53). On September 22, 2010, Petitioner reported to his therapist that he had no deficits in daily activities, including no neck pain. (Id. at 46-47). Petitioner repeated that had no pain or deficits in his neck during daily activities or therapy and was ready to return to full work duties. (Id. at 43-44). Petitioner completed physical therapy on October 8, 2010 and Dr. Arayan released him to full duty on October 4, 2010. (Pet. Ex. 8 at 41-42; Pet. Ex. 9 at 25). Petitioner followed-up with Dr. Arayan on October 15, 2010 relative to his cervical spine, stating that even after returning to work he still had 0/10 pain in his lower back. (Pet. Ex. 9 at 27-28). At trial, Petitioner testified his neck continues to hurt. (Trans. at 58). He has pain on the right side at the base of his neck going down to the upper part of his back. (Id.). Based on the Arbitrator's findings *supra*, and that any treatment after the MMI date of October 3, 2010 was not causally related to the October 5, 2009 work injury, the Arbitrator awards 10% loss of use of the person as a whole, or 50 weeks at a PPD rate of $547.20, for Petitioner's cervical spine injuries.

3. **Lumbar Spine:** Petitioner sustained a lumbar strain and disc bulges at L3-L4, L4-L5 and L5-S1 due to his work-related motor vehicle accident of October 5, 2009. (Pet. Ex. 1 at 10; Pet. Ex. 5 at 3). Dr. Singh reviewed the MRI and noted that there was no evidence of disk herniation or spinal stenosis. (Resp. Ex. 3). Dr. Arayan noted in his exam in April 16, 0210 that there was no lumbar radiculopathy. (Pet. Ex. 9 at 5-6). During a visit to Dr. Arayan on June 10, 2010, Petitioner noted that he had 0/10 pain relative to his lower back. (Id. at 14-15). Petitioner underwent extensive physical therapy treatment through October 1, 2010 at which time he noted to his therapist that he had no deficits in his daily activities, nor believed he would have issues performing his work duties. (Pet. Ex. 8 at 41-42). Dr. Arayan returned Petitioner to full work duty effective October 4, 2010. (Pet. Ex. 9 at 25). Petitioner followed-up with Dr. Arayan on October 15, 2010 relative to his lower back, stating that even after returning to work, he still had 0/10 pain in his lower back. (Pet. Ex. 9 at 27-28). Based on the Arbitrator's findings *supra*, and that any treatment after the MMI date of October 3, 2010 was not causally related to the October 5, 2009 work injury, the Arbitrator awards 3% loss of use of the person as a whole, or 15 weeks at a PPD rate of $547.20, for Petitioner's low back injury.

4. **Right leg/knee:** Petitioner sustained a right knee contusion due to his work-related accident for which he underwent physical therapy. Dr. Nam determined Petitioner was at MMI for his right knee and released him back to work on March 8, 2010. (Pet. Ex. 1 at 16). Petitioner followed-up with Dr. Arayan on October 15, 2010 and stated that even after returning to work, he still had 0/10 pain in his right knee. (Pet. Ex. 9 at 27-28). Petitioner offered testimony that he continues to have problems with his right knee and his symptoms have been deteriorating since 2013. (Trans. at 39-40). Petitioner testified that he feels pressure in his knee when he walks upstairs, and his leg sometimes gives out when he walks down the stairs. (Trans. at 40). The current condition of the knee however is inclusive of symptoms and alleged injuries which are not causally related to the October 5, 2009 injury. Based on the Arbitrator's findings *supra*, and that any treatment after the MMI date of October 3, 2010 was not causally related to the October 5, 2009 work injury, the Arbitrator awards 3% loss of use of the right leg, or 6.45 weeks at a PPD rate of $547.20.

O. Prospective Medical

The Arbitrator repeats the findings set forth in support of (F), (J), (K), and (L) as if fully set forth herein.

The Arbitrator finds that the Petitioner is not entitled to any further prospective medical treatment as a result of his work-related accident which occurred on October 5, 2009. The Arbitrator finds Petitioner has reached maximum medical improvement for all his work-related accident as of October 3, 2009, and as such, awards nature and extent per issue "L" *supra*.

Signed: June 26, 2020
SIGNATURE OF ARBITRATOR DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC031157
Case Name	DISALVO, PETER v. AT&T AKA ILLINOIS BELL TELEPHONE COMPANY
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0203
Number of Pages of Decision	46
Decision Issued By	Kathryn Doerries, Commissioner, Thomas Tyrrell, Commissioner

Petitioner Attorney	Gary Friedman
Respondent Attorney	Terrence Donohue

DATE FILED: 5/31/2022

/s/Kathryn Doerries, Commissioner
Signature

DISSENT: /s/Thomas Tyrrell, Commissioner
Signature

STATE OF ILLINOIS)		
) SS.		
COUNTY OF COOK)		

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PETER DISALVO,

Petitioner,

vs. NO: 15 WC 31157

A T & T aka ILLINOIS BELL,

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, medical expenses, prospective medical, and the admissibility of Dr. Konowitz's reports, and being advised of the facts and law, vacates the Arbitrator's award of prospective medical, vacates in part the Arbitrator's temporary total disability award and 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 modifies several sections of the Arbitrator's Findings of Fact designated below, and viewing the evidence differently than the Arbitrator, arrives at different Conclusions of Law with respect to issues (F) whether Petitioner's current condition of ill-being is causally related to the injury, (K) whether Petitioner is entitled to any prospective medical care and, (L) whether Petitioner is entitled to any temporary total disability benefits. Therefore, the Commission modifies the Arbitrator's Findings of Fact as referenced below, strikes the paragraphs under sections (F), (K) and (L) in the Arbitrator's Conclusions of Law and substitutes the paragraphs

respectively detailed below, vacates the award of prospective medical and vacates the award of temporary total disability (TTD) for the periods September 17, 2020, through September 23, 2020, and September 26, 2020, through April 27, 2021, for the reasons outlined below.

Findings of Fact

Summary of Medical Records (Modified)

The Commission strikes the Arbitrator's third and fourth paragraphs in this section of the Arbitrator's Decision, and after paragraph two, substitutes the paragraphs below, so this entire section now reads as follows:

> Petitioner presented to Concentra on April 9, 2015 and reported that he had slipped and twisted his right knee at a customer's house going downstairs. Records indicate that Petitioner heard a "pop" at the time of the injury. (PX1, 1) Petitioner was diagnosed with a right knee strain, was given a brace, a script for physical therapy and work restrictions of no driving, no squatting, no kneeling, no stairs, no ladders, and no walking on uneven terrain. (PX1, 3-4)
>
> On April 10, 2015, Petitioner presented to his family doctor at Elmhurst Clinic (PX2) who recommended an MRI and placed Petitioner off work. (PX2, 9-20) Petitioner also sought continued treatment at Elmhurst Clinic for chronic back pain after a 2013 lumbar back surgery and on May 18, 2015, he requested a parking placard due to his back issues. It was noted, however, he had been seeing a neurosurgeon for this and was receiving injections and medications. Dr. Pae had also prescribed Flexeril and hydrocodone for pain. (PX2, 14-16)
>
> Petitioner underwent the MRI at Midwest Open MRI on June 12, 2015 showing "grade 2 chondromalacia at the summit of the patella, mild tendinosis of the patellar and quadriceps tendons at the patellar attachment, mild joint effusion, no evidence of meniscal tear and bone marrow signal appears normal without evidence of fracture." (PX10) Following the MRI, Petitioner was referred to orthopedic surgeon, Dr. Gregory Dairyko, at Elmhurst Clinic who administered a cortisone injection on June 19, 2015. Diagnosis was right knee patellofemoral chondromalacia and Petitioner remained off work per Dr. Dairyko. (PX2, 20)

Petitioner underwent physical therapy at NovaCare commencing April 21, 2015. (PX3) Petitioner's work status in the physical therapy notes between August 11, 2015 and August 18, 2015, document that he was unable to work secondary to dysfunction. (PX3, 54-61) On August 18, 2015, Dr. Dairyko's office visit documents that Petitioner requested a note stating that Petitioner was able to travel. (PX2, 59) Dr. Dairyko complied and authored a "To Whom It May Concern" letter that stated Petitioner was currently under his medical care and there was no contra-indication for the Petitioner to travel with regard to his right knee. (PX2, 58) Petitioner was off work at the time and claimed TTD for the period commencing April 10, 2015 through October 28, 2017. The next therapy visits document the same "unable to work secondary to dysfunction"

status. (PX3, 62-66) On August 25, 2015, the NovaCare therapy record documents that Petitioner cancelled his appointment because he was leaving for Mexico early. (PX3, 67)

Petitioner also did not show up for his appointment on September 15, 2015. (PX3, 68) Therefore, the Commission infers that Petitioner went to Mexico for two weeks, August 25, 2015 through September 15, 2015.

On September 16, 2015, Petitioner reported to his therapist that he remained in a lot of pain and Rehabilitation was put on hold secondary to "IME." (PX3, 69-71)

On September 22, 2015, Dr. Dairyko's records note, "PT has been put on hold because knee pain is getting worse. Rates pain 6/10. Requesting new knee brace." In his plan, Dr. Dairyko noted that Petitioner would benefit from obtaining an MRI with a magnet strength of three Tulsa in order to grade the amount of cartilage loss present on the undersurface of the patella. Petitioner was given a new brace and continued off work status. Petitioner was last seen by Dr. Dairyko on October 9, 2015, where he documented that Petitioner, "was told that I would not recommend surgical intervention at this time. The patient will obtain a second opinion from Dr. Brian Cole at Rush." Petitioner would remain off work pending his evaluation with Dr. Cole. (PX2, 82)

Respondent's First Section 12 Examiner, Dr. Brian Forsythe (Modified)

The Commission modifies paragraph two and strikes the Arbitrator's third, fourth, sixth, seventh, eighth, and ninth paragraphs in this section of the Arbitrator's Decision, and substitutes the paragraphs below, so this entire section now reads as follows:

> Respondent scheduled an Independent Medical Examination ("IME") pursuant to Section 12 of the Act with Dr. Brian Forsythe for September 17, 2015. (PX4) Dr. Forsythe opined that Petitioner had pre-existing patellar chondromalacia that was exacerbated due to the work injury. Dr. Forsythe recommended work restrictions of no squatting and no kneeling and opined that Petitioner may benefit from a diagnostic arthroscopy and debridement pending operative findings. (PX4, 4)
>
> Petitioner chose to continue treatment with Dr. Forsythe who kept him off work pending surgery. (PX4, 30) Petitioner underwent surgery on November 16, 2015, at Munster Specialty Surgery Center consisting of a diagnostic arthroscopy and right knee arthroscopic patellar chondroplasty. The description of the procedure documented:
>
> > Diagnostic arthroscopy was notable for no loose bodies within the superior patellar pouch, medial arid lateral gutters. Within the notch, ACL and PCL were intact. Within the medial compartment, the meniscus, femoral condyle and tibial plateau were intact and stable to probing. Within the lateral compartment, the meniscus, femoral condyle and tibial plateau were similarly intact and stable to probing.

> I then turned my attention to the patellofemoral joint. The trochlea was intact along the medial and lateral facets. There was fibrillation grade 1-2 of the distal lateral patellar facet. With an arthroscopic shaver, this was gently debrided back to a smooth stable margin. A 1-2 mm tissue depth was debrided over an area measuring approximately 4 x 8 mm. This completed arthroscopic patellar chondroplasty, The medial facet was completely intact as well as the apex proximally. (PX6)

Dr. Forsythe placed Petitioner on sedentary duty on February 4, 2016, and referred Petitioner to Dr. Amin for pain management. (PX4, 17-19)

Petitioner presented to Dr. Sandeep Amin on April 11, 2016, who recommended a right sided genicular nerve block followed by a radiofrequency ablation of the right knee. Dr. Amin continued Dr. Forsythe's sedentary work restrictions. (PX5, 14) Petitioner's past medical history was significant for "congenital lumbar spinal stenosis, requiring injections and radiofrequency ablation of his lumbar facets." (PX5, 60)

Om May 10, 2016, Dr. Amin authored a letter to the adjuster appealing the denial of the right genicular radiofrequency ablation and possible radiofrequency ablation. (PX7, 55-56)

Dr. Forsythe saw Petitioner next on June 6, 2016, for his right knee post-operative follow-up and concurred that Petitioner might benefit from a nerve block to alleviate his symptoms. Dr. Forsythe did not address the radiofrequency ablation recommended by Dr. Amin. (PX5, 8)

Petitioner saw Dr. Amin on July 11, 2016 and MRI findings were noted to be patellar chondromalacia, ACL ganglion (sic nerve), and mild patellar tendinosis. Dr. Amin's documentation confirms that Petitioner was not a surgical candidate and he planned to proceed with a diagnostic nerve block. (PX7, 49-50)

The Petitioner underwent the nerve block on July 13, 2016, with Dr. Amin. (PX7, 48) On September 27, 2016, Petitioner returned to Dr. Amin. Petitioner reported that his pain had fully resolved at rest after his genicular nerve block one month ago. Dr. Amin documented Petitioner alleged his pain returned when he kneels, however, Petitioner asked to postpone his radiofrequency ablation scheduled the next day for as long as he was not in pain. He requested a Functional Capacity Exam to see when he can get back to work. (PX7, 38)

A Functional Capacity Examination was performed at NovaCare on October 11, 2016, showing that Petitioner could work at a heavy physical demand level ("PDL"). (PX8) On October 25, 2016, Dr. Amin gave Petitioner work restrictions of no frequent kneeling and no pole climbing. Petitioner was instructed to follow up as needed. (PX7, 35)

February 7, 2017, Petitioner followed up with Dr. Amin reporting that he had the FCE done and confirming that he was not taking pain medicine. "Not back to work yet, today here to send

his disability paperworks (sic) to insurance companies. Insurance paperwork faxed to the A T & T disability." (PX7, 46-47)

Dr. Cohen references that on March 9, 2017, Dr. Amin recommended proceeding with radiofrequency denervation of the genicular nerve in order to "provide this patient with long lasting relief." (PX9, 4) Just as the radiofrequency ablation reports are missing from the record, this March 9, 2017, note was absent form Dr. Amin's records.

On May 15, 2017, Dr. Amin's office note documents that Petitioner was there for follow-up and he was unable to obtain radiofrequency denervation procedure of the genicular nerve of the right knee despite having had a successful diagnostic block. Patient was also complaining of right leg numbness and lower back pain exacerbated with increased activity. Assessment notes that Petitioner had superimposed right leg lumbar radicular symptoms with numbness and tingling in the right leg. "Patient is unable to work without restrictions with the current status of knee pain due to inability to obtain a procedure." (PX7, 44-45)

On June 1, 2017, Dr. Amin authored a "To Whom It May Concern" letter noting Petitioner's right leg numbness and also lower back pain that is exacerbated with increased activity. Dr. Amin opined that, "[t]his all seems to be stemming from the initial injury due to the very similar nature of pain and the concepts involved with the idea of exacerbation of similar pain with activity." An MRI was ordered to evaluate his lumbar spine and assess if there is any worsening pathology. (PX7, 26, 28)

On June 12, 2017, Petitioner returned to Dr. Amin noting right knee and leg pain and low back pain. Insurance approved the radiofrequency denervation of the genicular nerves and the plan was to schedule the procedure. Preventative Medicine noted "Above Normal BMI Giving encouragement to exercise." Also, "Tobacco Counseling. Patient counseled on the dangers of smoking and urged to quit." Follow up two weeks for RFTC right knee genicular. (PX7, 42-43)

Petitioner ultimately returned to Dr. Amin and underwent the first radiofrequency ablation on July 26, 2017. (T. 32) Petitioner returned to Dr. Amin on August 28, 2017, presenting for follow-up after having undergone a radiofrequency denervation procedure of the right knee with majority of the original knee pain having subsided. Petitioner complained of new pain in the suprapatellar region different than the original pain. He had full range of motion in the knee. There was no tenderness overlying the entry sites of the needles. Dr. Amin planned to obtain an MRI scan of the right knee to further evaluate the suprapatellar pain. He was to start physical therapy to assist with decreasing pain and improving range of motion. (PX7, 40-41)

Petitioner continued care with Dr. Amin and was returned to work full duty on October 23, 2017. (PX7, 23) Petitioner testified that he returned to work on October 29, 2017. (T. 33- 34) On December 15, 2017, Dr. Amin authored a letter to the adjuster noting Petitioner returned to Dr. Amin on December 4, 2017, with complaints of low back pain and radiating pain down his right leg. Dr. Amin recommended an MRI of the lumbar spine calling this "related pathology." (PX7, 17-18)

On January 26, 2018, Dr. Amin authored a letter to the adjuster "in response to a request made for an update on the patient's current treatment regimen and medications." Dr. Amin notes that Petitioner has exhausted conservative management and is being treated with medications. He notes that Petitioner continued to have weekly exacerbation of his pain, which is managed with conservative therapy, "including home exercises, NSAIDS, and other medications. He notes that "[t]hat the patient would continue to require conservative treatment until he's a candidate for a surgical option, as recommended by an orthopedic surgeon. The patient has returned back to work since October and continues to complain of exacerbation of his pain with increased activity and changes in the weather and will require continued treatment." (PX7, 12)

Dr. Amin's office note from the same date, January 26, 2018, states Petitioner is currently not a surgical candidate for TKA due to his young age. In the Assessments, Dr. Amin notes that the patient was also anticipating increased need for medicine with increase in workload. Dr. Amin discussed with Petitioner having the previous radiofrequency ablation approximately six months earlier that Petitioner could return for a repeat radiofrequency ablation in approximately six months. He also stated that Petitioner was not surgical candidate and his next surgical option will be per orthopedic surgeon. (PX7, 13-14)

Petitioner last saw Dr. Forsythe on March 15, 2018. Petitioner was released from care with instructions to continue a home exercise program focusing on hamstring flexibility. At that time, Dr. Forsythe stated that "there was no indication for further surgical recommendation or intervention." Dr. Forsythe noted Petitioner "will continue working full duty and follow-up in the office on an as needed basis. He is ok to proceed with radiofrequency treatment if recommended by Dr. Amin." (PX5, 2)

July 2, 2018, Dr. Amin noted Dr. Forsythe's opinion that Petitioner is not a surgical candidate, and documented, "recurrence of right knee pain secondary to degenerative joint disease deemed to be not a surgical candidate one year after radiofrequency denervation procedure to the genicular nerves." Assessments included right knee pain, degenerative joint disease (DJD) of the knee, and lumbar radiculopathy. (PX7, 8)

Petitioner testified that he had a second radiofrequency denervation procedure of the right genicular nerves in July 2018. (T. 34-35) The Commission notes, however, documentation of that procedure is absent from the record. On August 1, 2018, a work release form states that Petitioner may return to work on August 13, 2018. (PX7, 7)

However, on August 13, 2018, a second work release form signed by Dr. Amin released Petitioner to work one week later, on August 20, 2018. (PX7, 6)

A follow-up consult with Dr. Amin occurred on September 17, 2018. The Assessments listed three issues: (1) Chronic prescription opiate use- (Primary), (2) Right knee DJD, (3) Right knee pain. It was noted that Petitioner related complete resolution of knee pain status post radiofrequency denervation procedure of the right knee. "Patient has since returned back to work

with no limitations. Patient will need to repeat procedure involving radiofrequency denervation of the knee for recurring pain approximately once a year." Treatment list chronic prescription opiate use and labs were ordered for opiate confirmation, urine screen, and for Tramadol. (PX7, 4)

There is a work release form dated July 30, 2019, that states that Petitioner was, "seen in the clinic with 10/10 medial knee pain resulting inability to perform work functions. Patient is not released to work until after his (?-illegible) RFA procedure on 8/19/19." (PX7, 3)

The August 19, 2019, procedure note is absent from the record. Return to work documentation after this procedure is also absent from the record.

Petitioner testified, however, that he returned to work on November 19, 2019, and worked regular duty up until August 2020. (T. 38) Petitioner's claim for TTD entitlement for this off-work period on the request for hearing/trial stipulations (ArbX1) comports that TTD entitlement was claimed by Petitioner through November 18, 2019. Thus, Petitioner was off work for three months after receiving his radiofrequency ablation procedure.

Further, Petitioner testified that he returned to Dr. Amin in August 2020 as he once again experienced increased pain, buckling, swelling, and clicking when bending in the right knee. (T. 39) The last full treatment note submitted into evidence is from August 14, 2020, in which Dr. Amin recommends another radiofrequency denervation. It was noted that Petitioner "also had pulled a muscle in the belly for which she (sic) is off work currently." (PX7, 1) Petitioner testified that he treated with his primary care doctor for the muscular injury, Dr. Nathaniel Pae. His treatment consisted of physical therapy and rest. (T. 54)

On September 11, 2020, a Return to Work Clearance and Physical Activity Limitations form was generated from the Oak Park Pain Center with an illegible signature and checks a box that states the "employee may return to work with the following restrictions on (date): 09/14/20 the restrict." Functional work level is checked for sedentary work. The boxes referencing how long the restrictions are in effect are not checked. (PX7, 10-11)

A work status note dated February 15, 2021, from Dr. Amin states Petitioner was being "seen in our pain clinic for treatment of his right knee pain. From 8/31/20 to 9/11/20, Mr. DiSalvo was advised to not return to work due to exacerbation of R knee pain. Thereafter, he was evaluated and placed on light (sedentary) duty beginning 9/14/20. To date, this remains his work status until he is able to undergo the recommended treatment-R knee genicular radiofrequency ablation." (PX12, 2)

Petitioner testified that he contacted Respondent following his September 14, 2020, appointment for light duty accommodations and ultimately returned to work September 24, 2020. (T. 59) Petitioner submitted into evidence an email to Respondent's human resources dated September 22, 2020, regarding job accommodations, but the request was initially denied. (T. 43; PX13) Petitioner testified that he worked light duty on September 24 and 25, 2020, but then ongoing light duty accommodations were denied. (T. 43)

Respondent's Second Section 12 Examiner, Dr. James Cohen (Modified)

The Commission modifies this section of the Arbitrator's Decision so it now reads as follows:

Petitioner was seen for an Independent Medical Evaluation by Dr. James Cohen from Illinois Bone & Joint Institute before the second radiofrequency ablation was performed, on March 21, 2019, pursuant to Section 12 of the Act. Dr. Cohen authored a report on the same day. (PX9, RX3) Dr. Cohen noted that he was a Board Certified Orthopedic surgeon in full-time clinical practice as well as a fellow of the American Academy of Orthopaedic Surgeons. (PX9, 1)

Dr. Cohen reviewed Petitioner's medical records. (PX9, 2-5) When he reviewed Dr. Amin's January 26, 2018, office note, Dr. Cohen noted Dr. Amin had stated "the patient is not currently a surgical candidate for TKA due to his young age." Dr. Cohen added a parenthetical, "(clearly the patient is not a candidate for total knee replacement regardless of his age with the intraoperative findings)." (PX9, 4-5)

On physical examination, Dr. Cohen made the following notations: The patient appears comfortable and in no distress. He was observed to have a normal gait. He could stair step well with both knees. There was no crepitus with stair stepping on the left knee. There was minimal crepitus with stair stepping on the right knee. He had normal leg alignment. There was no effusion, warmth or erythema of either knee. There was a mild patellar click with range of motion of both knees. It was symmetric. He had a full range of motion from 0°to 130°. There was no medial, lateral, or AP laxity. McMurray testing was negative. Patellar apprehension testing was negative. Patellar tracking was normal. With apprehension testing on the right, which is pressured directed to the medial patella, he did have some tenderness there, not on the left side. There was no tenderness on the lateral patella. McMurray testing was negative. There was no popliteal or calf tenderness. Knee and ankle reflexes were brisk. He did not have any reproduction of his knee pain with flexion or extension of his spine. Heel and toe walking were normal. EHL testing normal. There were no hypesthesias. (PX9, 5)

Dr. Cohen reviewed the two MRIs of the right knee and obtained AP standing and standing PA films in flexion, lateral and skyline views and they were completely normal with normal patellar tracking, and there were no arthritic changes. (PX9, 5)

Dr. Cohen authored a list of his Impressions that states as follows:

1. My diagnosis is that Mr. DiSalvo has an area of chondromalacia patella measuring approximately 4 x 8 mm. It is partial thickness. The basis for this opinion is both my review of the MRI as well as Dr. Forsythe's operative note from November 16, 2015. This is a very

small area. He has symptoms that are significantly worse than the objective findings.

2. I believe that the cause of his current symptomatology is somewhat unclear as he has significantly more symptoms than the objective pathologic findings. Regarding the medical records from December 2017, when he was having right leg radicular pain in his calf down to his foot, he is no longer having any of these symptoms, and I do not feel that he needs a lumbar MRI. I did examine his lumbar spine to look for a possible cause of his knee pain, but examination of his lumbar spine did not produce any such symptoms.

3. I believe that he is at MMI for the work-related injury in the sense that I clearly do not believe that he needs any further orthopedic surgery. I believe that if he does develop increased pain in his right knee, I believe that he may need an intraarticular steroid and lidocaine injection. Frequently, this type of injection is helpful for mild chondromalacia. Also, treatment with a nonsteroidal anti-inflammatory would be reasonable. Mr. DiSalvo's last radiofrequency ablation according to the history that I obtained provided marked relief. Radiofrequency ablation is not a procedure that I perform nor is it within my level of expertise. Nevertheless, my understanding is that frequently it is not helpful, but clearly Mr. DiSalvo felt that he had considerable relief from the second (sic) radiofrequency ablation, and if indeed he did have severe pain, and the injection that I recommended was not helpful, I believe that it is a reasonable treatment modality. It should also be noted that radiofrequency ablation is a temporary measure and frequently the pain returns. Other than the injections that I have discussed above, I do not feel that any further therapy or surgery is indicated and in that sense he is at maximum medical improvement.

4. The patient states that he is performing his full duties working up to 50 hours per week. I believe that he is capable of working a full-duty status.

5. I believe that the medical treatment to date has been reasonable, specifically I believe that the genicular nerve injection and radiofrequency ablation was medically reasonable. Although, I should state that it would have been my preference postoperatively as well as preoperatively to try another intraarticular steroid and lidocaine injection, this is a much simpler procedure and frequently will give substantial relief. If that did not help, I believe that the injections by Dr. Amin would have been reasonable.

6. I was asked to perform an impairment rating. Using the AMA Guide to the Evaluation of Permanent Impairment Sixth Edition, an impairment rating was derived. Using the knee regional grid table 16-3 on page 509, I use the diagnosis of chondromalacia patella, which is a soft tissue lesion. This diagnosis was based on the MRI findings as well as the arthroscopic findings. He did have mild crepitus on the right knee. There was no motion defect and this results in a lower extremity impairment that could range from 0 to 2% depending on key modifiers. Class 1 was assigned. Using the functional history assessment table 16-6 on page 516, the patient's exam showed a normal gait. He completed a pain disability questionnaire that

totaled 26. Using a table on page 40, this results in a mild designation and therefore a grade 1 modifier was assigned. Using the physical examination adjustment table 16-7 on page 517, the patient's exam was essentially normal other than minimal crepitus, and he did have some tenderness over the medial patella. His thigh circumference was 24-1/2 inches bilaterally at a level 6" above the superior pole of the patella. There were no other objective findings and therefore a grade 1 was assigned. Using the clinical studies adjustment table 16-8 on page 519, a grade 1 modifier was assigned based on tile MRI confirming mild pathology. Using the net adjustment formula, a zero net adjustment was calculated. Returning to table 16-3 on page 509, this results in a 1% lower extremity impairment. From a 1% lower extremity impairment, a 1% whole person impairment is derived. (PX9, 5-6)

Testimony of Respondent's Third Section 12 Examiner, Dr. Howard Konowitz (modified)

The Commission strikes the Arbitrator's paragraph, and modifies this section of the Arbitrator's Decision so it now reads as follows:

At Respondent's request, pursuant to §12, Petitioner was examined by Dr. Howard Konowitz, a board-certified anesthesiologist with a subspecialty in pain management at Comprehensive Pain Management Group, on October 28, 2020. (RX7, 6, 9, 41) Dr. Konowitz prepared a report on that same day and authored an Impairment Rating Report on November 2, 2020. (RX7, 9, 29-20) Dr. Konowitz testified via an evidence deposition on January 27, 2021. (RX7)

Dr. Konowitz first summarized what Petitioner marked in a pain diagram and wrote in his pain questionnaire. He reported a pain score of 5 and activity pain score of 8; worse is listed as 10 and best is 4 to5 . Petitioner denied radiation below the knee, any pain radiation superior or central, and on his pain diagram the only area he marked a circle around the knee. (RX7, 11) Dr. Konowitz reported only what Petitioner stated, with no interpretation. (RX7, 12-12) Petitioner reported that he's had radiofrequency geniculate ablations with an improvement in his pain state for up to one year. After his last injection, he reported that he had a subsequent cortisone injection and then returned to work. Petitioner also reported taking Tramadol at the end of the day. (RX7, 13)

Dr. Konowitz testified that the physical exam impacted his opinions because he found Petitioner was "70 inches tall, 265, a BMI of 38.16, and pretty much normal vitals beyond that, and his reported pain was right knee 5 to 8. Certainly BMI with knee pain is specifically important. As your BMI goes up, your frequency of knee pain increases. In this zone over a BMI that's morbidly obese, there's probably a 27 percent frequency of knee pain. It's also important and educational, as you drop each pound, it's a four-pound less load on the knee so it improves knee pain. So that's the importance of vitals." (RX7, 14-15)

On examination of Petitioner's right knee, Dr. Konowitz testified that he could not trigger any knee pain. "There was full motion. There was no swelling or erythema. This was other than a surgical knee, meaning he had scars, there was nothing to report from a knee not under stress,

meaning when you examine." (RX7, 16) Dr. Konowitz testified that he reviewed medications, imaging, FCE, other IMEs, office notes, physical therapy notes and work statuses and as he works he summarizes them to use for his impressions. (RX7, 16-17) He diagnosed Petitioner with "right knee pain residual, that this was a subjective pain post-traumatic with a prior history of knee surgeries. I write subjective in this way because on physical exam, I could not reproduce his pain state. He does have some radiographs of chondromalacia; but from an exam standpoint, I couldn't trigger a pain state on exam." (RX7, 20) He further testified that "[t]he one narrow question here is all about radiofrequency ablation and geniculate ganglion question. (sic-see T. 58-59, "I'm talking about the genicular nerves"; "referring to the geniculate plexus around the knee where we do radiofrequency.")

Dr. Konowitz testified that his recommendations "include weight loss due to the mechanical knee stress that occurs with his current weight; for each pound of weight loss, there would be a four-pound decrease in mechanical stress at the knee. Conservative medications are acceptable. Ultimately the current symptoms with a negative exam are not temporally related to the past accident." (RX7, 22)

Dr. Konowitz further testified that it was his opinion, based upon a reasonable degree of medical certainty, Petitioner did not need to continue treatment for the alleged work injury, that Petitioner had reached MMI for his work injury, and that the ablation currently being prescribed by Dr. Amin is what the Petitioner described is his fourth geniculate nerve block. (RX7, 22-23, 24) Dr. Konowitz opined that "there is no literature to support multiple and chronic use of RF on geniculate ganglion." Petitioner reported subjective improvement with the last geniculate block which also included a steroid injection afterwards to get him back to work. He then testified that in his report he answered, "under 5(a) under the question, Do you believe that pain treatment including two previous geniculate nerve blocks and RF performed by Dr. Amin were medically reasonable, necessary, and causally related to the accident? Geniculate ganglion RFs is without long-term longitudinal studies in this situation and therefore treatment would not be causally related." He further opined, " I do not agree with the opinion nor is there literature to support yearly geniculate ganglion in the future. This is based on geniculate ganglion and RF. These studies, we can discuss, but they are all chronic knee pain after a total knee replacement, chronic knee pain that has Kellgren-Lawrence-" (RX7, 24-25)

Dr. Konowitz testified that for a patient with a normal knee exam, radiographic findings that do not make it a Grade 3, Grade 4, or Grade 2 osteoarthritis, which would be a potential indication, "which, [w]e don't have that in this state. We have subjective knee pain. In that situation, there's no matching study that would verify this use or be considered in that use. We're treating a nonplacebo controlled study in essence using him as the control." (RX7, 26)

Dr. Konowitz testified "What is clear, though, is that the steroid injection after his last one is what got him back to work, and steroids do work on chronic knee pain. Also, his duration of improvement is a year where most RFs are 90 days. They have duration. Are these new injuries? Are these repeat events? You can't make any conclusion because we're dealing with someone

treated with radiofrequency ablation outside of any literature that would support that." (RX7, 27)

Dr. Konowitz testified on cross-examination that he would do the radiofrequency ablations "in patients who fail treatment of chronic pain as a treatment of last resort. Neurodestructive procedures, I want them to be my last choice. I'll use -- Just because of the nature of what we just described, you are destroying a nerve." In his practice, it's a treatment of last resort. (RX7, 51-52)

Dr. Konowitz testified that there are limited studies on radiofrequency ablations in this setting. He testified those groups have osteoarthritis, "the Kellgren-Lawrence criteria group that has enough arthritis you're seeing it on radiograph and fitting criteria. There is (sic) indications there. Certainly our postsurgical total knees which have a 30 percent frequency of chronic pain despite a nicely placed total knee have radio frequency, but you're looking in the population that gets a total joint replacement." (RX7, 54-55) He testified the population is much older for those studied by definition because it is a total knee replacement and you rarely replace a 28 year old and get "a total knee." (RX7, 55)

On cross-examination Dr. Konowitz clarified the misuse of the term geniculate ganglion when it was meant to refer to the geniculate nerve was due to his use of Dragon, which the Commission interprets as referring to his dictation software, since he went on to say, "that's what came out. I didn't author and correct it." (RX7, 60)

Dr. Konowitz testified further on cross examination, that there would be no longitudinal study that says repetitive radiofrequency ablations helped or that it is utilized in this setting of this specific patient. (RX7, 56-57) He further explained that there have been studies since 2011 (which) was some of the original work and before. He agreed with Petitioner's counsel that in order to get the long-term longitudinal study, you would have to do the exact procedure over and over again and that he did not believe that procedure is medically reasonable. (RX7, 64)

Dr. Konowitz testified that he performed an impairment rating using the AMA Edition Guidelines to Impairment 6th Edition and arrived at a whole person pain rating of zero percent. (RX7, 29-31)

Respondent moved to admit Dr. Konowitz's IME and impairment rating reports and Petitioner's counsel objected based on hearsay.

Respondent's Utilization Reviews (Modified)

The Commission modifies this section of the Arbitrator's Decision so it now reads as follows:

Respondent submitted into evidence three utilization or peer reviews ("UR") deeming Petitioner's recommended nerve blocks and ablations not medically necessary. (Resp. ex 1, 2, 4).

On May 2, 2016, Dr. Moshe Lewis (board certified in physical medicine and rehabilitation with an added expertise in pain medicine) authored a utilization review report. In arriving at her conclusion Dr. Lewis documented that she spoke with the provider on April 28, 2016. The provider noted that the claimant would benefit with additional treatment via this injection primarily for diagnostic reasons, but potentially therapeutic purposes as the claimant is young and not a candidate for surgery.

Dr. Lewis authored a summary of records, and the review question, "Is a Right sided genicular nerve block for right knee medically necessary?" Dr. Lewis opined that a right sided genicular nerve block for the right knee is not medically necessary. Dr. Lewis wrote, "The claimant complained of 4/10 right knee pain. He reported that he had physical therapy which has helped with his range of motion (ROM) but not his pain. However, per the guidelines, genicular nerve blocks are not supported. Therefore, a right-sided genicular nerve block for the R knee is not medically necessary." Dr. Lewis documented the reference she used to arrive at her opinion as follows:
CA MTUS guidelines do not address the requested treatment. ODG cite.

> ODG (knee chapter) NERVE BLOCK
>
> Recommended only for evaluation and treatment of neuromas, but not for genicular nerves (arthritis, post TKA). The purpose of performing a diagnostic injection or block of any nerve around the knee would be to assess whether marked pain relief occurs. It could be accompanied with cortisone which could potentially be therapeutic. In the case of the genicular nerves, such blocks have been requested primarily to argue for unproven conditions like (illegible-neurotomy ablation or neurectomy) and these are not recommended due to lack of sufficient evidence. See nerve excision (following TKA), Neurotomy, radiofrequency neurotomy (of genicular nerves in knee). (RX1)

On May 24, 2016, a second opinion was sought for peer review of the requested procedure, a right sided genicular nerve for the right knee, is this medically necessary? Dr. Jeffrey Middledorf (board certified in physical medicine and rehabilitation with an added expertise in pain medicine) wrote a report documenting a summary of records. (RX1, 7-11)

> Reviewed documentation submitted by treating provider then opined:
>
> The request for Right sided genicular nerve block for right knee is not medically necessary. I am not able to support this request. The claimant has 4/10 pain with ibuprofen at rest. He had some physical therapy and his surgeon said he was up to

> 70% improved. He has full range of motion. He has functional strength. The guidelines do not support the use of the geniculate nerve block for arthritis or pain, other than for the treatment of a neuroma. The guidelines indicate often times the premise for doing the genicular nerve block is to proceed with radiofrequency ablation, which the guidelines clearly indicate is not recommended due to lack of sufficient evidence. There is a research article discussing genicular nerve block and radiofrequency ablation for severe osteoarthritis. The claimant's MRI doesn't show he has severe osteoarthritis. For these reasons I am unable to support this request. Therefore, the request for Right sided genicular nerve block for right knee, is not medically necessary.
>
> Reference to Research article which discusses genicular nerve block and radiofrequency ablation only for severe osteoarthritis. Pain, 2011 Mar, 152(3) 481-7 dot10.1016/j, Pain 2010.09029. Epub 2010 Nov.4 Radiofrequency treatment relieves chronic knee osteoarthritis pain; a double-blind randomized controlled trial. Choi WJI, Hwang SJ, Song JG, Leem JG, Kang YU, Park PH, Shin JW. He described the study which investigated whether RF after neurotomy applied to articular nerve branches (genicular nerves) was ineffective in relieving chronic osteoarthritis knee joint pain. The conclusion of the study was that RF after neurotomy of genicular nerves can lead to significant pain reduction and functional improvement in only a subset of elderly chronic knee osteoarthritis pain. Petitioner's MRI does not show severe osteoarthritis. (RX 1, p. 7-8)

A peer review UR physician advisor decision dated March 2, 2017, authored by Dr. Siva Ayyar (board certified in occupational medicine with an added expertise in medical toxicology) stated that, "[w]hile the Third Edition ACOBM Guidelines, Chronic Pain Chapter, acknowledges that local anesthetic injections such as the knee genicular nerve block in question are reasonable for diagnosing chronic pain, ACOEM qualifies this position by noting the neural ablative injections or procedures, as was proposed here, to ameliorate localized pain by such nerve blocks, are "not recommended" as the risks of increased pain, local tissue reaction, and neuroma outweigh any documented benefits. The AP failed to furnish a clear or compelling rationale for selection of this particular treatment modality in the face of the unfavorable ACOEM position on the same. Therefore, the request for RF right knee genicular nerve under fluoroscopic guidance is not medically necessary." (RX2)

On September 11, 2020, a UR peer review report authored by Dr. Lisa Gill (board certified in anesthesiology with an added expertise in pain medicine) cited the ODG Knee and Leg chapter that states radiofrequency ablations are not recommended in the knee until higher quality studies with longer follow-up periods are available, demonstrating long-term efficacy and possible adverse effects. Radiofrequency neurotomy of articular nerve branches in the knee (genicular nerves) is a potential therapeutic alternative for chronic pain associated with OA of the knee, but only for some older individuals with comorbidities who may not be good surgical candidates. Data for neurotomy are lacking, but RF neurotomy of the genicular nerves led to some pain reduction and

functional improvement in elderly patients with chronic knee osteoarthritis (OA) who responded positively to a diagnostic genicular nerve block; however, small sample size and short-term follow-up led to limited recommendation. (Choi 2011) A review of 13 studies of ablative or pulsed RF knee treatments suggested some benefit for relief of chronic knee pain over the short-term, but only 2 studies were weak randomized control trials with the authors stating concerns over the quality of available evidence. (Bhaton 2018) A systematic review of 17 studies including 5 small -sized RCT's of RF ablation for knee OA similarly concluded that there might be some promise up to one year with minimal complications, but most publications were of poor quality, precluding any broad conclusions. (Gupta 2017) (RX4)

Conclusions of Law

The Commission adopts the Arbitrator's Findings of Fact as modified above in support of the Conclusions of Law set forth below. The Commission affirms and adopts the Arbitrator's Decision with respect to the second through fifth paragraphs under the Conclusions of Law as well as the Arbitrator's Conclusions with respect to Issue M, whether penalties or attorney's fees should be imposed upon Respondent.

As a matter of Petitioner's credibility, the Commission modifies the Arbitrator's Decision on page six, the fourth full paragraph, above "Issue F." The Commission strikes the fourth full paragraph (the last paragraph) before "Issue F" and substitutes the following:

The Commission finds that the Petitioner's testimony was untruthful in regard to his work status between November 19, 2019, and August 2020 which is relevant to the issues of both Petitioner's credibility and temporary total disability entitlement.

Petitioner underwent a third radiofrequency ablation procedure in 2019, according to Petitioner's testimony. (T. 38) The medical records indicate that he had this procedure on August 19, 2019, although the documentation of the procedure is absent from the record. (PX7, 3) Petitioner testified that he returned to work on November 19, 2019, and worked regular duty up until August 2020. (T. 38) Further, Petitioner testified that he returned to Dr. Amin in August 2020 as he once again reported that he experienced increased pain, buckling, swelling, and clicking when bending in the right knee. (T. 39) However, on cross-examination, Respondent's attorney asked Petitioner when he was first taken off work "for that belly injury." (T. 54) Petitioner answered, "I do not recall, probably in March or April of 2020." Thus, Petitioner's testimony that he was working regular duty up until August 2020 is patently false.

Petitioner did not work for three months after the August 19, 2019, third radiofrequency ablation procedure if he returned to work on November 19, 2019. Assuming he was off work in March or April for the belly injury, Petitioner was off work for four or five months for an unrelated condition before his August 14, 2020, visit to Dr. Amin.

Notwithstanding Petitioner's lack of recall of whether or not he was off work, the Commission finds that Dr. Amin's office note is the most reliable indicator of Petitioner's work status on August 14, 2020, and Petitioner's testimony that he was taken off work for a pulled belly muscle since March or April comports with his off-work status at Dr. Amin's August office visit. The Commission further infers that Dr. Amin did not address Petitioner's work status on August 14, 2020, because Petitioner reported he was already off-work.

After review of the totality of the evidence, including Petitioner's two week trip to Mexico while receiving TTD, the Petitioner's above-referenced testimony, and the entire record, the Commission finds Petitioner is not credible as it relates to his condition and his TTD entitlement after the August 14, 2020, office visit with Dr. Amin, given that this issue is central to the instant dispute.

Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Commission finds as follows:

The Commission finds that Petitioner's condition of ill-being solely in his right knee is causally related to the work injury of April 9, 2015, until March 21, 2019, the date of Dr. Cohen's §12 evaluation and opinion report finding Petitioner at MMI, that he could work full-duty, and that his subjective complaints far outweigh his objective findings. In so concluding, the Commission acknowledges that Petitioner was off-work at the time he was evaluated by Dr. Cohen and further, that Dr. Cohen noted that RFA procedures were not his area of expertise. Petitioner underwent one further RFA procedure in August 2019 administered by Dr. Amin and returned to work on November 19, 2019.

In some instances, "an employee could both reach MMI and require continued pain management." See, *e.g., Elmhurst Memorial Hospital v. Industrial Comm'n*, 323 Ill. App. 3d 758, 765, 753 N.E.2d 1132, 257 Ill. Dec. 506 (2001) (Commission did not err in finding compensable—even after the employee reached MMI—medical treatment that helped alleviate pain from a chronic condition that was causally related to her work accident and injury). *Harrell v. Ill. Workers' Comp. Comm'n,* 2018 IL App (1st) 163346WC-U, P19, 2018 Ill. App. Unpub. LEXIS 159, *15

That is not the case here. While Petitioner's post operative recovery initially included a referral to Dr. Amin when it appeared that Petitioner might need pain management to help "relieve the effects" of his injury, the Commission finds that Petitioner's current condition is not related to the work injury. This is based upon Dr. Konowitz's opinion that Petitioner is at MMI, Petitioner's "current symptoms with a negative exam are not temporally related to the past accident" and moreover, that conservative medications and weight loss due to the mechanical knee stress that occurs with his current weight are recommended, but not continued treatment for the work injury. (RX7, 22)

Therefore, while finding Petitioner's condition of ill-being is causally related through March 21, 2019, in so deciding the issue of TTD, the Commission has awarded Medical and TTD through November 18, 2019, for reasons discussed below under Issue K, whether Petitioner is entitled to any prospective medical care, and Issue L, whether Petitioner is entitled to any temporary total disability benefits.

The Commission's conclusions regarding causal connection are based upon the following. Although Petitioner treated for a small meniscal tear in 2007, he testified that he did not have additional treatment, other injuries, or complaints of right knee pain until his April 9, 2015, work accident. While he was off-work and supposed to be continuing physical therapy, Petitioner solicited a note from his then treating doctor, Dr. Dairyko, to say that it was not contra-indicated for him to travel. Petitioner was well enough to travel to Mexico in August 2015 and after this trip, his condition was aggravated as evidenced by the fact that he quit going to therapy, which, according to Dr. Dairyko's notes, was for increased pain reasons and Petitioner requested a new brace upon his return. The Commission notes Petitioner saw Dr. Forsythe immediately after his Mexico vacation, however, without objective diagnostic evidence to compare before and after the Mexico vacation, the Commission finds that it was not unreasonable for Dr. Forsythe to perform an arthroscopic diagnostic surgery despite Dr. Dairyko's opinion that surgery was not warranted.

Petitioner complained of post-operative pain. On June 9, 2016, Dr. Forsythe noted the arthroscopic patellar chondroplasty and distal lateral facet grade 1-2 changes during surgery. He agreed with Dr. Amin's plan to administer a regional nerve block. Petitioner underwent a diagnostic genicular nerve block on July 13, 2016. On September 27, 2016, Petitioner requested an FCE. (PX7)

An FCE was performed at NovaCare on October 11, 2016, showing that Petitioner demonstrated the ability to meet the physical demand requirements of an A T & T technician provided by the employer. Further, Petitioner demonstrated the ability to function in the Heavy Physical Demand Category, according to the U.S. Department of Labor. (PX8, 1-12) The FCE confirmed that upon full kneel, the Petitioner showed no deficit. The Petitioner's knee flexion and extension was within normal limits. Strength was 5/5. The therapist recommended Petitioner wear knee pads when kneeling and noted that he was unable to test pole climbing. (PX8, 6, 1) After the FCE, Dr. Amin assigned additional restrictions of 15 minutes per eight hour work day for pole climbing and kneeling thereafter.

Petitioner remained off-work for a full year after the FCE, and he was released to return to work full duty by Dr. Amin on October 23, 2017, (PX7, 23) three months after he received a radiofrequency ablation procedure on July 26, 2017, administered by Dr. Amin. (T. 32) (Further conclusions in this regard are also addressed under Issue L, TTD entitlement.)

Petitioner testified that he actually returned to work on October 29, 2017. (T. 33-34) Only five weeks later, on December 15, 2017, Dr. Amin authored a letter to the adjuster noting Petitioner returned to Dr. Amin on December 4, 2017, with complaints of low back pain and radiating pain

down his right leg. Dr. Amin recommended an MRI of the lumbar spine calling this "related pathology." (PX7, 17-18)

The Commission does not agree that the Petitioner's lumbar back condition is related pathology in light of the many references in the Elmhurst Clinic records to Petitioner's 2013, lumbar back surgery and chronic lumbar back pain, and, according to the May 18, 2015, Elmhurst Clinic office note, Petitioner was treating with a neurosurgeon for his chronic lumbar back condition. (PX2, 11-14)

On January 26, 2018, Dr. Amin authored a letter to the adjuster "in response to a request made for an update on the patient's current treatment regimen and medications" wherein Dr. Amin goes on to say Petitioner *has exhausted conservative management* and is being treated with medications. (emphasis added) Dr. Amin then notes Petitioner continue to have weekly exacerbation of his pain, "which is managed with conservative therapy, including home exercises, NSAIDS, and other medications." He notes that "[t]hat the patient *would continue to require conservative treatment* until he's a candidate for a surgical option, as recommended by an orthopedic surgeon. (emphasis added) The patient has returned back to work since October and continues to complain of exacerbation of his pain with increased activity and changes in the weather and will require continued treatment." (PX7, 12)

The Commission finds Dr. Amin's letter is flawed in two respects. First, he opines that Petitioner will need treatment indefinitely until he is a candidate for a surgical option recommended by an orthopedic surgeon. However, there is no evidence that Petitioner will be a surgical candidate at any time in the future and, in fact, both orthopedic surgeons, Dr. Forsythe and Dr. Cohen, opined that Petitioner is not a surgical candidate. It is speculative to presume that he will require surgery in the future.

Further, Dr. Amin contradicts himself by claiming that Petitioner has exhausted conservative management, yet then goes on to say that Petitioner will require conservative treatment with Dr. Amin "in the foreseeable future for exacerbations and worsening pain." The Commission finds that Petitioner has the burden of proving that his ongoing condition after the surgery and release to return to work by Dr. Forsythe is causally related to the work injury.

Petitioner last saw Dr. Forsythe on March 15, 2018. Petitioner was released from care with instructions to continue a home exercise program focusing on hamstring flexibility. At that time, Dr. Forsythe stated that "there was no indication for further surgical recommendation or intervention." Dr. Forsythe noted Petitioner "will continue working full duty and follow-up in the office on an as needed basis. He is ok to proceed with radiofrequency treatment if recommended by Dr. Amin." (PX5, 2)

On July 2, 2018, Dr. Amin noted Dr. Forsythe's opinion that Petitioner is not a surgical candidate, and documented, "recurrence of right knee pain secondary to degenerative joint disease deemed to be not a surgical candidate one year after radiofrequency denervation procedure to the

genicular nerves." Dr. Amin's Assessments included right knee pain, degenerative joint disease (DJD) of the knee, and lumbar radiculopathy. (PX7, 8)

Petitioner testified that he underwent a second radiofrequency denervation, procedure of the right genicular nerves in July 2018. (T. 34-35)

An August 1, 2018, a work release form states that Petitioner may return to work on August 13, 2018. (PX7, 7) An August 13, 2018, work release form signed by Dr. Amin released Petitioner to work on August 20, 2018. (PX7, 6)

Petitioner went for follow-up with Dr. Amin on September 17, 2018. Dr. Amin noted that Petitioner "has since returned back to work with no limitations. *Patient will need to repeat procedure involving radiofrequency denervation of the knee for recurring pain approximately once a year.*" Treatment list indicated chronic prescription opiate use and labs were ordered for opiate confirmation, urine screen, and for Tramadol. (PX7, 4) (emphasis added)

The Commission does not interpret Dr. Forsythe's reference to Petitioner being "ok" to proceed with radiofrequency denervation procedure to the genicular nerves before the second such procedure "if recommended by Dr. Amin" to infer that Dr. Amin has the latitude to perform a procedure annually that Dr. Konowitz characterized as a "neurodestructive procedure" and not medically necessary.

On March 21, 2019, pursuant to Section 12 of the Act, Petitioner was seen for an Independent Medical Evaluation by Dr. James Cohen from Illinois Bone & Joint Institute because a third radiofrequency ablation was performed and Dr. Amin had recommended annual RFA procedures. Dr. Cohen authored a report on the same day. (PX9, RX3)

When Dr. Cohen reviewed Dr. Amin's January 26, 2018, office note, Dr. Cohen noted Dr. Amin had stated "the patient is not currently a surgical candidate for TKA due to his young age." Dr. Cohen added a parenthetical, "(clearly the patient is not a candidate for total knee replacement regardless of his age with the intraoperative findings)." (PX9, 4-5)

Dr. Cohen diagnosed Petitioner with an area of chondromalacia patella measuring approximately 4 x 8 mm. and noting it is partial thickness. " The basis for this opinion is both my review of the MRI as well as Dr. Forsythe's operative note from November 16, 2015. This is a very small area. He has symptoms that are significantly worse than the objective findings" (PX9).

Dr. Cohen opined the cause of Petitioner's current symptomatology as somewhat unclear as " he has significantly more symptoms than the objective pathologic findings." Regarding the medical records from December 2017, when he was having right leg radicular pain in his calf down to his foot, Dr. Cohen opined that Petitioner was no longer having any of these symptoms, and he "does not feel that Petitioner needs a lumbar MRI." He examined Petitioner's lumbar spine to look for a possible cause of his knee pain, but examination of his lumbar spine did

not produce any such symptoms. Dr. Cohen opined that Petitioner was at MMI for the work-related injury and he did not need any further orthopedic surgery. For any increased pain in his right knee, he was of the opinion that Petitioner may need an intraarticular steroid and lidocaine injection. Frequently, this type of injection is helpful for mild chondromalacia. Also, treatment with anonsteroidal anti-inflammatory would be reasonable.

Dr. Cohen noted Petitioner had reported his last radiofrequency provided marked relief but stated that, "Radiofrequency ablation is not a procedure that I perform nor is it within my level of expertise. Nevertheless, my understanding is that frequently it is not helpful, but clearly Mr. DiSalvo felt that he had considerable relief from the second (sic) radiofrequency ablation, and if indeed he did have severe pain, and the injection that I recommended was not helpful, I believe that it is a reasonable treatment modality. It should also be noted that radiofrequency ablation is a temporary measure and frequently the pain returns. Other than the injections that I have discussed above, I do not feel that any further therapy or surgery is indicated and in that sense he is at maximum medical improvement." Dr. Cohen noted that Petitioner stated that "he is performing his full duties working up to 50 hours per week. I believe that he is capable of working a full-duty status."

Dr. Cohen opined "that the medical treatment to date has been reasonable, specifically I believe that the genicular nerve injection and radiofrequency ablation was medically reasonable. Although, I should state that it would have been my preference postoperatively as well as preoperatively to try another intraarticular steroid and lidocaine injection, this is a much simpler procedure and frequently will give substantial relief. If that did not help, I believe that the injections by Dr. Amin would have been reasonable. (PX9, 5-6)

The Commission finds that Petitioner's condition had stabilized and that he was at MMI as of March 21, 2019, the date of Dr. Cohen's examination. The Commission finds it notable that both Petitioner and Respondent relied upon Dr. Cohen's examination and both entered his report into evidence. (PX9, RX3) Given Dr. Cohen's comments regarding the RFA procedures not being his area of expertise, the Commission does not rely upon Dr. Cohen's opinion regarding the reasonableness and necessity of the Petitioner's radiofrequency ablation procedures. From his comments, Dr. Cohen made it clear, however, that he does not use radiofrequency ablation and would instead recommend a steroid and lidocaine injection for mild chondromalacia such as Petitioner's condition.

Petitioner testified that he did not undergo a steroid or pain injection as suggested by Dr. Cohen. (T. 67-68) Petitioner further testified that he did not pursue any sort of steroid or lidocaine injection suggested by Dr. Konowitz. (T. 68)

The Commission further finds that Petitioner's subjective pain complaints kept him off-work for extended periods of time that are not justified by the medical in evidence and, in so determining, notes that Petitioner's testimony in regard to the issues central to this dispute are simply put, not credible. The Commission finds that the circumstances of this case are similar to

the facts in *Dawn Food Prods. v. Ill. Workers' Comp. Comm'n*, 2016 IL App (3d) 150829WC-U, 2016 Ill. App. Unpub. LEXIS 2707 where the Court upheld the Commission's decision to find Petitioner's back condition was unrelated to his alleged work accident given the Petitioner's credibility issues and in reliance upon Respondent's expert's opinion.

In the instant case, both Petitioner and Respondent rely upon Dr. Cohen's opinions for two different reasons, however, it is obvious that his opinion is held in high regard by both parties as it was an exhibit tendered by both parties.

The Commission finds that Petitioner's condition of ill-being solely to his right knee condition was causally related to the subject work accident up until March 21, 2019, when Dr. Cohen found that Petitioner was at MMI and could work full-duty with no restrictions.

The Commission acknowledges that Petitioner had an off-work status from Dr. Amin when he saw Dr. Cohen on March 21, 2019, that he was kept off-work until he underwent a third RFA procedure in August 2019, and Petitioner was not released to return to work for three months thereafter. After Petitioner was off-work for three months following the RFA, he then worked November 19, 2019, and was off-work again March or April 2020 when he remained off-work thereafter for an unrelated medical condition until August 14, 2020, when he saw Dr. Amin.

Petitioner testified that after his third ablation he returned to Dr. Amin in August 2020 as he once again experienced increased pain, buckling, swelling, and clicking when bending in the right knee. (T. 39) The Commission finds, however, that Petitioner failed to prove the causal connection between the increased symptomology in his right knee and his original work injury since he was off-work for four or five months preceding the August 14, 2020 office visit.

In *Long*, the Illinois Supreme Court held:

> We have many times held that resolving conflicts in the evidence, drawing inferences from testimony, and determining credibility of witnesses and the weight to be given to their testimony are matters within the province of the Industrial Commission and this court will not disturb the Commission's finding unless against the manifest weight of the evidence. *Long v. Industrial Com*m'n., 76 Ill. 2d 561, 565-566, 394 N.E.2d 1192, 1194, 1979 Ill. LEXIS 360, *4-5, 31 Ill. Dec. 815, 817 (1979).

Moreover, the Commission is not required to give more weight to a treating physician's opinion than to the opinion of an examining physician. *Prairie Farms Dairy v. Industrial Comm'n*, 279 Ill. App. 3d 546, 550, 664 N.E.2d 1150, 216 Ill. Dec. 222 (1996).

Further, aside from the Petitioner's increased symptoms on August 14, 2020, being unrelated, the Commission finds that the prospective medical he seeks is not medically necessary (as further explained under Issue (K)) and relying upon Dr. Cohen's opinion, and more recently,

Dr. Konowitz's opinion, finds that Petitioner is capable of working full-duty and his condition of ill-being in his right knee is at MMI.

In so concluding, the Commission also relies upon Dr. Konowitz's opinion regarding Dr. Amin's recommendation for annual radiofrequency ablations. Specifically, Dr. Konowitz testified that, 1) "there is no literature to support multiple and chronic use of RF on geniculate ganglion (sic-nerve);" (RX7) 2) Dr Konowitz opined that steroids work on chronic knee pain; and that Petitioner's alleged "duration of improvement is a year where most RFs are 90 days."

Given Dr. Konowitz's opinion that the RFA's have approximately a 90 day relief duration, based upon the timing of Petitioner's complaints and return to work dates, the Commission finds that that Petitioner's subjective pain complaints are not credible based upon both Dr. Cohen's and Dr. Konowitz's examinations and opinions and there is no credible evidence that the procedures administered by Dr. Amin are medically necessary. Further, the Commission finds that Petitioner's increased symptomology reported to Dr. Amin on August 14, 2020, was not causally related to work because Petitioner was off-work for four or five months prior to his reporting increased pain in his right knee. Paradoxically, his pain complaints could not be elicited when he saw Dr. Konowitz months later.

The Commission further rejects Dr. Amin's opinion that Petitioner would need a radiofrequency ablation procedure annually. The Commission finds Dr. Konowitz's opinion that this procedure is not medically necessary is more reliable than Dr. Amin's opinion in this regard because Dr, Konowitz's opinion is supported by the four physicians who authored utilization review reports pursuant to Section 8.7 of the Illinois Workers' Compensation Act. Each of the four UR physicians opined that these procedures were not medically necessary. The Commission finds that Dr. Amin's opinions set forth in letters to the adjuster on several occasions are misleading at best. While he touts RFA procedures would help Petitioner return to work, there has been little evidence that the procedures aided Petitioner in a timely return to work after the procedures-noting he was off for three months after two of three of the procedures; nor did the procedures aid in keeping Petitioner working more than two years in the five years since he has been treating Petitioner.

The Petitioner had a valid FCE that deemed Petitioner capable of meeting the physical demands of his job in October 2016, one and one-half years after his work accident, and he was found to be at MMI by Dr. Cohen and capable of working full duty as of March 21, 2019. Therefore, the Commission finds that Petitioner's condition stabilized as of the date of his FCE, and he has been found to be at MMI and capable of returning to full-duty work as of March 21, 2019, by Dr. Cohen. Petitioner failed to meet his burden of proving his condition of ill-being in his right knee after March 21, 2019, is causally related to the work injury. Finally, Dr. Konowitz also confirmed that Petitioner was still at MMI as of the date that he evaluated Petitioner on October 28, 2020. (RX7, 22)

Issue K, whether Petitioner is entitled to any prospective medical care, the Commission finds as follows:

Under §8(a), the Petitioner is entitled to *** all necessary medical, surgical and hospital services thereafter incurred*, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury*, even if a health care provider sells, transfers, or otherwise assigns an account receivable for procedures, treatments, or services covered under this Act. *820 ILCS 305/8(a) (West 2004*). (emphasis added)

The Commission finds that the Petitioner failed to prove that prospective radiofrequency ablation or future nerve block procedures are medically necessary.

The August 19, 2019, radiofrequency procedure note is absent from the record. Return to work documentation after this procedure is also absent from the record. However, Petitioner testified that he returned to work on November 19, 2019, after his third RFA procedure and that he worked regular duty up until August 2020. (T. 38) Petitioner's claim for TTD entitlement on the request for hearing/trial stipulations (ArbX1) comports that for this lost time period before the third RFA procedure, TTD entitlement was claimed by Petitioner July 30, 2019, through November 18, 2019. Thus, Petitioner was off work for three months following his third and last radiofrequency ablation procedure on August 19, 2019.

The Commission notes that Dr. Konowitz, a board certified anesthesiologist, and Dr. Cohen, a board certified orthopedic surgeon, testified that the effects of a radiofrequency ablation (RFA) are short-lived, approximately 90 days according to Dr. Konowitz. (Px9, 6; RX7, 27)

The Commission further notes that Dr. Amin kept Petitioner off work for approximately 90 days, after both the first and the third RFA procedures, thus the medical efficacy of the procedure has not been shown. Once Petitioner returned to work on November 19, 2019, after the third RFA procedure that he had on August 19, 2019, he incurred a pulled muscle in his belly within four or five months, i.e. "March or April" per Petitioner's testimony. While resting and doing therapy for his pulled belly muscle since "March or April" Petitioner alleged that he had increased right knee pain complaints four or five months later on August 14, 2020, exactly one year after his last RFA procedure. Petitioner had been off work approximately eight months of that year and off-work for four or five months when he had increased right knee pain complaints. The Commission finds that Petitioner failed to prove how these late appearing alleged pain complaints are work or work-injury related when Dr. Konowitz could not elicit pain upon his physical exam in October 2020. (RX7, 19-20)

In fact, when Dr. Konowitz evaluated Petitioner on October 28, 2020, he could not elicit right knee pain and he found Petitioner was at MMI for his work injury and opined that he needed no further medical intervention. (RX7) Dr. Konowitz also opined, based upon a reasonable degree of medical certainty, that the ablation procedures which had been prescribed by Dr. Amin are not medically reasonable and necessary. He testified that there is no literature to support multiple

and chronic use of radiofrequency ablation on geniculate ganglion (sic). Subjective improvement was noted with the last geniculate block which, Dr. Konowitz also thought included a steroid injection afterwards to get him back to work, contrary to Petitioner's testimony that he had no injections per Dr. Cohen's or Dr. Konowitz's recommendations. (T. 67-68)

Dr. Amin made several references to future surgery in his notes yet defers to an orthopedic doctor for surgical opinions. When Dr. Forsythe released Petitioner in March 2018, he specifically commented that Petitioner did not require any further surgical intervention. (PX5, 2) Dr. Cohen specifically commented that Petitioner is definitely not a surgical candidate. (PX9, 6) Petitioner testified Dr. Forsythe talked about future surgery, (T. 69-70) however, the Commission finds any comments allegedly made in this regard by Dr. Forsythe are absent from his records, and, in fact, are contrary to what Dr. Forsythe's records reflect. (PX5, 2) This testimony further taints Petitioner's credibility.

The Commission acknowledges that Dr. Forsythe referred Petitioner to Dr. Amin and Dr. Forsythe's March 15, 2018, opinion that states, "Petitioner is ok to proceed with future radiofrequency ablation treatment if recommended by Dr. Amin." (PX5) Dr. Forsythe's last office visit on March 15, 2018, was given when Dr. Amin was seeking approval for his second RFA procedure and is not evidence that he agreed with Dr. Amin's letter two years later that stated Petitioner may need a radiofrequency ablation every year or that annual treatment is reasonable, related or necessary.

Even if Dr. Forsythe agreed with Dr. Amin to administer three or even annual radiofrequency ablations to Petitioner, the long-term effects of such a procedure are not proven according to both Dr. Konowitz, an anesthesiologist well known to the Commission, and according to the opinions of the four Utilization Review physicians. Further, most recently, Petitioner did not return to work after the second RFA for three months, certainly negating any short-term clinical benefit that Dr. Amin might tout. Dr. Cohen and Dr. Konowitz testified to the short term, temporary relief the procedure might provide and thus, it appears to the Commission, that the Petitioner appears to be using pain management as a guise for the purpose of extended time off work.

Dr. Konowitz offered an alternative treatment recommendation of weight loss, describing that as your BMI goes up, your frequency of knee pain increases. In Petitioner's zone over a BMI that's morbidly obese, there's probably a 27 percent frequency of knee pain. It's also important and educational, as you drop each pound, it's a four-pound less load on the knee so it improves knee pain. (RX7, 14-15)

Dr. Konowitz opined that further treatment options included conservative medications. Dr. Konowitz opined that ultimately the current symptoms with a negative exam are not temporally related to the past accident. Based upon that same standard of a reasonable degree of medical certainty, Dr. Konowitz testified that Petitioner had reached maximum medical improvement for his work injuries. He further opined that he would not continue treatment for the alleged work injury, and that the patient is at MMI for his work injury.

The Commission relies upon Dr. Konowitz's expertise, finding him more credible than Dr. Amin. Dr. Amin did not testify and offers no explanation, scientific or otherwise for his opinion that Petitioner would need annual radiofrequency ablations and without causing him harm, given Dr. Konowitz's caution against using a neurodestructive procedure.

Further, Dr. Amin's theory of efficacy is disproven given the amount of time Petitioner was off-work. The Commission finds that Dr. Amin never explained keeping Petitioner off-work for extended periods of time despite an FCE in 2016 that showed Petitioner met the physical demands of the job, other than his assigning limitations that were never imposed by the therapist that conducted the FCE. Despite this, It appears those added work restrictions kept Petitioner off work an additional year after the FCE.

Therefore, the Commission concludes, based upon the credible utilization review reports written by four competent physicians, including a board certified anesthesiologist with added expertise in pain medicine, two physicians board certified in physical medicine and rehabilitation with an added expertise in pain medicine, and another board certified in occupational medicine with an added expertise in medical toxicology, and Dr. Konowitz's opinion that Dr. Amin's prescribed radiofrequency ablation is not medically necessary, that Petitioner has failed to prove the radiofrequency ablation treatment prescribed by Dr. Amin is medically necessary and reasonable under the Act. The Commission, therefore, vacates the Arbitrator's award of prospective medical.

Issue L, whether Petitioner is entitled to any temporary total disability benefits, the Commission finds as follows:

Petitioner's claim for TTD as on the Request for Hearing/Trial Stipulations is for off-work periods commencing April 10, 2015, through October 28, 2017, August 1, 2018, through August 20, 2018, July 30, 2019, through November 18, 2019, August 31, 2020, through September 23, 2020, and from September 26, 2020, through April 27, 2021 (the date of the Arbitration Hearing), representing 186-2/7 weeks. (ArbX1) 186-2/7 weeks off work is equivalent to more than 3-1/2 years of the total 6 years that passed from the date of accident to the date of hearing. In addition, Petitioner was off-work for an unrelated pulled muscle in his belly for approximately 5 months, from March or April 2020 to August 30, 2020. Thus, Petitioner worked approximately two years out of the six years that passed from the date of accident to the hearing despite having an FCE that deemed that he was capable of meeting the physical demands of his job in October 2016. (RX8)

The *Land & Lakes Co.* Court described Petitioner's burden to prove entitlement to TTD as follows:

> A claimant seeking TTD benefits must prove not only that he or she did not work, but also that he or she was unable to work. *Anders*, 332 Ill. App. 3d at 507. The dispositive test is whether the claimant's condition has stabilized, *i.e.*, reached MMI. *Mechanical Devices*, 344 Ill. App. 3d at 759. The factors to consider in deciding whether a claimant's condition has stabilized include (1) a release to

> return to work; (2) the medical testimony about the claimant's injury; and (3) the extent of the injury. *Beuse v. Industrial Comm'n*, 299 Ill. App. 3d 180, 183, 701 N.E.2d 96, 233 Ill. Dec. 453 (1998) *Land & Lakes Co. v. Indus. Comm'n* (Dawson), 359 Ill. App. 3d 582, 594, 834 N.E.2d 583, 594, 2005 Ill. App. LEXIS 873, *23, 296 Ill. Dec. 26, 37. (2005).
>
> Once the injured employee has reached MMI, he is no longer eligible for TTD benefits. *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1072, 820 N.E.2d 570, 289 Ill. Dec. 794 (2004).

The Commission has carefully examined the entire record including the testimony, the medical records and expert opinions in the context of the *Land & Lakes Co*. factors to consider in determining whether Petitioner's condition has stabilized and has examined the evidence in the context of these three prongs: Petitioner's extent of injury, release to return to work, and medical testimony about Petitioner's injury.

The extent of the injury

Petitioner sustained an injury when he slipped on a wet stair and twisted his right knee on April 9, 2015. Petitioner had a past medical history of right knee surgery for a meniscal tear incurred playing soccer in 2007. Petitioner was well enough to travel to Mexico only a few months after the accident while collecting TTD. Petitioner's first orthopedic treater opined that surgery was not warranted. Petitioner planned to seek a second opinion. Respondent had Petitioner examined pursuant to Section 12 with Dr. Forsythe who opined that Petitioner likely had pre-existing patellar chondromalacia, which was exacerbated due to the work injury. Petitioner decided to treat with Dr. Forsythe who recommended a diagnostic arthroscopy and debridement which he underwent on November 16, 2015. The operative note confirmed the procedure consisted of a right knee arthroscopic patellar chondroplasty, distal lateral facet grade 1 to 2 changes.

Petitioner complained of pain that worsened when he saw Dr. Forsythe on June 9, 2016. Therefore, Dr. Forsythe agreed with Dr. Amin's treatment plan to administer regional nerve blocks "to see if we can alleviate the symptoms and improve his functionality. We will release him to return to sedentary duty only. I will see him back in two months' time as he is scheduled to see Dr. Amin next month." (PX5)

Despite the May 2, 2016 utilization review (UR) and UR appeal finding a right-sided genicular nerve block for right knee is not medically necessary, (RX1, 2, 7, 9) Petitioner underwent the nerve block on July 11, 2016. (PX7) He has since undergone an FCE and been released to return to work.

Release to return to work

According to the October 11, 2016, FCE report, Petitioner demonstrated the ability to meet the physical demand requirements of an AT&T Technician based upon the job description provided by the employer. Petitioner demonstrated the ability to function in the HEAVY DEMAND CATEGORY according to the U.S. Department of Labor. Deficits noted during the exam: "light fatigue with repetitive stair climbing and ladder climbing, unable to test pole climbing." (PX8)

Dr. Amin next assigned work restrictions that included no frequent kneeling and no pole climbing on October 25, 2016, and later, at what appears to be the employer’s request, clarified on November 10, 2016, that meant Petitioner could climb for 15 minutes in an 8 hour work day and could kneel for 15 minutes in an 8 hour work day. (PX7, 30)

After three months, on February 7, 2017, Dr. Amin noted that Petitioner returned to discuss treatment options for increasing knee pain. Petitioner had previously postponed the radiofrequency nerve ablation but reported to Dr. Amin that he was then considering having it. Dr. Amin documented that Petitioner was not taking pain medicine and was at the appointment to send his disability paperwork to the insurance companies. (PX7)

Although the FCE documented that Petitioner demonstrated the ability to return to work on October 11, 2016, Petitioner did not go back to full-duty work, until more than one year later, on October 29, 2017. During that year, Dr. Amin advocated for Petitioner to receive the first radiofrequency ablation procedure which was performed on July 26, 2017. Petitioner complained of new pain in the suprapatellar region different than the original pain when he went for follow-up the following month. He had full range of motion in the knee. There was no tenderness overlying the entry sites of the needles. Dr. Amin planned to obtain an MRI scan of the right knee to further evaluate the suprapatellar pain. He was to start physical therapy to assist with decreasing pain and improving range of motion despite the referenced finding that Petitioner had full range of motion. (PX7, 40-41)

Petitioner continued care with Dr. Amin and was returned to work full duty on October 23, 2017. (PX7, 23) Petitioner testified that he did not return to work until October 29, 2017. (T. 33-34) There is no explanation in the record for the reason that Petitioner did not return to work for an extra week after his first release.

Petitioner last saw Dr. Forsythe on March 15, 2018. Petitioner was released from care with instructions to continue a home exercise program focusing on hamstring flexibility. At that time, Dr. Forsythe stated that “there was no indication for further surgical recommendation or intervention.” Dr. Forsythe noted Petitioner “will continue working full duty and follow-up in the office on an as needed basis. He is ok to proceed with radiofrequency treatment if recommended by Dr. Amin.” (PX5, 2)

Thus Petitioner had been released to continue working full-duty by Dr. Forsythe at the time of his discharge on March 15, 2018.

On July 2, 2018, Dr. Amin noted Dr. Forsythe's opinion that Petitioner is not a surgical candidate, and documented, "recurrence of right knee pain secondary to degenerative joint disease deemed to be not a surgical candidate one year after radiofrequency denervation procedure to the genicular nerves." Assessments included right knee pain, degenerative joint disease (DJD) of the knee, and lumbar radiculopathy. (PX7, 8)

Petitioner testified that he had a second radiofrequency denervation, procedure of the right genicular nerves in July 2018. (T. 34-35) Although there was no medical documentation of that procedure in the record, an August 1, 2018, work release form states that Petitioner may return to work on August 13, 2018. (PX7, 7)

However, a second work release form dated August 13, 2018, and signed by Dr. Amin released Petitioner to work a week later, on August 20, 2018. (PX7, 6) Again, there is no explanation in the record for the reason that Petitioner did not return to work for an extra week after his first release.

It appears that Petitioner worked until July 30, 2019, when a work release form dated July 30, 2019, states that Petitioner was, "seen in the clinic with 10/10 medial knee pain resulting inability to perform work functions. Patient is not released to work until after his (?-illegible) RFA procedure on 8/19/19." (PX7, 3)

The August 19, 2019, procedure note is absent from the record. Return to work medical documentation after this procedure is also absent from the record. The request for hearing/trial stipulations (ArbX1) shows TTD entitlement was claimed by Petitioner through November 18, 2019, and Petitioner testified that he returned to work on November 19, 2019, and worked regular duty up until August 2020. (T. 38) Thus, Petitioner was off work for three months after receiving his August 19, 2019 radiofrequency ablation procedure.

However, Petitioner testified that he returned to Dr. Amin in August 2020 as he once again experienced increased pain, buckling, swelling, and clicking when bending in the right knee. (T. 39) The last full treatment note submitted into evidence is from August 14, 2020, in which Dr. Amin recommends another radiofrequency denervation. It was also noted that Petitioner "also had pulled a muscle in the belly for which she (sic) is off work currently." (PX7, 1) Petitioner testified that he treated with his primary care doctor for the belly muscular injury with physical therapy and rest and that he had been off-work for that injury since March or April 2020. (T. 54)

On September 11, 2020, a Return to work clearance and physical activity limitations form was generated from the Oak Park Pain Center with an illegible signature and checks a box that states the "employee may return to sedentary work on September 14, 2020." The boxes referencing how long the restrictions are in effect are not checked. (PX7, 10-11)

A work status note dated February 15, 2021, from Dr. Amin address Petitioner's work status retroactively, stating Petitioner was being "seen in our pain clinic for treatment of his right knee pain. From 8/31/20 to 9/11/20, Mr. DiSalvo was advised to not return to work due

to exacerbation of R knee pain. Thereafter, he was evaluated and placed on light (sedentary) duty beginning 9/14/20. To date, this remains his work status until he is able to undergo the recommended treatment-R knee genicular radiofrequency ablation." (PX12, 2)

Petitioner testified that he contacted Respondent following his September 14, 2020, appointment for light duty accommodations and ultimately returned to work September 24, 2020. (T. 59) Petitioner testified that he worked light duty on September 24 and 25, 2020, but then ongoing light duty accommodations were denied. (T. 43)

Testimony regarding Petitioner's condition

On March 21, 2019, Dr. Cohen opined that Petitioner was at MMI and could work full-duty. (PX9) Dr. Cohen opined Petitioner's subjective complaints far outweighed his objective pathologic findings. (PX9, 6) However, the Commission acknowledges, that Dr. Cohen conceded he is not an expert in the field of radiofrequency ablation procedures. Thus, the Petitioner and Dr. Amin continued to seek approval for that third procedure from the insurance carrier and Dr. Amin kept Petitioner off work until the procedure on August 19, 2019 through November 18, 2019. Although there were several utilization review reports denying the medical necessity of the procedures, it appears that Dr. Cohen's opinions regarding the reasonableness of the RFA treatment caused confusion. For that reason, the Commission awards the Petitioner both the lost time and the medical expense from the third and last RFA procedure. Petitioner was off-work for three months post-RFA procedure.

However, when Dr. Konowitz evaluated Petitioner on October 28, 2020, he could not elicit right knee pain, found Petitioner was at MMI for his work injury and opined that he needed no further medical intervention. (RX7) Dr. Konowitz further opined that annual radiofrequency ablation procedures are not medically necessary. (RX7) Four utilization review reports found the RFA procedures are not medically necessary in a patient with the Petitioner's medical profile, which Dr. Cohen noted was mild chondromalacia. (RX1, 2, 4; PX9)

Petitioner was off-work commencing March or April 2020 through the date of Dr. Amin's office visit on August 14, 2020 for his pulled belly muscle. Dr. Amin did not specify any right knee restrictions at the August 14, 2020, office visit and Petitioner did not claim entitlement to TTD on the trial stipulations until August 31, 2020. The record is silent as to the date Petitioner returned to work after being off between March or April through August 14, 2020. On August 14, 2020, Petitioner reported to Dr. Amin that his right knee symptoms increased while he was, and after he had been, off-work for several months for an unrelated condition.

Based upon the Commission's finding that Petitioner's current condition in his right knee is not causally related to his work-injury or to work activity after March 21, 2019, but in light of the third RFA administered by Dr. Amin in August 2019, the Commission finds that Petitioner is entitled to TTD through November 18, 2019. Petitioner's return to work after the third RFA was on November 19, 2019.

Given that Dr. Amin did not specify any right knee restrictions at the August 14, 2020, office visit, and there are no treatment notes in the record confirming Petitioner's physical exam findings or reason for light duty restrictions given on September 11, 2020, to commence as of September 14, 2020, the Commission agrees with the Arbitrator and finds that Petitioner has not met his burden of proving TTD entitlement for the period August 31, 2020, through September 16, 2020, even in light of Dr. Amin's February 15, 2021 retroactive note alleging that Petitioner was examined on September 14, 2020, and placed on light (sedentary) duty. Further, the Commission finds that Petitioner's exacerbation of right knee pain occurred before his consult with Dr. Amin on August 14, 2020, and only after he had been off-work for four or five months for an unrelated medical condition.

The Commission finds Dr. Konowitz's opinion that he could not elicit pain complaints upon his examination in October 2020 is credible and that his opinion challenges Petitioner's claim of subjective pain complaints. Further, Dr. Konowitz pointed out that during these annual reports of increased pain complaints whether Petitioner was claiming repetitive or new events. It is clear to the Commission, however, that the most recent increased pain complaints occurred when Petitioner was off-work for an unrelated injury. Dr. Cohen had also opined that Petitioner's subjective pain complaints outweighed his objective pathology. Thus, the Commission finds that Petitioner's claim of new subjective pain complaints are not credible and such episodes previously resulted in Dr. Amin keeping Petitioner off-work for one year following a valid FCE that found Petitioner was able to meet the physical demands of his job, and in total for almost four of the six years since his date of accident. The Commission is baffled by Dr. Amin's off-work assignments, which were apparently ransom for approval of the RFA procedures.

For the same reasons for which the Commission finds Petitioner failed to prove his condition of ill-being after March 21, 2019, is related to the work injury, the Commission finds Petitioner is not entitled to TTD after November 18, 2019, the day before he commenced work after the third radiofrequency ablation procedure and the last time he was off-work before his pulled belly muscle. Therefore, the Commission vacates the Arbitrator's award of temporary total disability (TTD) for the periods September 17, 2020, through September 23, 2020, and September 26, 2020, through April 27, 2021

The Commission further finds that the Arbitrator properly excluded Dr. Konowitz's reports.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on July 23, 2021, is hereby modified as outlined above and for the reasons stated herein, otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of prospective medical, including radiofrequency ablation treatment prescribed by Dr. Amin for Petitioner's right knee, is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of temporary total disability for the periods September 17, 2020, through September 23, 2020, and September 25, 2020 (sic should be September 26, 2020), through April 27, 2021, is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $501.76 per week for a period of 152-1/7 weeks, for the periods commencing April 10, 2015, through October 28, 2017, August 1, 2018, through August 20, 2018, and July 30, 2019, through November 18, 2019, that being the period of temporary total incapacity for work under §8(b), and that as provided in §8(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 be given a credit of $82,288.64 for temporary total disability benefits that have been paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Petition for Penalties as provided in §19(k), §19(l) and attorney's fees pursuant to §16 is denied.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

May 31, 2022

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

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

DISSENT AND PARTIAL CONCURRENCE

After carefully considering the totality of the evidence, I respectfully dissent from the opinion of the majority and would affirm the Decision of the Arbitrator on the issues prospective medical treatment in the form of a radiofrequency ablation and temporary total disability benefits.

In addition to the Arbitrator's well-reasoned conclusions, I would note that the evidence shows that Petitioner underwent prior radiofrequency ablation (hereinafter "RFA") procedures with great success. These procedures allowed him to avoid pain medications with significant side effects, such as renal failure. Petitioner underwent his first RFA on July 26, 2017. He was able to function without pain. He was able to return to work on October 29, 2017. By the end of July 2018, he had increased pain with swelling, buckling, and clicking. He underwent a second RFA and was able to return back to work regular duty on August 21, 2018. He worked for almost another year before noticing an increase in knee pain with buckling and clicking around July 2019. After a Section 12 Examination with Dr. James C. Cohen, Petitioner was approved for his third RFA. He then was able to return to regular duty from November 19, 2019 through August 31, 2020. However, a fourth RFA was denied by Respondent. Petitioner returned to work light duty September 24 and 25, 2020, but was then denied accommodation by Respondent. Petitioner has remained off work since.

Dr. Konowitz's opinion is that it was the steroid injection after the third RFA that got Petitioner back to work. (RX7, p. 24, 27). This opinion is not supported by the evidence, which shows no record of steroid injection following the third RFA in August 2019. Petitioner testified that following the suggestion of cortisone injection by Dr. Cohen, he "went with Dr. Amine and talked about it; and his response was, there's many side effects, not to do that." (T. 68). Petitioner further testified that following the third ablation he felt "improved, less pain, was able to go back to work with no restrictions." (T. 38).

The Arbitrator was correct to place more weight on the opinions of Drs. Forsythe and Amin, whom Petitioner is treating at Respondent's referral. Dr. Cohen also testified that prior RFAs were reasonable and necessary. Finally, Dr. Konowitz admitted that he does RFAs for patients with chronic pain as a "last resort," which undermines any suggestion that they are not suitable in this instance.

The Arbitrator found Petitioner to be a credible witness. He is a young individual who desires to return to work. The RFA has been shown to alleviate the effects of his injury such that he can work full duty.

As to the issue of temporary total disability benefits, the evidence shows that Petitioner was off work at the direction of Dr. Amin for the periods awarded by the Arbitrator. As of September 25, 2020, Respondent, in writing, refused to accommodate Petitioner's light duty restrictions. Respondent did not enter any medical opinion that Petitioner was capable of working full duty during these time periods. Dr. Konowitz provided no testimony on the issue.

For the forgoing reasons, I would affirm the Decision of the Arbitrator.

o: 03/29/2022
TJT/ahs
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/s/ *Thomas J. Tyrrell*
Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC031157
Case Name	DISALVO, PETER v. AT&T A/K/A ILL BELL
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	Gary Friedman
Respondent Attorney	Terrence Donohue

DATE FILED: 7/23/2021

THE INTEREST RATE FOR THE WEEK OF JULY 20, 2021 0.05%

/s/ *Rachael Sinnen, Arbitrator*
Signature

STATE OF ILLINOIS	)
	)SS.
COUNTY OF COOK	)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Peter DiSalvo
Employee/Petitioner

Case # **15** WC **31157**

v.

Consolidated cases: _____

AT&T a/k/a Ill. Bell
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Rachael Sinnen**, Arbitrator of the Commission, in the city of **Chicago**, on **04/27/21**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **04/09/15**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**39,137.28**; the average weekly wage was $**752.64**.

On the date of accident, Petitioner was **23** years of age, ***single*** 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 $**82,288.64** for TTD, $**0** for TPD, and other benefits to be determined.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $501.76/week for 183 6/7 weeks, commencing 4/10/15 – 10/28/17, 8/1/18 – 8/20/18, 7/30/19 – 11/18/19, 9/17/20 – 9/23/20, and 9/25/20 – 4/27/21, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $82,288.64 for temporary total disability benefits that have been paid.

Petitioner's petition for penalties as provided in Sections 16, 19(k) and 19(l) of the Act is denied.

Respondent shall approve and pay for the radiofrequency ablation treatment prescribed by Dr. Amin for Petitioner's right knee as provided in Section 8(a) and 8.2 of the Act.

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

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

Signature of Arbitrator

July 23, 2021

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Peter DiSalvo)
)
Petitioner,)
)
vs.) No. 15 WC 31157
)
)
AT&T a/k/a Ill. Bell,)
)
Respondent.)

FINDINGS OF FACT

This matter proceeded to hearing on April 27, 2021 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Request For Hearing under Sections 8(a) and 19(b) of the Illinois Workers' Compensation Act ("Act"). Issues in dispute include causal connection, temporary total disability ("TTD"), and prospective medical treatment. Petitioner also filed a petition for penalties under Sections 16, 19(k), and 19(l) of the Act. By agreement, the parties reserved presentation of outstanding medical bills and any credit for medical paid that may be due to Respondent. (See Arbitrator's Exhibit "Arb ex" 1).

Petitioner, Peter DiSalvo, worked for Respondent, AT&T, installing and/or repairing internet, television and/phone services at customers' homes. Transcript ("TR") 23-24. Prior to the instant work accident, Petitioner had a right knee surgery for a small meniscal tear incurred playing soccer in an eighth-grade gym class in 2007 (TR.24-25). Petitioner testified that he did not have any additional treatment for his right knee following his 2007 surgery up until his accident on April 9, 2015. He further testified that he had no right knee complaints or other injuries to the right knee prior to his work injury. (TR.24-25; 47; 63).

Accident of April 9, 2015

Petitioner testified that it was raining on April 9, 2015 and he was wearing booties while going in and out of a customer's house performing a repair. He was required by work to wear booties over his shoes when entering a customer's home. (TR.25-26). He slipped going downstairs in the customer's home when his right foot broke through the bootie. He heard and felt a pop in his right knee. Petitioner was unable to put his weight on the knee and he could not finish the job. (TR.25-26). Petitioner called work to report the accident and two supervisors came to the customer's home. One supervisor took Petitioner to Concentra while the other handled Petitioner's truck. (TR.27).

Summary of Medical Records

Petitioner presented to Concentra on April 9, 2015 and reported that he had slipped and twisted his right knee at a customer's house going downstairs. Records indicate that Petitioner heard a "pop" at the time of the injury. (Petitioner's Exhibit "Pet. ex" 1, p.1). Petitioner was diagnosed with a right knee strain, was given a brace, a script for physical therapy and work restrictions of no driving, no squatting, no kneeling, no stairs, no ladders, and no walking on uneven terrain. (Pet. ex 1, p.3-4).

On April 10, 2015, Petitioner presented to his family doctor at Elmhurst Clinic (Pet. ex 2) who recommended an MRI and placed Petitioner off work. (Pet. ex 2, p.5,19-20). Petitioner also sought continued treatment at Elmhurst Clinic for chronic back pain. (Pet. ex 2). Petitioner underwent the MRI at Midwest Open MRI on June 12, 2015 showing "grade 2 chondromalacia at the summit of the patella, mild tendinosis of the patellar and quadriceps tendons at the patellar attachment, mild joint effusion, no evidence or meniscal tear and bone marrow signal appears normal without evidence of fracture." (Pet. ex 10). Following the MRI, Petitioner was referred to orthopedic surgeon, Dr. Gregory Dairyko, at Elmhurst Clinic who administered a cortisone injection on June 19, 2015. Diagnosis was right knee patellofemoral chondromalacia and Petitioner remained off work per Dr. Dairyko. (Pet. ex 2, p.20).

Petitioner underwent physical therapy at NovaCare from April 21, 2015 to September 15, 2015 (Pet. ex 3).

Petitioner reported little to no relief at his follow up appointment and Dr. Dairyko ordered a second MRI that was done at 3T Imaging on October 6, 2015. (Pet. ex 2. p. 76-77; Pet. ex 11). Impression was patellar chondromalacia, ACL ganglion, and mild patellar tendinosis." It was noted that findings were "age-indeterminate" and a comparison with the prior May 2015 MRI was recommended. (Pet. ex 11). Petitioner was last seen by Dr. Dairyko on October 9, 2015 and it was documented that Petitioner was not surgical but would be obtaining a second opinion from Dr. Cole at Rush. Petitioner was to remain off work pending his evaluation with Dr. Cole. (Pet. ex. 2, p. 82).

Respondent's First Section 12 Examiner, Dr. Brian Forsythe

Respondent scheduled an Independent Medical Examination ("IME") pursuant to Section 12 of the Act with Dr. Brian Forsythe for September 17, 2015. (Pet. ex 4). Dr. Forsythe opined that Petitioner had pre-existing patellar chondromalacia that was exacerbated due to the work injury. Dr. Forsythe recommended work restrictions of no squatting and no kneeling and opined that Petition may benefit from a diagnostic arthroscopy and debridement pending operative findings. (Pet. ex 4, p. 4).

Petitioner choose to continue treatment with Dr. Forsythe who kept him off work pending surgery. (Pet. ex 4, p. 30). Petitioner underwent surgery on November 16, 2015 at Munster Specialty Surgery Center (Pet. ex 6). Dr. Forsythe placed Petitioner on sedentary duty on February 4, 2016 and referred Petitioner to Dr. Amin for pain management. (Pet. ex 4, p. 17-19).

Petitioner presented to Dr. Sandeep Amin on April 11, 2016 who recommended a right sided genicular nerve block followed by a radiofrequency ablation of the right knee. Dr. Amin continued Dr. Forsythe's sedentary work restrictions. (Pet. ex 5, p. 14). Petitioner returned to Dr. Forsythe on June 6, 2016

who concurred with Dr. Amin. (Pet. ex 5, p. 8).

Petitioner underwent the nerve block on July 13, 2016 with Dr. Amin and continued with work restrictions. (Pet. ex 7, p. 48). On September 27, 2016, Petitioner returned to Dr. Amin. Petitioner decided to postpone the ablation and requested a functional capacity evaluation ("FCE") to determine his work status. (Pet. ex 7, p. 38). An FCE was performed at NovaCare on October 11, 2016, showing that Petitioner could work at a heavy physical demand level ("PDL"). (Pet. ex 8). On October 25, 2016, Dr. Amin gave Petitioner work restrictions of no frequent kneeling and no pole climbing. Petitioner was instructed to follow up as needed. (Pet. ex 7, p. 35).

Petitioner ultimately returned to Dr. Amin and underwent the first radiofrequency ablation on July 26, 2017. (TR. 32). Petitioner continued care with Dr. Amin and was returned to work full duty on October 23, 2017. (Pet. ex 7, p.23). Petitioner testified that he returned to work on October 29, 2017 (TR. 33-34). Petitioner returned to Dr. Amin in December 2017 with complaints of low back pain and radiating pain down his right leg. (Pet. ex 7, p. 17-18).

Petitioner last saw Dr. Forsythe on March 15, 2018. Petitioner was released from care with instructions to continue a home exercise program, continue working full duty, and continue with future radiofrequency treatment as recommended by Dr. Amin. (Pet. ex 5, p. 2).

In his September 17, 2018 treatment note, Dr. Amin opined that Petitioner needs repeat radiofrequency denervation approximately once a year. (Pet. ex 7, p. 4). There is a July 30, 2019 work status note indicating that Petitioner had 10/10 medial knee pain and was placed off work until his denervation procedure on August 19, 2019. (Pet. ex 7, p. 3).

Petitioner testified that he returned to work November 19, 2019 and worked regular duty up until August 2020. (TR. 38). Petitioner testified that he returned to Dr. Amin in August 2020 as he once again experienced increased pain, buckling, swelling, and clicking when bending in the right knee. (TR. 39). The last full treatment note submitted into evidence is from August 14, 2020 in which Dr. Amin recommends another denervation. It is also noted that Petitioner "had pulled a muscle in the belly for which she (sic) is off work currently." (Pet. ex 7, p. 1).

A work status note dated February 15, 2021 from Dr. Amin states that Petitioner was advised not to return to work from August 31, 2020 through September 11, 2020 due to an exacerbation of right knee pain. It was noted that Petitioner was evaluated September 14, 2020 and was placed on light (sedentary) duty until he can undergo his pending ablation. (Pet. ex 12, p. 2).

Petitioner testified that he contacted Respondent following his September 14, 2020 appointment for light duty accommodations and ultimately returned to work September 24, 2020. (TR. 59). Petitioner submitted into evidence an email to Respondent's human resources dated September 22, 2020 regarding job accommodations, but the request was initially denied. (TR 43; Pet. ex 13). Petitioner testified that he worked light duty on September 24 and 25, 2020 but then ongoing light duty accommodations were denied. (TR. 43).

Respondent's Second Section 12 Examiner, Dr. James Cohen

Respondent scheduled an IME with Dr. James Cohen from Illinois Bone & Joint Institute on March 21, 2019. (Pet. ex 9). Dr. Cohen examined his lumbar spine to see if it was a possible cause of his knee pain, but "examination of his lumbar spine did not produce any such symptoms." (Pet. ex 9, p. 6, no.2). Dr. Cohen opined that Petitioner may benefit from steroid and lidocaine injections if Petitioner develops increased pain in the right knee. (Pet. ex 9, p. 6, no. 3). Dr. Cohen noted that Petitioner's last ablation provided marked relief but opined the ablation is a temporary measure. He stated that "radiofrequency ablation is not a procedure that I perform nor is it within my level of expertise." (Pet. ex 9, p. 6, no. 3). Dr. Cohen further stated that the genicular nerve injection and radioablation was medically reasonable although his preference postoperatively would be an intraarticular steroid and lidocaine injection. (Pet. ex 9, p. 6, no. 5).

Petitioner's Current Condition

Petitioner testified he has been off work since September 26, 2020. (TR. 45). He stated that he would return to light duty if Respondent would allow it. (TR. 77). Petitioner testified that he tried to proceed with the ablation with his group insurance but was unable to do so because of his pending case. (TR. 65-66, 76-77). Petitioner testified that if the procedure were awarded, he would try to return to work as soon as possible. (TR. 46-47).

He testified that he experiences discomfort with activity, including driving or sitting, every single day, in his right knee. (TR. 45) He testified he tries to stay off his right leg or he uses ice or heat to alleviate the pain. (TR. 46). He testified that he does have a tramadol prescription, but he tries not to take it. (TR. 46). Petitioner testified that he saw Dr. Amin approximately two weeks prior to the hearing. (TR. 49-50).

Testimony of Respondent's Third Section 12 Examiner, Dr. Howard Konowitz

Respondent had Petitioner examined by Dr. Howard Konowitz, a board-certified anesthesiologist with a subspecialty in pain management at Comprehensive Pain Management Group, on October 28, 2020. (Respondent's Exhibit "Resp. ex" 7, p. 6, 9, 41). He testified by way of an evidence deposition on January 27, 2021. (Resp. ex 7). Dr. Konowitz testified that Petitioner's knee exam was normal, his complaints were subjective and that Dr. Konowitz was unable to reproduce the right knee pain on exam. (Resp. ex 7, p. 20, 26). Dr. Konowitz indicated that he did not dispute "the work injury or the treatment related to it." (Resp. ex 7, p. 20). With regards to the radiofrequency ablation and geniculate nerve blocks, Dr. Konowitz opined that such treatment is "without long-term longitudinal studies" and would therefore not be causally related. (Resp. ex 7, p. 25). He further testified that while he does perform ablations, it's a treatment of last resort when patients fail treatment of chronic pain. (Resp. ex 7, p. 51-52). Dr. Konowitz testified that steroid injections work on chronic knee pain and that Petitioner's last steroid injection did return him back to work. (Resp. ex 7, p. 27). Dr. Konowitz opined that Petitioner had reached maximum medical improvement ("MMI"), the no further treatment was needed and recommended weight loss. (Resp. ex 7, p. 22). He does not testify to Petitioner's work status.

It should be noted that Respondent moved to admit Dr. Kinowitz's IME and impairment rating

reports and Petitioner's counsel objected to hearsay. The Arbitrator reserved ruling on the matter and it will be addressed in her conclusions of law.

Respondent's Utilization Reviews

Respondent submitted into evidence utilization reviews ("UR") deeming Petitioner's recommended nerve blocks and ablations not medically necessary. (Resp. ex 1, 2, 4). Dr. Moshe Lewis (board certified in physical medicine and rehabilitation with an added expertise in pain medicine) wrote that the guidelines do not support nerve blocks for genicular nerves and only for the evaluation and treatment of neuromas. (Resp. ex 1, p. 2). Dr. Jeffrey Middledorf (board certified in physical medicine and rehabilitation with an added expertise in pain medicine) wrote,

> "[t]he guidelines do not support the use of the geniculate nerve block for arthritis or pain, other than for the treatment of a neuroma. The guidelines also indicate that often times the premise for doing the genicular nerve block is to proceed with radiofrequency ablation which the guidelines clearly indicate is not recommended due to a lack of sufficient evidence. There is a research article discussing genicular nerve block and radiofrequency ablation for severe osteoarthritis. The claimant's MRI does not show he has severe osteoarthritis. For these reasons I am unable to support this request. Therefore, the request for [r]ight sided genicular nerve block for right knee is not medically necessary."

(Resp. ex 1, p. 7-8). Dr. Middledorf's report included a summary of the research referenced indicating that radiofrequency treatment relieves chronic knee osteoarthritis pain. (Resp. ex 1, p. 8).

A UR authored by Dr. Siva Ayyar (board certified in occupational medicine with an added expertise in medical toxicology) stated that the Third Edition ACOBM Guidelines, Chronic Pain Chapter, acknowledges that nerve blocks are recommended for diagnosing chronic pain but that ablations to address pain are not recommended as the risks of increased pain, local tissue reaction and neuroma outweigh any documented benefits. (Resp. ex 2, p. 16).

A UR authored by Dr. Lisa Gill (board certified in anesthesiology with an added expertise in pain medicine) cited the ODG Knee and Leg chapter that states radiofrequency ablations are not recommended in the knee until higher quality studies with longer follow-up periods are available, demonstrating long-term efficacy and possible adverse effects. The report cites to small, short term studies where radiofrequency neurotomy of the genicular nerves led to pain reduction and functional improvement in elderly patients with chronic knee osteoarthritis who responded positively to a diagnostic genicular nerve block. (Resp. ex 4). The Arbitrator notes that the articles and studies referred to were not submitted into evidence before proofs closed.

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered

in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. Board of Trustees v. Industrial Commission, 44 Ill. 2d 214 (1969).

Credibility is the quality of a witness which renders his evidence worthy of belief. 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 mere existence of testimony does not require its acceptance. Smith v. Industrial Commission, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. U.S. Steel v. Industrial Commission, 44 Ill2d 207, 214, 254 N.E.2d 522 (1969); see also Hansel & Gretel Day Care Center v. Industrial Commission, 215 Ill. App. 3d 284, 574 N.E.2d 1244 (1991). 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).

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. O'Dette v. Industrial Commission, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); Hosteny v. Workers' Compensation Commission, 397 Ill. App. 3d 665, 674 (2009).

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds him to be a credible witness. Petitioner was well-mannered, composed, spoke clearly, and made normal eye contact with the Arbitrator. Further, the Arbitrator watched Petitioner while he was seated and noticed that he sits with his right leg slightly extended compared to his left. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions.

Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal

connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." International Harvester v. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

Although Petitioner treated for a small meniscal tear in 2007, he credibly testified that he did not have additional treatment, other injuries, or complaints of right knee pain until his April 9, 2015 work accident. Further, Respondent's Section 12 examiners and Petitioner's treating physicians opined that Petitioner's pre-existing patellar chondromalacia was exacerbated due to the work injury.

As such, the Arbitrator finds that Petitioner has met his burden in proving that his current condition of ill-being of the right knee is causally related to his work injury of April 9, 2015.

Issue K, whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

As the Arbitrator found that Petitioner's condition of ill being is causally related to his work accident, the Arbitrator finds that Respondent is liable for the prospective medical treatment plan recommended by Dr. Amin (namely annual radiofrequency ablation treatment).

The Arbitrator considers the URs and opinions of Respondent's Section 12 examiner, Dr. Konowitz, but finds that they do not outweigh the opinions of Dr. Amin, Dr. Forsythe and Dr. Cohen.

Drs. Forsythe and Cohen are orthopedic surgeons who deferred care to Dr. Amin. Petitioner initially saw Dr. Forsythe as Respondent's first Section 12 examiner but then continued treatment with him. Dr. Forsythe referred Petitioner to Dr. Amin post-operative. When Petitioner returned to Dr. Forsythe, the doctor agreed with Dr. Amin's treatment plan. Respondent had Petitioner evaluated by Dr. Cohen as its second Section 12 examiner. Dr. Cohen stated that radiofrequency ablation is not within his level of expertise. However, he opined that the genicular nerve injection and radioablation Dr. Amin recommended was medically reasonable even if he would prefer an intraarticular steroid and lidocaine injection.

The Arbitrator does not find the URs to be credible. First, most of the reviewing doctors' specialties do not carry the same weight as Petitioner's treaters. Respondent's URs were authored by two physiatrists, an occupational medicine doctor, and Dr. Gill who was the only anesthesiologist. Moreover, the UR doctors rely on "the guidelines" that are not sufficiently described and are too narrow for practical use. Dr. Ayyar's report states that nerve blocks are recommended for diagnosing chronic pain. Dr. Middledorf's report states that the guidelines do not support the use of nerve blocks for arthritis or pain, other than for the treatment of neuromas, but then refers to research showing the benefits of nerve blocks and ablations for osteoarthritis. Dr. Gill's report (similar to Dr. Middledorf's) indicates that ablations are not recommended in the knee until there are better quality studies about their effectiveness. The Arbitrator does not find

treatment to be unreasonable simply because its' effectiveness is still being researched with long term studies.

Respondent's third Section 12 examiner, Dr. Konowitz, is an anesthesiologists and pain medicine specialist like Dr. Amin. Even though Dr. Konowitz stated that there were no long-term studies to support Dr. Amin's treatment plan, Dr. Konowitz testified that he does perform ablations as a "last resort" with patients that fail treatment of chronic pain. While Dr. Konowitz states that steroid injections are appropriate for chronic knee pain, he is silent as to what treatment options are available for Petitioner. Still, one opinion on treatment from a qualified doctor does not make another qualified doctor's approach unreasonable. Here, Dr. Amin has successfully treated Petitioner since April 2016 and the Arbitrator relies on the opinions of Petitioner's treating physician, Dr. Amin, over those of Respondent's third Section 12 examiner, Dr. Konowitz.

As a result, Dr. Amin's treatment plan of annual radiofrequency ablation treatment is contemplated as compensable treatment under Section 8(a) of the Act, and therefore Respondent is responsible for authorizing and paying for said treatment.

Issue L, whether Petitioner is entitled to any temporary total disability benefits, the Arbitrator finds as follows:

Having found that Petitioner's current condition of ill-being of the right knee is causally related to his work accident, the Arbitrator finds that Petitioner is entitled to TTD benefits. Based on the Request for Hearing form, the claimed TTD periods of April 10, 2015 through October 28, 2017; August 1, 2018 through August 20, 2018; and July 30, 2019 through November 18, 2019 are not in contention. At issue is the claimed TTD period of August 31, 2020 through September 23, 2020 and September 26, 2020 through April 28, 2021. (See Arb. ex 1, no. 8).

The last full treatment record from Dr. Amin that was submitted into evidence is from August 14, 2020 at which point it was documented that Petitioner was off work from a pulled muscle in his belly. Dr. Amin did not comment on Petitioner's work status as it relates to the right knee. There are no subsequent work status notes until Dr. Amin drafts a February 15, 2021 note retroactively placing Petitioner off work from August 31, 2020 through September 11, 2020 and then stating that Petitioner has been on light duty since his September 14, 2020 evaluation for which no treatment note has been provided.

Petitioner was not able to recall when he was off work for the pulled muscle in his belly. (See TR. 55). Given that Petitioner pulled a muscle in his belly; that Dr. Amin did not specify any right knee restrictions at the August 14, 2020 visit; and that no subsequent treatment notes were submitted into evidence, the Arbitrator finds that Petitioner failed to meet his burden for TTD benefits from August 31, 2020 through September 16, 2020 even in light of Dr. Amin's February 15, 2021 retroactive note.

Dr. Amin's February 15, 2021 note indicates that Petitioner was examined on September 14, 2020 and placed on light (sedentary) duty. While the September 14, 2020 treatment note was not submitted, there is corroborating evidence that light duty restrictions were given at that time. Petitioner's attorney emailed Respondent's attorney on September 17, 2020 referencing the work

note and requesting job accommodations. (See Resp. ex 11, p. 173). Petitioner worked September 24 and 25, 2020 but light duty accommodations were revoked. (See TR. 43).

The Arbitrator considers the opinions of Respondent's Section 12 examiner, Dr. Konowitz, but finds that they do not outweigh the opinions of Dr. Amin with regards to Petitioner's work status. The Arbitrator relies on Dr. Amin's opinions regarding Petitioner's work status as he has treated Petitioner for approximately five years (since April 2016). Dr. Forsythe (initially Respondent's IME then Petitioner's treating surgeon) and Dr. Cohen (Respondent's second IME) deferred treatment to Dr. Amin. While Dr. Konowitz testified that Petitioner's complaints are subjective, no treating physician nor any of Respondent's Section 12 examiners indicated that Petitioner displayed signs of symptom magnification.

In his evidence deposition, Dr. Konowitz never discusses Petitioner's work status. (See Resp. ex 7). Petitioner's counsel objected to the admission of Dr. Konowitz's IME and impairment rating reports as hearsay. The Arbitrator finds that such reports are inadmissible hearsay and are hereby not admitted into evidence.

As a result, the Arbitrator finds that Petitioner met his burden for TTD benefits from September 17, 2020 (when light duty accommodations were requested) through September 23, 2020 and then from September 26, 2020 (when light duty accommodations were revoked) through April 27, 2021 (the date of hearing).

Overall, the Arbitrator finds that Petitioner is entitled to TTD benefits from April 10, 2015 through October 28, 2017; August 1, 2018 through August 20, 2018; July 30, 2019 through November 18, 2019; September 17, 2020 through September 23, 2020; and September 26, 2020 through April 27, 2021.

Issue M, whether penalties or fees should be imposed upon Respondent, the Arbitrator finds as follows:

The Arbitrator finds that penalties or fees should not be imposed upon Respondent as its choice to proceed with a third Section 12 examiner was not unreasonable given its utilization reviews denying the nerve blocks and ablations as well as Dr. Cohen's statement that Dr. Amin's treatment plan was not within his level of expertise. Further, Respondent did not send Petitioner to another orthopedic surgeon (like Dr. Cohen) but to an anesthesiologist with a specialty in pain management. As such, Petitioner's petition for penalties is denied.

RACHAEL SINNEN, ARBITRATOR

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC010071
Case Name	IJAMES, ROBERT v. GARDA USA, INC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0204
Number of Pages of Decision	20
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Daniel Jones
Respondent Attorney	Justin Nestor

DATE FILED: 5/31/2022

/s/*Deborah Simpson, Commissioner*

Signature

STATE OF ILLINOIS	)		
	) SS.		
COUNTY OF JEFFERSON	)		

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Ijames,
Petitioner,

vs. NO: 20 WC 10071

Garda USA, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 2, 2021, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $58,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

May 31, 2022

d5/25/22
DLS/rm
046

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC010071
Case Name	IJAMES, ROBERT v. GARDA USA, INC
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Daniel Jones
Respondent Attorney	Justin Nestor

DATE FILED: 12/2/2021

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 30, 2021 0.09%

/s/*William Gallagher, Arbitrator*

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Robert Ijames
Employee/Petitioner

v.

Garda USA, Inc.
Employer/Respondent

Case # 20 WC 10071

Consolidated cases: n/a

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on October 8, 2021. By stipulation, the parties agree:

On the date of accident, January 16, 2019, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $27,478.88; the average weekly wage was $528.44.

At the time of injury, Petitioner was 34 years of age, married, with 4 dependent child(ren).

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

Respondent shall be given a credit of $13,324.91 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $13,324.91. The parties stipulated TTD benefits were paid in full.

ICArbDecN&E 2/10 100 W. Randolph Street #8-200 Chicago, IL 60601 312/814-6611 Toll-free 866/352-3033 Web site: www.iwcc.il.gov
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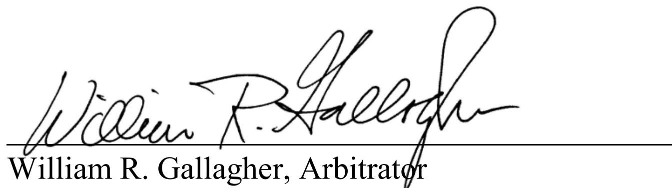
After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $330.00 per week for 177.25 weeks because the injury sustained caused the 30% loss of use of the right hand; 40% loss of use of the right foot; 15% loss of use of the right leg; and 10% loss of use of the left foot, as provided in Section 8(e) of the Act.

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

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



William R. Gallagher, Arbitrator

DECEMBER 2, 2021

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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 January 16, 2019. According to the Application, Petitioner sustained injuries to his "Left Foot, Left Leg, Right Foot, Right Leg, Right Hand, Right Arm" as a result of a "Motor Vehicle Accident when Petitioner was a Passenger" (Arbitrator's Exhibit 2). Petitioner and Respondent stipulated Petitioner sustained a work-related accident on January 16, 2019, and medical and temporary total disability benefits had been paid in full. The only disputed issue was the nature and extent of disability (Arbitrator's Exhibit 1).

Respondent is an armored truck company and its primary service to its customers is to pick up money and transport it to banks. The money picked up and transported by Respondent is both currency and coins.

Petitioner began working for Respondent in 2017 as a member of a crew (usually two individuals) who would transport money. Petitioner would typically report for work at Respondent's facility in Evansville, Indiana. Petitioner and another crew member would travel on a designated route and make stops at various businesses and ATM machines. On numerous occasions, they would have to make as many as 60 stops. The route destination was St. Louis, Missouri. The vehicle used was a Peterbilt semi truck with an armor modified trailer and cab.

While working, Petitioner was armed and wore a company uniform, bulletproof vest and work boots. When Petitioner would make a stop, he would complete paperwork and load the currency and coins onto the truck. The coins are kept in boxes and separated by denominations. The largest box was the quarter box which contained 50 rolls/$500 of quarters. This weighed approximately 25 pounds. Currency was carried in bags which were approximately two feet long and held separate denominations.

When Petitioner serviced an ATM machine, he had to access the safe which was a process that required the use of a combination code and keys. The safe had "cassettes" in it which contained currency which was either removed or replaced. The cassettes were in the lower portion of the ATM and below waist level. Petitioner had to get on the ground to access them and he would usually squat rather than sit because he was more vulnerable when sitting.

When Petitioner and the other crew member arrived at the Respondent's facility in St. Louis, they had to unload the truck by hand. The truck was then loaded for the return trip to Evansville. Upon arriving at Evansville, the same unloading procedure was followed. Petitioner testified a work day was usually 10 hours.

Petitioner said he sustained a fracture to his left hand when he was younger, but he had no problems with it thereafter. Petitioner stated he had no prior injuries to his right hand, right leg or either feet.

On January 16, 2019, Petitioner was the passenger in the armored truck and a fellow worker named "Joe" was driving the truck. The truck was on I64 and just outside Mt. Vernon, Illinois. Petitioner estimated the truck was traveling at approximately 65 miles per hour. Petitioner testified he was

texting a message to his wife and, when he looked up, he saw a semi truck and trailer approximately 30 feet in front of them that was not moving. Joe attempted to swerve the truck to the left to avoid a collision, but was unable to do so. The front right portion of the truck where Petitioner was seated, struck the left side of the corner of the other semi truck and trailer. The area of the impact was directly in front of where Petitioner was seated.

Petitioner testified their truck pushed the semi truck down the roadway for approximately 30 seconds following the impact. The dashboard of the truck Petitioner was in was pushed back to the point to where Petitioner could not see his legs below the knee. Petitioner experienced pain in both legs/feet, but was unable to move them. Petitioner also experienced pain in his right hand. Petitioner was unable to get out of the truck on his own and the emergency personnel who responded had to use the Jaws of Life to cut an opening in the door and free his legs. One of the EMTs had to crawl into the cab of the truck and help him onto a gurney.

Following the accident, Petitioner was treated at the ER of Good Samaritan Hospital. At that time, Petitioner complained primarily of pain in the right wrist/hand, right ankle/foot and left foot, with the right ankle/foot hurting the most. Initially, CT scans of the cervical spine and head were obtained, both of which were normal (Petitioner's Exhibit 3).

X-rays of Petitioner's left foot, right hand, right lower leg and right foot were ordered. The x-ray of Petitioner's left foot revealed a nondisplaced fracture of the fourth metatarsal. The x-ray of Petitioner's right hand revealed a comminuted fracture of the proximal metadiaphysis of the fifth metacarpal with overriding of fragments and shortening of the metacarpal. The x-ray of Petitioner's right lower leg revealed a fracture of the distal fibula and a possible chip fracture of the tibial cortex. The x-ray of Petitioner's right foot revealed a nondisplaced fracture of the fourth metatarsal and a possible fracture of the calcaneus. Petitioner was placed in splints, given a walker, prescribed medication and directed to follow up with an orthopedic physician (Petitioner's Exhibit 3).

On January 17, 2019, Petitioner was evaluated by Dr. William Martin, an orthopedic specialist. He reviewed the x-rays of Petitioner's feet and lower right leg and agreed with the interpretation of the radiologist. In regard to the right foot x-ray, he noted the fracture of the calcaneus was “poorly seen” so he ordered new x-rays of the right foot which confirmed Petitioner had sustained a fracture of the calcaneus. He noted Petitioner had an extreme amount of swelling of the right front. He applied a dressing to the right foot and gave Petitioner of boot for the left foot. In regard to Petitioner's right hand injury, he referred Petitioner to Dr. David Boles, an orthopedic surgeon associated with him (Petitioner's Exhibit 4).

Dr. Boles evaluated Petitioner on January 24, 2019. He opined the fracture of the fifth metacarpal was in poor position. He recommended Petitioner undergo right hand surgery which would include insertion of a metal plate and screws (Petitioner's Exhibit 4).

On January 28, 2019, Dr. Boles performed surgery on Petitioner's right hand. The procedure consisted of open reduction and internal fixation with a metal plate and screws of the fifth metacarpal (Petitioner's Exhibit 4).
Following surgery, Dr. Boles ordered physical therapy. Petitioner received physical therapy from February 27, 2019, through April 8, 2019. Petitioner's right hand condition improved, but when

seen on April 4, 2019, Petitioner complained of "crunching and popping" when he moved his wrist (Petitioner's Exhibit 4).

Dr. Boles saw Petitioner on April 8, 2019. At that time, Petitioner advised he did not have all of his grip strength. On examination, Dr. Boles noted Petitioner's right hand had a full range of motion and was stable. He opined Petitioner was at MMI and did not have any permanent partial impairment. However, Dr. Boles also noted Petitioner needed to expect a slow return of strength and he should participate in a home exercise program (Petitioner's Exhibit 4).

In regard to the injuries to Petitioner's right leg/foot and left foot, Dr. Martin referred Petitioner to Dr. Glenn Henning, a podiatrist associated with him. Dr. Henning evaluated Petitioner on February 8, 2019. Dr. Henning applied a cast boot to both feet and opined Petitioner could begin weight bearing on his left foot, but not on his right foot (Petitioner's Exhibit 4).

Dr. Martin saw Petitioner on February 21, 2019, and noted Petitioner's foot conditions had improved. He opined Petitioner could bear full weight on his left foot without restrictions and could start putting partial weight on his right foot. He authorized Petitioner to return to work, only for sedentary work, but he did not authorize Petitioner to drive (Petitioner's Exhibit 4).

Dr. Martin continued to treat Petitioner, primarily for the right foot/ankle condition. When he saw Petitioner on March 14, 2019, he obtained x-rays which revealed healing of the fractures in the right foot. However, on examination, he noted the presence of a soft tissue mass which was extremely tender. He ordered an MRI scan (Petitioner's Exhibit 4).

Dr. Martin subsequently saw Petitioner on March 21, 2019, and reviewed the MRI. He noted it revealed some thickening of the plantar fascia; however, he opined the pain may have been because of tenosynovitis (Petitioner's Exhibit 4).

Dr. Martin continued to treat Petitioner and he ordered physical therapy. Petitioner's right foot/ankle condition gradually improved, but when Dr. Martin saw him on July 30, 2019, Petitioner advised he had pain in his right foot, could not stand long and had difficulties walking on uneven surfaces. Dr. Martin opined Petitioner had a tethered FHL tendon in his right foot. He recommended Petitioner do stretching exercises to loosen it (Petitioner's Exhibit 4).

When Dr. Martin saw Petitioner on September 24, 2019, Petitioner advised he still experienced discomfort, but was able to get around. Petitioner informed Dr. Martin of his job duties and Dr. Martin authorized Petitioner to drive his usual route. However, Dr. Martin opined Petitioner should not be required to get out of the vehicle and walk quickly. On examination, he noted the range of motion of the right ankle was good and the FHL tendon was looser (Petitioner's Exhibit 4).

Petitioner was again seen by Dr. Martin on November 8, 2019. Petitioner had returned to work, but was experiencing soreness, especially at the end of the day. On examination, Dr. Martin noted some right ankle swelling and FHL tightness. He administered an injection into Petitioner's right ankle (Petitioner's Exhibit 4).

Dr. Martin saw Petitioner on November 22, 2019, and Petitioner advised the injection had helped some. Petitioner continued to complain of pain/tenderness on the plantar side of the right foot. Dr. Martin again referred Petitioner to Dr. Henning (Petitioner's Exhibit 4).

Dr. Henning saw Petitioner on December 12, 2019. Dr. Henning opined Petitioner had residual scar tissue and tightness of the plantar fascia ligament. He opined the condition would improve over time and did not recommend any surgery, but recommended Petitioner continue with stretching exercises (Petitioner's Exhibit 4).

At trial, Petitioner testified he was able to return to work for Respondent and was promoted to crew leader. In regard to his right hand, Petitioner continues to experience pain in his right hand where the metal plate is located. Petitioner said he has diminished strength in his right hand and is not able to move the coin boxes as well as he used to. He limits himself to moving one coin box at a time and, many times, has to use both hands instead of one. He also complains of periodic crunching/popping when he closes his right hand.

In regard to the injuries to his feet, Petitioner still experiences pain in both of them. When he has to get down on the floor to access an ATM, he must do so quickly or stand up to pause because of the pain. Squatting continues to be a problem for him. Petitioner said that certain job tasks now take longer to perform because of his feet symptoms, specifically, servicing ATM machines.

Petitioner has more symptoms in respect to his right foot than his left front. Because of his right foot pain symptoms, Petitioner said he has difficulties walking and keeping his balance. Petitioner will, on occasion, walk with a limp because of his pain symptoms. Petitioner said he is able to go up/down stairs, but he always uses a handrail.

The injuries have affected other aspects of Petitioner's life. Petitioner said he continues to go hunting with his four boys, but does so in pain. Petitioner can no longer engage in hiking or other physical activities with his sons.

Conclusion of Law

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 30% loss of use of the right hand; 40% loss of use of the right foot; 15% loss of use of the right leg; and 10% loss of use of the left foot.

In support of this conclusion the Arbitrator notes the following:

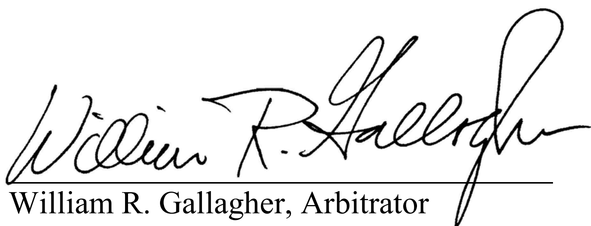
When Dr. Boles opined Petitioner was at MMI in regard to the right hand injury, he opined Petitioner had no permanent partial impairment. However, this was not a permanent partial impairment rating performed using the AMA guides. Further, no AMA permanent partial impairment ratings were tendered into evidence in regard to the other injuries Petitioner sustained as a result of the accident. The Arbitrator gives this factor no weight.
Petitioner worked for Respondent as a member of a crew who transported money. As noted in the Findings of Fact, this job required Petitioner to make multiple stops along a designated route, pick up and deliver money and service ATM machines. This job required getting in/out of the truck on

numerous occasions, lifting boxes which contained money and bending/squatting to service ATM machines. Because of the injuries he sustained, Petitioner is not able to perform his job duties as efficiently as he did prior to sustaining the accident. The Arbitrator gives this factor significant weight.

Petitioner was 34 years old at the time he sustained the accident and 36 years old at the time of trial. Petitioner presently has approximately 30 years before he will reach normal retirement age. Petitioner will have to live with the effects of this injury for the remainder of his working and natural life. The Arbitrator gives this factor significant weight.

There was no evidence the injury had any effect of Petitioner's future earning capacity. Petitioner has, in fact, been promoted to the position of crew leader. The Arbitrator gives this factor moderate weight.

Petitioner sustained a significant injury to his right hand which required surgery including open reduction and insertion of a metal plate with screws. As noted herein, Petitioner complained of crunching and popping while in physical therapy and he made the same complaint when this case was tried. Further, Petitioner's complaints of pain and diminished grip strength are consistent with the injury he sustained. Petitioner also sustained a serious injury to his right foot/ankle which consisted of a fractured calcaneus and forth metatarsal. Petitioner subsequently developed FHL tightness. Petitioner's complaints of pain and instability are consistent with the injury he sustained. Further, Petitioner sustained a fracture of the right fibula and this accounts for some of his lower right leg and right ankle complaints. Finally, Petitioner sustained a fracture of the fourth metatarsal of the left foot. Petitioner continues to have complaints consistent with the injury he sustained. The Arbitrator gives these factors significant weight.



William R. Gallagher, Arbitrator