ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC004996
Case Name	FREEMAN, PERRY v. MONEE FIRE DEPARTMENT
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0502
Number of Pages of Decision	12
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Randall Sladek
Respondent Attorney	Patrick Jesse

DATE FILED: 10/4/2021

/s/*Deborah Simpson, Commissioner*

Signature

STATE OF ILLINOIS	)	
	) SS.	
COUNTY OF WILL	)	

[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

Perry Freeman,
Petitioner,

vs. NO: 18 WC 4996

Monee Fire Department,
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, temporary disability and permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 28, 2019, is hereby affirmed and adopted.

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

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

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.

October 4, 2021

o9/29/21
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
NOTICE OF ARBITRATOR DECISION

FREEMAN, PERRY
Employee/Petitioner

Case# **18WC004996**
15WC024213

MONEE FIRE DEPARTMENT
Employer/Respondent

On 10/28/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.60% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0154 KROL BONGIORNO & GIVEN LTD
RANDALL SLADEK
20 S CLARK ST SUITE 1820
CHICAGO, IL 60603

0507 RUSIN & MACIOROWSKI LTD
PATRICK J JESSE
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CHICAGO, IL 60606

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

Perry Freeman
Employee/Petitioner

v.

Monee Fire Protection District
Employer/Respondent

Case # **18**WC **4996**

Consolidated cases: **15 WC 24213**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **New Lenox, Illinois**, on **August 7, 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. [ ] 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. [x] Other **Prospective Medical**

FINDINGS

On **8/20/2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**82,332.64**; the average weekly wage was $**1,583.32**.

On the date of accident, Petitioner was **47** 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 $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

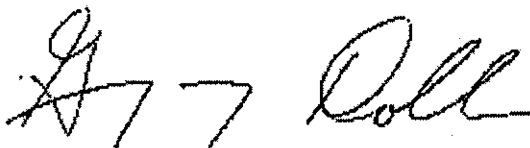
Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

Having found that Petitioner failed to prove that his right knee condition of ill-being is causally related to the accident herein, Petitioner's claim for prospective medical benefits is hereby denied.

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

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



Signature of Arbitrator

10/24/19
Date

OCT 2 8 2019

Attachment to Arbitrator Decision
(18 WC 4996 and 15 WC 24213)

FINDINGS OF FACT:

Petitioner testified that at the time of the January 2, 2015 work accident he was employed concurrently by Monee Fire Protection District as a part-time firefighter/paramedic and Westmont Fire Protection District through Kurtz Ambulance as a contract paramedic. With respect to Monee Fire Protection District, Petitioner had been employed for approximately 19 years with Respondent and continued to work for Respondent to the date of arbitration.

Petitioner testified that on January 2, 2015, he was responding to a call regarding an auto accident on north-bound I-57. A car had veered off the highway and went into the ditch. Petitioner went down the ditch in order to assist the driver out of the car. While transporting the driver on a backboard out of the ditch, Petitioner lost his footing. Petitioner testified that he stumbled and fell to the ground. Petitioner rotated his body while trying to hold the backboard up, which caused him to twist his right knee. Petitioner testified that he immediately felt pain in his right leg.

Petitioner testified regarding prior medical history relative to his right knee. Specifically, Petitioner testified that prior to January 2, 2015, he experienced aches and pains in his right knee with weather changes and with overexertion. Petitioner testified that these complaints had existed since he was approximately 20 years old. At the time of arbitration, Petitioner was 52 years old. Petitioner testified that he injured his right knee at work in 1987. Petitioner testified that he underwent an arthroscopic surgery of the right knee following the 1987 injury. Petitioner could not recall the exact procedure other than "cleaning up" his right knee. Petitioner believed that he had sustained a torn meniscus as a result of the 1987 accident. Petitioner was unsure whether the entire meniscus was removed at that time. Petitioner further testified that his treating doctors at that time referred him for an additional surgery. Petitioner testified that he did not wish to go through the additional surgery and he had ongoing pain in his right knee since the 1987 injury. Petitioner further admitted that he settled that matter. The Commission records reflect that Petitioner received 35% loss of use of the right leg (see 88 WC 45467 Perry Freeman v. Starfire Party Sales).

Petitioner testified that after the January 2, 2015 injury, he was transported to Franciscan Saint James Hospital. According to the medical records, Petitioner was seen in the emergency room and reported a complaint of right knee pain following a twisting injury. Petitioner denied any other complaints. The medical records documented that Petitioner had a prior knee arthroscopy and surgery. Petitioner complained of a moderate amount of pain. X-rays of the right knee were obtained and interpreted to reveal severe degenerative joint changes without any acute fractures. It was noted that Petitioner had findings of bulky multi-compartment osteophytes with severe medial compartment joint space loss. There was also a finding of a small joint effusion. Petitioner was diagnosed by the ER physicians with a right knee sprain. He was given crutches and advised to remain non-weight bearing on the right lower extremity. Petitioner was also advised to follow up with his primary care provider. (PX 1)

Upon discharge from the emergency room, Petitioner sought treatment at Working Well the same date. At the time Petitioner was seen, he reported pain complaints rated at a 4/10. Petitioner also reported a prior a right knee surgery due to an internal ligament injury at approximately age 18. In terms of his complaints, Petitioner reported joint pain, stiffness, swelling, locking of the knee, muscle pain, and pain with weight bearing. Examination findings were positive for tenderness over the medial compartment. Petitioner's McMurray's sign was negative. The x-rays obtained in the emergency room were reviewed. Petitioner was diagnosed with a right knee contusion and sprain, which was noted to be mildly exacerbated. Naproxen was ordered and Petitioner was advised to remain off work and continue to use crutches. (PX 2)

Petitioner was reevaluated on January 9, 2015. According to the records, Petitioner's pain complaints were 2 out of 10. Petitioner was still exhibiting stiffness on physical examination, as well as tenderness over the medial compartment. Petitioner was also noted to be limping. Petitioner's diagnoses remained the same. His restrictions were upgraded to no lifting greater than 20 pounds and no kneeling or squatting. Ibuprofen was ordered and Petitioner was given a knee sleeve. Petitioner's crutches were discontinued. (PX 2)

Petitioner was re-evaluated on January 14, 2014 and again reported 2 out of 10 pain complaints. Examination findings revealed decreased flexion with tenderness over the medial compartment and pain with stress testing. Petitioner's McMurray sign remained negative. Petitioner's diagnosis also remained the same. The records note that Petitioner's condition was still showing a mild exacerbation. Petitioner was given a referral for physical therapy and kept on work restrictions. (PX 2)

Petitioner was re-evaluated on January 20, 2015. According to the records, Petitioner reported significant improvement of his right knee pain with current pain complaints of 1 out of 10. Examination findings revealed full range of motion with flexion and extension. There was tenderness over the lateral joint line, but no pain. Petitioner had full strength and a negative McMurray's test. The remainder of the physical examination was noted to be normal. Petitioner was diagnosed with a right knee contusion and a right leg sprain. Petitioner was released to return to work full duty without restrictions. (PX 2)

Petitioner did not return to Working Well for approximately two months. Petitioner testified that he experienced an increase in pain when he tweaked his right knee while carrying a patient on March 6, 2015. Petitioner testified that he did not file an Application for Adjustment of Claim with respect to that incident. Petitioner, however, felt his pain complaints were a continuation of the January 2, 2015 incident.

On March 6, 2015, Petitioner returned to Working Well Clinic. Petitioner now reported 4 out of 10 pain complaints. Petitioner reported that he had been attending physical therapy. He described right knee pain when going downstairs or laying down. (There was no mention of the incident in which Petitioner tweaked his right knee while carrying a patient down steps.) Examination findings continued to reveal full range of motion with extension and flexion. There was tenderness to palpation over the medial joint line with involvement of a medial collateral ligament. There is also pain with stress testing. At this visit, Petitioner exhibited a positive McMurray's sign. Petitioner's diagnosis remained knee contusion and knee sprain/strain. A Prednisone taper was ordered. Petitioner was returned to work full duty and recommended at home exercises. (PX 2)

Petitioner returned on March 18, 2015 to Working Well Clinic. Petitioner reported pain at 2 out of 10. Petitioner also complained of catching in his right knee, but overall noted improvement. Examination findings continued to reveal full range of motion with ongoing tenderness near the patella and lateral joint area. Petitioner's McMurray's sign remained positive. Petitioner was diagnosed with a knee contusion and strain. Petitioner's full duty work was continued. An MRI was ordered. (PX 2)

Petitioner returned to Working Well Clinic on April 14, 2015. According to the records, Petitioner had undergone an abnormal MRI of the right knee. Reportedly, the study revealed degenerative joint disease changes with meniscal tears and chronic ACL tear. Petitioner was continuing to work regular duty. His pain levels were now a 5/10. Petitioner reported no improvement or changes in his condition. Examination findings were consistent with the prior medical records. Petitioner was diagnosed with a knee contusion and knee sprain. However, he was given a referral to an orthopedic surgeon for right knee internal derangement and meniscal tear with chronic ACL tear. Petitioner was also continued on full duty work status. (PX 3)

On May 15, 2015, Petitioner was evaluated by Dr. William Payne, an orthopedic surgeon. Dr. Payne recorded a consistent history of accident. The doctor noted Petitioner's representation that he had dealt with

arthritis in his right knee over the years and that now said pain had become more frequent. Petitioner furthermore complained that he felt instability in his leg. Examination findings revealed tenderness over the medial collateral ligament, as well as over the lateral joint line. Petitioner exhibited abnormal flexion with a positive medial McMurray's test. Dr. Payne reviewed the MRI and noted an extruded medial meniscus with increased signal which he indicated suggested an underlying degenerative tear. Also noted was an undersurface tear of the lateral meniscus involving the body and posterior horn. There was tricompartmental chondromalacia with full thickness cartilage loss in the medial compartment and diffused prominent osteophytes. Lastly, Dr. Payne noted the nonvisualization of the ACL. Dr. Payne diagnosed tear of medial cartilage or meniscus of the right knee and recommended medial meniscectomy. Petitioner was on full duty work status. (PX 4)

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. Joseph Monaco on June 30, 2015. Dr. Monaco authored a report detailing his opinions on July 16, 2015. The doctor also testified via evidence deposition (Respondent's Exhibit 1). Dr. Monaco testified that he is a board certified orthopedic surgeon, primarily specializing in treatment of the knees and shoulder. Dr. Monaco testified that he reviewed Petitioner's medical records from the emergency room, as well as Working Well Clinic and Dr. Payne. Dr. Monaco testified that the initial x-rays obtained in the emergency room on January 2, 2015, were consistent with severe tricompartmental osteoarthritis degenerative changes of the right knee joint without any signs of an acute injury (RX 1, pp. 9-10) Dr. Monaco testified that Petitioner had findings on the date of accident of osteophytes, which were consistent with arthritis. Dr. Monaco testified that the medial compartment of Petitioner's right knee had shown significant erosion of the articular cartilage to the point that there was no longer any visible cartilage and essentially bone on bone (RX 1, pp. 10-11) Dr. Monaco explained further that the findings on the initial x-rays obtained on the date of accident were longstanding, degenerative and pre-existing in nature.

Dr. Monaco testified that he found the January 14, 2015 office note from Working Well Clinic to be significant. Dr. Monaco noted at that point, Petitioner had reported only 2/10 pain complaints with document improvement. This was contrasted with the initial records, which revealed 4/10 pain complaints. Dr. Monaco also found it significant that Petitioner reported a history of arthritis, as well as joint pain and joint stiffness, along with pain with weight bearing. Dr. Monaco testified that the January 20, 2015 note from Working Well Clinic was significant. Dr. Monaco testified that Petitioner only reported 1/10 pain, which was approximately two weeks following the incident. Dr. Monaco further noted that Petitioner reported significant improvement in his subjective right knee complaints and the physical examinations revealed full range of motion with full strength and a normal gait. (RX 1, pp. 13-15)

Dr. Monaco believed that the records were consistent with a temporary aggravation or exacerbation of Petitioner's underlying osteoarthritis as documented in the Working Well notes. Dr. Monaco explained that a permanent aggravation of a degenerative condition would involve a permanent worsening of a pre-existing condition. Dr. Monaco contrasted this with an exacerbation, which he explained to be a temporary increase in symptoms and a return to baseline that existed prior to the work-related incident (RX 1, p.15) Dr. Monaco testified that he believed Petitioner had sustained a temporary exacerbation based upon these medical records. Dr. Monaco testified that Petitioner's pain complaints had eventually returned to a 1/10 approximately two and a half weeks after the incident with a return to work full duty. According to Dr. Monaco, Petitioner conveyed and the medical records show he had a history of pre-existing complaints of right knee pain. Dr. Monaco testified that there was clear evidence that Petitioner had pre-existing pain in the right knee before the January 2, 2015 work accident. Dr. Monaco furthermore found it significant that Petitioner reported a history of aching and pain in his right knee prior to the work-related accident and that this could be a sign of symptomatic osteoarthritis. (RX 1, pp. 15-17)

Dr. Monaco also testified that he reviewed the MRI films dated March 27, 2015. Dr. Monaco testified that the findings on the films were positive for evidence of articular cartilage loss, most notably in the medial compartment, but also in the lateral compartment with early stage chondromalacia or cartilage wearing. Dr.

Monaco also noted that there was an absence of Petitioner's anterior cruciate ligament with demonstrated osteophyte formation in the right knee. Dr. Monaco also found evidence of diffused tearing of the medial meniscus, as well as a high signal change in the lateral meniscus, also consistent with a tear. Dr. Monaco did not believe those findings were caused by the work accident. Dr. Monaco believed all of those findings were consistent with degenerative changes of the right knee joint, which pre-existed the accident. (RX 1. pp. 18-19)

Dr. Monaco furthermore found it significant that Petitioner, again, admitted a history of complaints of arthritis over the years. Dr. Monaco testified that Petitioner denied having any difficulties with his job duties prior to January 2, 2015. He noted that Petitioner was off work, but eventually returned to regular duty at the time he had examined him. (RX 1, p. 20)

Dr. Monaco testified that he obtained a history from Petitioner relative to his 1987 injury (1986 was referenced by Dr. Monaco in the deposition). Dr. Monaco testified that Petitioner reported ongoing aching pain in the right knee that was worse with weather changes since the injury in the 1980s. Dr. Monaco indicated Petitioner reported that his baseline was a constant aching feeling in the knee at a level of 3-4/10. Petitioner also conveyed that the knee would become sore and sometimes up to an 8-9/10 associated with a clicking sensation of the knee. Petitioner further conveyed that he had problems over the years with the right knee giving out, but without any falls to the ground. (RX 1, pp. 23-24)

Dr. Monaco testified that he diagnosed Petitioner with a sprain of the medial collateral ligament, which he believed to have resolved. Dr. Monaco testified that Petitioner had underlying severe osteoarthritis of the right knee, which was pre-existing and not caused by the January 2, 2015 accident. Dr. Monaco was of the opinion that Petitioner sustained a temporary exacerbation of his pre-existing degenerative changes in the right knee. Dr. Monaco opined that Petitioner's symptoms in his right knee relative to the degenerative osteoarthritis had returned to baseline within weeks after the January 2, 2015 accident. Dr. Monaco believed that Petitioner had reached maximum medical improvement as it relates to the January 2, 2015 incident. Lastly, Dr. Monaco was in agreement with Petitioner's treating physicians that he could continue to work full duty. (RX 1, pp. 27-29)

On cross examination, Dr. Monaco testified that he did not have any evidence that Petitioner had any treatment in the recent years leading up to the accident. Dr. Monaco further admitted that there is no evidence that Petitioner had ever been referred for surgery to the right knee within 10 years of the January 2, 2015 accident. (RX 1, p. 40) Dr. Monaco reiterated his prior opinions that he believed Petitioner sustained a temporary exacerbation. Dr. Monaco testified that the expectation is that with a degenerative condition, the symptoms will wax and wane over time. According to Dr. Monaco, the pain can "ebb and flow" in terms of the severity. Dr. Monaco, however, noted that the prognosis of arthritis is that it will worsen over time. Dr. Monaco testified that he continued to believe Petitioner sprained his medial collateral ligament on January 2, 2015, which caused pain, swelling, and stiffness. Dr. Monaco furthermore testified that the MRI revealed no acute findings and was consistent of chronic changes. (RX 1, pp. 43-46)

On re-direct examination, Dr. Monaco did not find it significant that Petitioner allegedly did not seek any medical treatment within 10 years before the January 2, 2015 accident. He noted that records submitted show "...[Petitioner] complained of dealing with arthritis over the years...and consistent with [Petitioner] who I feel has a fairly stoic presentation and likely a fairly high pain threshold, that he may have a problem but not seek treatment which would put him in a class of millions of people who deal with it." (RX 1, p.53)

Petitioner did not return for any additional treatment until August 20, 2015 when he sustained his second accident. According to Petitioner's testimony, he was working for Respondent on that date. While carrying a patient with another firefighter out of the house, he twisted his knee the wrong way. Petitioner testified that he went to the emergency room. Petitioner testified that he did not undergo any new MRIs. Petitioner testified that

he was prescribed pain medications, but declined the same. Petitioner did not offer any medical records relative to his treatment following the August 20, 2015 accident.

At Respondent's request, Petitioner underwent a second Section 12 examination with Dr. Monaco on April 14, 2016. In addition to preparing a report dated April 27, 2016, Dr. Monaco also testified via deposition. Dr. Monaco testified that since his last evaluation, Petitioner was seen at the emergency room at Riverside Medical in September of 2015 due to complaints of an inability to weight bear. Dr. Monaco clarified that the emergency room evaluation discussed in his testimony took place on August 21, 2015. Dr. Monaco testified that Petitioner had reported a history of carrying a patient down steps using a stretcher in which Petitioner experienced a gradual increase in his right knee pain that became severe enough causing him to return for additional treatment. Dr. Monaco further testified that he reviewed medical records from Dr. Chadan on October 29, 2015. Dr. Monaco further testified that he did not review any updated diagnostic studies. According to what Petitioner told Dr. Monaco, he was able to return to work relatively quickly after the August 20, 2015 incident. (RX 1, pp. 30-33)

At the time of the second evaluation, Petitioner was working full duty. According to Dr. Monaco's testimony, Petitioner was now experiencing pain once or twice a week when rising from a sit to stand position. Petitioner told Dr. Monaco that his complaints were unchanged after the August 20, 2015 incident. Dr. Monaco testified that his examination findings were the same as the prior visit. (RX 1, p. 34)

Dr. Monaco continued to believe that Petitioner sustained, again, a temporary exacerbation of a pre-existing condition, that being severe osteoarthritis which had again returned to baseline. Dr. Monaco continued to believe Petitioner could work full duty and did not believe Petitioner required further medical treatment with respect to the August 20, 2015 incident. (RX 1, pp. 35-36)

Dr. Monaco was of the belief that Petitioner's examination findings were relatively the same, as well as his complaints with respect to both reports. Dr. Monaco had no reason to doubt Petitioner's veracity. (RX 1, pp. 47-49)

Petitioner testimony and the medical record submitted show Petitioner did not seek additional medical treatment until November 28, 2017 when he was evaluated by Dr. Hurbanek of Hinsdale Orthopedics. According to Petitioner, he did not follow through with the surgical recommendations from Dr. Payne as he wanted to work through his issues. Petitioner testified that he continued to work the entire time.

The records of Dr. Hurbanek dated November 28, 2017 revealed that Petitioner presented with 10 out 10 right knee complaints. Petitioner attributed his complaints to the January 2, 2015 incident. (The Arbitrator notes that there is no reference in the record of the August 20, 2015 incident nor was there any mention of the March 6, 2015 incident in which Petitioner tweaked his right knee while carrying a patient.) Petitioner complained to Dr. Hurbanek of popping, clicking, pain, swelling, and sensitivity to weather changes. Petitioner reported that he had a history of right knee injury when he was 18 years old and had to undergo surgery. Petitioner further reported that since the surgery, he had aches and pains in his right knee. (PX 3)

New x-rays were obtained. According to Dr. Hurbanek, Petitioner had tricompartmental osteoarthritis with osteophyte formation and joint space narrowing. Dr. Hurbanek assessed right knee osteoarthritis. Dr. Hurbanek felt Petitioner's "...work injury aggravated what was likely some arthritis that had been present." The doctor recommended a Cortisone injection, or a total knee replacement. Dr. Hurbanek did not believe an arthroscopic meniscectomy would be of any benefit given the significant arthritic changes. Petitioner chose to undergo injection therapy at that time. An injection was given and Petitioner was cleared to work full duty. (PX 3)

Petitioner continued to work full duty for Respondent. Shortly after Petitioner was seen by Dr. Hurbanek in November of 2017, Petitioner was terminated by The Village of Westmont/Kurtz Ambulance. Petitioner testified that he believed part of the reason he was terminated was due to his right knee condition, but also stated that there may have been other reasons why and that he was never given a straight answer by his concurrent employer. Petitioner testified that after leaving Kurtz, he started his own business transporting and hauling RVs, campers, and trailers locally and across the country. Petitioner stated that while most of the travel was local, there was one trip over 1,000 miles. Petitioner also testified that long car rides would increase his right knee complaints.

Petitioner next returned to Dr. Hurbanek for further treatment on June 7, 2018. Petitioner reported that he was doing well following the first injection and experienced relief. Petitioner only reported pain with stairs and weight bearing. Dr. Hurbanek diagnosed Petitioner with right knee osteoarthritis and recommended a repeat injection. Dr. Hurbanek opined that Petitioner could return as needed, but furthermore believed Petitioner would likely need a knee replacement in the near future. Petitioner was cleared to return to work without restrictions. (PX 3)

Petitioner returned to Dr. Hurbanek for any additional care on April 16, 2019. According to the medical records, Petitioner reported that he experienced relief with the last injection and that his symptoms "vary day to day". Petitioner believed the injection had worn off and had experienced continued pain. Petitioner was reporting difficulty with stairs, bending, squatting, and standing up from a seated position. Dr. Hurbanek diagnosed Petitioner with tricompartmental osteoarthritis. The doctor indicated Petitioner had failed conservative treatment and recommended a total knee replacement. Dr. Hurbanek advised that Petitioner could continue working full duty without restrictions. (PX 3)

Petitioner testified that at the time of trial, he felt his leg was at the point of no return. Petitioner testified that he had tried to work through the pain, but unfortunately could not do so. Petitioner further testified that financially, he could not afford to undergo the surgery. Petitioner, however, admitted that he had group insurance through his concurrent employer. Petitioner claimed, however, that he could not afford the time lost from work. Petitioner also admitted that he was never taken off work by any of his doctors.

Petitioner testified that he would self-limit himself with certain activities. Specifically, Petitioner would ask for assistance when carrying someone down the stairs. No other examples of any self-imposed limitations were provided. Petitioner admitted that he had never missed any time from work from Monee Fire Protection District after January 20, 2015. Petitioner further admitted that he was able to perform his full firefighter/paramedic duties since being released on January 20, 2015. Furthermore, Petitioner agreed that the complaints of achiness, worsening pain with weather changes, knee catching, and giving way all pre-existed the January 2, 2015 accident. Petitioner further provided that his knee was never 100% after the 1980 surgery and that he always had pain. He acknowledged that he had an altered gait prior to the accident but had not been under any active treatment or had any surgical recommendations. When asked the difference between his right knee before and after January 2015, Petitioner responded that his condition had waxed and waned prior but since 2015 the pain was constant.

With respect to issue F.) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following:

The Arbitrator finds that Petitioner failed to meet his burden of proof with respect to causal connection relative to the August 20, 2015 accident. Petitioner did not offer any medical records. At least by way of the most recent treatment record of Dr. Hurbanek, Petitioner attributed all of his current complaints to the January 2, 2015 incident (See 15 WC 24213). This is consistent with the medical records and testimony at trial.

For these reasons, the Arbitrator denies Petitioner's request for further prospective medical treatment relative to the August 20, 2015 accident. All other issues are moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC024213
Case Name	FREEMAN, PERRY v. MONEE FIRE DEPT
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0503
Number of Pages of Decision	13
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Randall Sladek
Respondent Attorney	Patrick Jesse

DATE FILED: 10/4/2021

/s/Deborah Simpson, 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))
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☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Perry Freeman,
Petitioner,

vs. NO: 15 WC 24213

Monee Fire Department,
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DECISION AND OPINION ON REVIEW

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October 4, 2021

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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FREEMAN, PERRY
Employee/Petitioner

Case# **15WC024213**
18WC004996

MONEE FIRE PROTECTION DISTRICT
Employer/Respondent

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

0154 KROL BONGIORNO & GIVEN LTD
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CHICAGO, IL 60606

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

Perry Freeman
Employee/Petitioner

v.

Monee Fire Protection District
Employer/Respondent

Case # **15** WC **24213**

Consolidated cases: **18 WC 4996**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **New Lenox, Illinois**, on **August 7, 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. [ ] 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. [x] Other **Prospective Medical**

FINDINGS

On **1/2/2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**82,332.64**; the average weekly wage was $**1,583.32**.

On the date of accident, Petitioner was **47** 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 $**3,031.80** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

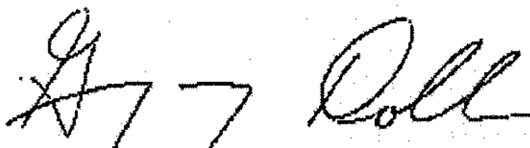
Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

The Arbitrator finds that Petitioner's current condition of ill-being is no longer causally related to the January 2, 2015 accident. Petitioner's claim for prospective medical benefits and medical bills incurred after January 20, 2015 are hereby denied.

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

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



Signature of Arbitrator

10/24/19
Date

OCT 28 2019

Attachment to Arbitrator Decision
(15 WC 24213 and 18 WC 4996)

FINDINGS OF FACT:

Petitioner testified that at the time of the January 2, 2015 work accident he was employed concurrently by Monee Fire Protection District as a part-time firefighter/paramedic and Westmont Fire Protection District through Kurtz Ambulance as a contract paramedic. With respect to Monee Fire Protection District, Petitioner had been employed for approximately 19 years with Respondent and continued to work for Respondent to the date of arbitration.

Petitioner testified that on January 2, 2015, he was responding to a call regarding an auto accident on north-bound I-57. A car had veered off the highway and went into the ditch. Petitioner went down the ditch in order to assist the driver out of the car. While transporting the driver on a backboard out of the ditch, Petitioner lost his footing. Petitioner testified that he stumbled and fell to the ground. Petitioner rotated his body while trying to hold the backboard up, which caused him to twist his right knee. Petitioner testified that he immediately felt pain in his right leg.

Petitioner testified regarding prior medical history relative to his right knee. Specifically, Petitioner testified that prior to January 2, 2015, he experienced aches and pains in his right knee with weather changes and with overexertion. Petitioner testified that these complaints had existed since he was approximately 20 years old. At the time of arbitration, Petitioner was 52 years old. Petitioner testified that he injured his right knee at work in 1987. Petitioner testified that he underwent an arthroscopic surgery of the right knee following the 1987 injury. Petitioner could not recall the exact procedure other than "cleaning up" his right knee. Petitioner believed that he had sustained a torn meniscus as a result of the 1987 accident. Petitioner was unsure whether the entire meniscus was removed at that time. Petitioner further testified that his treating doctors at that time referred him for an additional surgery. Petitioner testified that he did not wish to go through the additional surgery and he had ongoing pain in his right knee since the 1987 injury. Petitioner further admitted that he settled that matter. The Commission records reflect that Petitioner received 35% loss of use of the right leg (see 88 WC 45467 Perry Freeman v. Starfire Party Sales).

Petitioner testified that after the January 2, 2015 injury, he was transported to Franciscan Saint James Hospital. According to the medical records, Petitioner was seen in the emergency room and reported a complaint of right knee pain following a twisting injury. Petitioner denied any other complaints. The medical records documented that Petitioner had a prior knee arthroscopy and surgery. Petitioner complained of a moderate amount of pain. X-rays of the right knee were obtained and interpreted to reveal severe degenerative joint changes without any acute fractures. It was noted that Petitioner had findings of bulky multi-compartment osteophytes with severe medial compartment joint space loss. There was also a finding of a small joint effusion. Petitioner was diagnosed by the ER physicians with a right knee sprain. He was given crutches and advised to remain non-weight bearing on the right lower extremity. Petitioner was also advised to follow up with his primary care provider. (PX 1)

Upon discharge from the emergency room, Petitioner sought treatment at Working Well the same date. At the time Petitioner was seen, he reported pain complaints rated at a 4/10. Petitioner also reported a prior a right knee surgery due to an internal ligament injury at approximately age 18. In terms of his complaints, Petitioner reported joint pain, stiffness, swelling, locking of the knee, muscle pain, and pain with weight bearing. Examination findings were positive for tenderness over the medial compartment. Petitioner's McMurray's sign was negative. The x-rays obtained in the emergency room were reviewed. Petitioner was diagnosed with a right knee contusion and sprain, which was noted to be mildly exacerbated. Naproxen was ordered and Petitioner was advised to remain off work and continue to use crutches. (PX 2)

Petitioner was reevaluated on January 9, 2015. According to the records, Petitioner's pain complaints were 2 out of 10. Petitioner was still exhibiting stiffness on physical examination, as well as tenderness over the medial compartment. Petitioner was also noted to be limping. Petitioner's diagnoses remained the same. His restrictions were upgraded to no lifting greater than 20 pounds and no kneeling or squatting. Ibuprofen was ordered and Petitioner was given a knee sleeve. Petitioner's crutches were discontinued. (PX 2)

Petitioner was re-evaluated on January 14, 2014 and again reported 2 out of 10 pain complaints. Examination findings revealed decreased flexion with tenderness over the medial compartment and pain with stress testing. Petitioner's McMurray sign remained negative. Petitioner's diagnosis also remained the same. The records note that Petitioner's condition was still showing a mild exacerbation. Petitioner was given a referral for physical therapy and kept on work restrictions. (PX 2)

Petitioner was re-evaluated on January 20, 2015. According to the records, Petitioner reported significant improvement of his right knee pain with current pain complaints of 1 out of 10. Examination findings revealed full range of motion with flexion and extension. There was tenderness over the lateral joint line, but no pain. Petitioner had full strength and a negative McMurray's test. The remainder of the physical examination was noted to be normal. Petitioner was diagnosed with a right knee contusion and a right leg sprain. Petitioner was released to return to work full duty without restrictions. (PX 2)

Petitioner did not return to Working Well for approximately two months. Petitioner testified that he experienced an increase in pain when he tweaked his right knee while carrying a patient on March 6, 2015. Petitioner testified that he did not file an Application for Adjustment of Claim with respect to that incident. Petitioner, however, felt his pain complaints were a continuation of the January 2, 2015 incident.

On March 6, 2015, Petitioner returned to Working Well Clinic. Petitioner now reported 4 out of 10 pain complaints. Petitioner reported that he had been attending physical therapy. He described right knee pain when going downstairs or laying down. (There was no mention of the incident in which Petitioner tweaked his right knee while carrying a patient down steps.) Examination findings continued to reveal full range of motion with extension and flexion. There was tenderness to palpation over the medial joint line with involvement of a medial collateral ligament. There is also pain with stress testing. At this visit, Petitioner exhibited a positive McMurray's sign. Petitioner's diagnosis remained knee contusion and knee sprain/strain. A Prednisone taper was ordered. Petitioner was returned to work full duty and recommended at home exercises. (PX 2)

Petitioner returned on March 18, 2015 to Working Well Clinic. Petitioner reported pain at 2 out of 10. Petitioner also complained of catching in his right knee, but overall noted improvement. Examination findings continued to reveal full range of motion with ongoing tenderness near the patella and lateral joint area. Petitioner's McMurray's sign remained positive. Petitioner was diagnosed with a knee contusion and strain. Petitioner's full duty work was continued. An MRI was ordered. (PX 2)

Petitioner returned to Working Well Clinic on April 14, 2015. According to the records, Petitioner had undergone an abnormal MRI of the right knee. Reportedly, the study revealed degenerative joint disease changes with meniscal tears and chronic ACL tear. Petitioner was continuing to work regular duty. His pain levels were now a 5/10. Petitioner reported no improvement or changes in his condition. Examination findings were consistent with the prior medical records. Petitioner was diagnosed with a knee contusion and knee sprain. However, he was given a referral to an orthopedic surgeon for right knee internal derangement and meniscal tear with chronic ACL tear. Petitioner was also continued on full duty work status. (PX 3)

On May 15, 2015, Petitioner was evaluated by Dr. William Payne, an orthopedic surgeon. Dr. Payne recorded a consistent history of accident. The doctor noted Petitioner's representation that he had dealt with

arthritis in his right knee over the years and that now said pain had become more frequent. Petitioner furthermore complained that he felt instability in his leg. Examination findings revealed tenderness over the medial collateral ligament, as well as over the lateral joint line. Petitioner exhibited abnormal flexion with a positive medial McMurray's test. Dr. Payne reviewed the MRI and noted an extruded medial meniscus with increased signal which he indicated suggested an underlying degenerative tear. Also noted was an undersurface tear of the lateral meniscus involving the body and posterior horn. There was tricompartmental chondromalacia with full thickness cartilage loss in the medial compartment and diffused prominent osteophytes. Lastly, Dr. Payne noted the nonvisualization of the ACL. Dr. Payne diagnosed tear of medial cartilage or meniscus of the right knee and recommended medial meniscectomy. Petitioner was on full duty work status. (PX 4)

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. Joseph Monaco on June 30, 2015. Dr. Monaco authored a report detailing his opinions on July 16, 2015. The doctor also testified via evidence deposition (Respondent's Exhibit 1). Dr. Monaco testified that he is a board certified orthopedic surgeon, primarily specializing in treatment of the knees and shoulder. Dr. Monaco testified that he reviewed Petitioner's medical records from the emergency room, as well as Working Well Clinic and Dr. Payne. Dr. Monaco testified that the initial x-rays obtained in the emergency room on January 2, 2015, were consistent with severe tricompartmental osteoarthritis degenerative changes of the right knee joint without any signs of an acute injury (RX 1, pp. 9-10) Dr. Monaco testified that Petitioner had findings on the date of accident of osteophytes, which were consistent with arthritis. Dr. Monaco testified that the medial compartment of Petitioner's right knee had shown significant erosion of the articular cartilage to the point that there was no longer any visible cartilage and essentially bone on bone (RX 1, pp. 10-11) Dr. Monaco explained further that the findings on the initial x-rays obtained on the date of accident were longstanding, degenerative and pre-existing in nature.

Dr. Monaco testified that he found the January 14, 2015 office note from Working Well Clinic to be significant. Dr. Monaco noted at that point, Petitioner had reported only 2/10 pain complaints with document improvement. This was contrasted with the initial records, which revealed 4/10 pain complaints. Dr. Monaco also found it significant that Petitioner reported a history of arthritis, as well as joint pain and joint stiffness, along with pain with weight bearing. Dr. Monaco testified that the January 20, 2015 note from Working Well Clinic was significant. Dr. Monaco testified that Petitioner only reported 1/10 pain, which was approximately two weeks following the incident. Dr. Monaco further noted that Petitioner reported significant improvement in his subjective right knee complaints and the physical examinations revealed full range of motion with full strength and a normal gait. (RX 1, pp. 13-15)

Dr. Monaco believed that the records were consistent with a temporary aggravation or exacerbation of Petitioner's underlying osteoarthritis as documented in the Working Well notes. Dr. Monaco explained that a permanent aggravation of a degenerative condition would involve a permanent worsening of a pre-existing condition. Dr. Monaco contrasted this with an exacerbation, which he explained to be a temporary increase in symptoms and a return to baseline that existed prior to the work-related incident (RX 1, p.15) Dr. Monaco testified that he believed Petitioner had sustained a temporary exacerbation based upon these medical records. Dr. Monaco testified that Petitioner's pain complaints had eventually returned to a 1/10 approximately two and a half weeks after the incident with a return to work full duty. According to Dr. Monaco, Petitioner conveyed and the medical records show he had a history of pre-existing complaints of right knee pain. Dr. Monaco testified that there was clear evidence that Petitioner had pre-existing pain in the right knee before the January 2, 2015 work accident. Dr. Monaco furthermore found it significant that Petitioner reported a history of aching and pain in his right knee prior to the work-related accident and that this could be a sign of symptomatic osteoarthritis. (RX 1, pp. 15-17)

Dr. Monaco also testified that he reviewed the MRI films dated March 27, 2015. Dr. Monaco testified that the findings on the films were positive for evidence of articular cartilage loss, most notably in the medial compartment, but also in the lateral compartment with early stage chondromalacia or cartilage wearing. Dr.

Monaco also noted that there was an absence of Petitioner's anterior cruciate ligament with demonstrated osteophyte formation in the right knee. Dr. Monaco also found evidence of diffused tearing of the medial meniscus, as well as a high signal change in the lateral meniscus, also consistent with a tear. Dr. Monaco did not believe those findings were caused by the work accident. Dr. Monaco believed all of those findings were consistent with degenerative changes of the right knee joint, which pre-existed the accident. (RX 1. pp. 18-19)

Dr. Monaco furthermore found it significant that Petitioner, again, admitted a history of complaints of arthritis over the years. Dr. Monaco testified that Petitioner denied having any difficulties with his job duties prior to January 2, 2015. He noted that Petitioner was off work, but eventually returned to regular duty at the time he had examined him. (RX 1, p. 20)

Dr. Monaco testified that he obtained a history from Petitioner relative to his 1987 injury (1986 was referenced by Dr. Monaco in the deposition). Dr. Monaco testified that Petitioner reported ongoing aching pain in the right knee that was worse with weather changes since the injury in the 1980s. Dr. Monaco indicated Petitioner reported that his baseline was a constant aching feeling in the knee at a level of 3-4/10. Petitioner also conveyed that the knee would become sore and sometimes up to an 8-9/10 associated with a clicking sensation of the knee. Petitioner further conveyed that he had problems over the years with the right knee giving out, but without any falls to the ground. (RX 1, pp. 23-24)

Dr. Monaco testified that he diagnosed Petitioner with a sprain of the medial collateral ligament, which he believed to have resolved. Dr. Monaco testified that Petitioner had underlying severe osteoarthritis of the right knee, which was pre-existing and not caused by the January 2, 2015 accident. Dr. Monaco was of the opinion that Petitioner sustained a temporary exacerbation of his pre-existing degenerative changes in the right knee. Dr. Monaco opined that Petitioner's symptoms in his right knee relative to the degenerative osteoarthritis had returned to baseline within weeks after the January 2, 2015 accident. Dr. Monaco believed that Petitioner had reached maximum medical improvement as it relates to the January 2, 2015 incident. Lastly, Dr. Monaco was in agreement with Petitioner's treating physicians that he could continue to work full duty. (RX 1, pp. 27-29)

On cross examination, Dr. Monaco testified that he did not have any evidence that Petitioner had any treatment in the recent years leading up to the accident. Dr. Monaco further admitted that there is no evidence that Petitioner had ever been referred for surgery to the right knee within 10 years of the January 2, 2015 accident. (RX 1, p. 40) Dr. Monaco reiterated his prior opinions that he believed Petitioner sustained a temporary exacerbation. Dr. Monaco testified that the expectation is that with a degenerative condition, the symptoms will wax and wane over time. According to Dr. Monaco, the pain can "ebb and flow" in terms of the severity. Dr. Monaco, however, noted that the prognosis of arthritis is that it will worsen over time. Dr. Monaco testified that he continued to believe Petitioner sprained his medial collateral ligament on January 2, 2015, which caused pain, swelling, and stiffness. Dr. Monaco furthermore testified that the MRI revealed no acute findings and was consistent of chronic changes. (RX 1, pp. 43-46)

On re-direct examination, Dr. Monaco did not find it significant that Petitioner allegedly did not seek any medical treatment within 10 years before the January 2, 2015 accident. He noted that records submitted show "...[Petitioner] complained of dealing with arthritis over the years...and consistent with [Petitioner] who I feel has a fairly stoic presentation and likely a fairly high pain threshold, that he may have a problem but not seek treatment which would put him in a class of millions of people who deal with it." (RX 1, p.53)

Petitioner did not return for any additional treatment until August 20, 2015 when he sustained his second accident. According to Petitioner's testimony, he was working for Respondent on that date. While carrying a patient with another firefighter out of the house, he twisted his knee the wrong way. Petitioner testified that he went to the emergency room. Petitioner testified that he did not undergo any new MRIs. Petitioner testified that

he was prescribed pain medications, but declined the same. Petitioner did not offer any medical records relative to his treatment following the August 20, 2015 accident.

At Respondent's request, Petitioner underwent a second Section 12 examination with Dr. Monaco on April 14, 2016. In addition to preparing a report dated April 27, 2016, Dr. Monaco also testified via deposition. Dr. Monaco testified that since his last evaluation, Petitioner was seen at the emergency room at Riverside Medical in September of 2015 due to complaints of an inability to weight bear. Dr. Monaco clarified that the emergency room evaluation discussed in his testimony took place on August 21, 2015. Dr. Monaco testified that Petitioner had reported a history of carrying a patient down steps using a stretcher in which Petitioner experienced a gradual increase in his right knee pain that became severe enough causing him to return for additional treatment. Dr. Monaco further testified that he reviewed medical records from Dr. Chadan on October 29, 2015. Dr. Monaco further testified that he did not review any updated diagnostic studies. According to what Petitioner told Dr. Monaco, he was able to return to work relatively quickly after the August 20, 2015 incident. (RX 1, pp. 30-33)

At the time of the second evaluation, Petitioner was working full duty. According to Dr. Monaco's testimony, Petitioner was now experiencing pain once or twice a week when rising from a sit to stand position. Petitioner told Dr. Monaco that his complaints were unchanged after the August 20, 2015 incident. Dr. Monaco testified that his examination findings were the same as the prior visit. (RX 1, p. 34)

Dr. Monaco continued to believe that Petitioner sustained, again, a temporary exacerbation of a pre-existing condition, that being severe osteoarthritis which had again returned to baseline. Dr. Monaco continued to believe Petitioner could work full duty and did not believe Petitioner required further medical treatment with respect to the August 20, 2015 incident. (RX 1, pp. 35-36)

Dr. Monaco was of the belief that Petitioner's examination findings were relatively the same, as well as his complaints with respect to both reports. Dr. Monaco had no reason to doubt Petitioner's veracity. (RX 1, pp. 47-49)

Petitioner testimony and the medical record submitted show Petitioner did not seek additional medical treatment until November 28, 2017 when he was evaluated by Dr. Hurbanek of Hinsdale Orthopedics. According to Petitioner, he did not follow through with the surgical recommendations from Dr. Payne as he wanted to work through his issues. Petitioner testified that he continued to work the entire time.

The records of Dr. Hurbanek dated November 28, 2017 revealed that Petitioner presented with 10 out 10 right knee complaints. Petitioner attributed his complaints to the January 2, 2015 incident. (The Arbitrator notes that there is no reference in the record of the August 20, 2015 incident nor was there any mention of the March 6, 2015 incident in which Petitioner tweaked his right knee while carrying a patient.) Petitioner complained to Dr. Hurbanek of popping, clicking, pain, swelling, and sensitivity to weather changes. Petitioner reported that he had a history of right knee injury when he was 18 years old and had to undergo surgery. Petitioner further reported that since the surgery, he had aches and pains in his right knee. (PX 3)

New x-rays were obtained. According to Dr. Hurbanek, Petitioner had tricompartmental osteoarthritis with osteophyte formation and joint space narrowing. Dr. Hurbanek assessed right knee osteoarthritis. Dr. Hurbanek felt Petitioner's "...work injury aggravated what was likely some arthritis that had been present." The doctor recommended a Cortisone injection, or a total knee replacement. Dr. Hurbanek did not believe an arthroscopic meniscectomy would be of any benefit given the significant arthritic changes. Petitioner chose to undergo injection therapy at that time. An injection was given and Petitioner was cleared to work full duty. (PX 3)

Petitioner continued to work full duty for Respondent. Shortly after Petitioner was seen by Dr. Hurbanek in November of 2017, Petitioner was terminated by The Village of Westmont/Kurtz Ambulance. Petitioner testified that he believed part of the reason he was terminated was due to his right knee condition, but also stated that there may have been other reasons why and that he was never given a straight answer by his concurrent employer. Petitioner testified that after leaving Kurtz, he started his own business transporting and hauling RVs, campers, and trailers locally and across the country. Petitioner stated that while most of the travel was local, there was one trip over 1,000 miles. Petitioner also testified that long car rides would increase his right knee complaints.

Petitioner next returned to Dr. Hurbanek for further treatment on June 7, 2018. Petitioner reported that he was doing well following the first injection and experienced relief. Petitioner only reported pain with stairs and weight bearing. Dr. Hurbanek diagnosed Petitioner with right knee osteoarthritis and recommended a repeat injection. Dr. Hurbanek opined that Petitioner could return as needed, but furthermore believed Petitioner would likely need a knee replacement in the near future. Petitioner was cleared to return to work without restrictions. (PX 3)

Petitioner returned to Dr. Hurbanek for any additional care on April 16, 2019. According to the medical records, Petitioner reported that he experienced relief with the last injection and that his symptoms "vary day to day". Petitioner believed the injection had worn off and had experienced continued pain. Petitioner was reporting difficulty with stairs, bending, squatting, and standing up from a seated position. Dr. Hurbanek diagnosed Petitioner with tricompartmental osteoarthritis. The doctor indicated Petitioner had failed conservative treatment and recommended a total knee replacement. Dr. Hurbanek advised that Petitioner could continue working full duty without restrictions. (PX 3)

Petitioner testified that at the time of trial, he felt his leg was at the point of no return. Petitioner testified that he had tried to work through the pain, but unfortunately could not do so. Petitioner further testified that financially, he could not afford to undergo the surgery. Petitioner, however, admitted that he had group insurance through his concurrent employer. Petitioner claimed, however, that he could not afford the time lost from work. Petitioner also admitted that he was never taken off work by any of his doctors.

Petitioner testified that he would self-limit himself with certain activities. Specifically, Petitioner would ask for assistance when carrying someone down the stairs. No other examples of any self-imposed limitations were provided. Petitioner admitted that he had never missed any time from work from Monee Fire Protection District after January 20, 2015. Petitioner further admitted that he was able to perform his full firefighter/paramedic duties since being released on January 20, 2015. Furthermore, Petitioner agreed that the complaints of achiness, worsening pain with weather changes, knee catching, and giving way all pre-existed the January 2, 2015 accident. Petitioner further provided that his knee was never 100% after the 1980 surgery and that he always had pain. He acknowledged that he had an altered gait prior to the accident but had not been under any active treatment or had any surgical recommendations. When asked the difference between his right knee before and after January 2015, Petitioner responded that his condition had waxed and waned prior but since 2015 the pain was constant.

With respect to issue F.) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following:

The Arbitrator finds that Petitioner failed to meet his burden of proof that his present right knee condition of ill-being is causally related to the January 2, 2015 work accident.

The Arbitrator finds several undisputed facts as persuasive. Petitioner admitted at hearing that he was never asymptomatic in his right knee before the accident. All physicians agree that Petitioner had severe and

advanced degenerative osteoarthritis per the initial radiographs. Petitioner was able to treat conservatively and the records show that his symptoms improved to a 1 out of 10. Petitioner was able to return to work full duty shortly after the accident in a physically demanding position. Petitioner did not return for additional medical treatment until an incident in March of 2015 when he experienced an increase in symptoms. Petitioner thereafter treated sporadically over the course of several years while continuing to perform his regular and customary duties.

Based upon these set of facts, the Arbitrator finds that Petitioner's underlying osteoarthritic condition was temporarily aggravated and Petitioner returned to baseline as of the January 20, 2015 visit at Working Well. The Arbitrator finds that the condition was no longer causally related when Petitioner returned for further treatment in March of 2015.

Furthermore, and in so finding, the Arbitrator recognizes that an aggravation of a degenerative condition is a legitimate means of recovery. However, the Arbitrator does not find any persuasive testimony or evidence of a permanent change in Petitioner's condition after January 2, 2015. The medical records suggest that Petitioner has similar complaints and symptoms as he did before the accident. Primarily, Petitioner was never 100% before the January 2, 2015 incident and admitted to dealing with arthritis for years. Furthermore, Petitioner told Dr. Monaco that prior to the accident he had constant aching feeling in the knee at a level of 3-4/10. Petitioner admitted that the knee would become sore and sometimes up to an 8-9/10 associated with a clicking sensation of the knee. Petitioner furthermore admitted to Dr. Monaco that he had problems over the years with the right knee giving out. The Arbitrator finds this evidence to be persuasive.

The Arbitrator is also persuaded by the Petitioner's return to work full duty in a heavy physically demanding position as a firefighter within weeks of the accident. There was no evidence that Petitioner was ever restricted after January 20, 2015. Petitioner testified that he was able to effectively perform all his firefighter duties and that he was never reprimanded for an inability to meet his full job obligations. All of these facts and evidence are persuasive evidence to lead the Arbitrator to conclude that Petitioner's underlying osteoarthritic condition, which he now seeks surgery for, was temporarily aggravated by the January 2, 2015 accident.

The Arbitrator also finds it too tenuous to determine that Petitioner's current condition of ill-being is causally related to an accident four and a half years prior given the significant gaps in Petitioner's medical treatment. Specifically, after Petitioner received a surgical referral from Dr. Payne in May of 2015, there was no further treatment until Petitioner's second accident when he went to the ER at Riverside Medical Center on August 21, 2015. After August 21, 2015, there was no further medical treatment until November 28, 2017, or approximately two years and two month later. Given the degenerative osteoarthritic condition at issue, the Arbitrator finds these gaps in medical treatment to be fatal to Petitioner's claim for compensation.

The Arbitrator also finds that the facts of this case do not fit within a chain of events analysis. Under a chain of events analysis, evidence of a previous condition of good health, followed by an accident and resulting disability may serve as sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury (See International Harvester v. Industrial Comm'n).

In this matter, there was no history of consistent ongoing medical treatment post- accident. In fact, there were significant gaps. In addition, Petitioner was able to return to work full duty within weeks of the accident and continues to work full duty to date. Lastly, the medical records and testimony reflect that Petitioner's right knee was indeed symptomatic prior to the accident. For these reasons, the Arbitrator does not find the chain of events analysis applies in these circumstances.

The Arbitrator also finds the opinions of Dr. Monaco to be persuasive. While Petitioner is not required to obtain their own causal opinions, Petitioner nonetheless bears the burden of proving all issues. The Arbitrator

finds that Dr. Monaco's opinions were consistent with Petitioner's medical records and the improvement in Petitioner's complaints within weeks after the accident. Specifically, Dr. Monaco's opinion that Petitioner had returned to baseline is consistent with Petitioner's own testimony, as well as the medical records, which documented an improvement in pain, as well as a return to work full duty.

While Petitioner attempted to explain his reasons for not returning for medical treatment and the significant gaps in his treatment history, the Arbitrator does not find these explanations to be persuasive. While it is commendable that Petitioner continued to work full duty the entire time, the Arbitrator cannot overlook the gaps in Petitioner's medical treatment. As noted in the testimony of Dr. Monaco, a degenerative condition will only worsen over time. The fact that Petitioner is now being referred for a total knee replacement four and a half years after the work accident makes it difficult for the Arbitrator to find, even withstanding Petitioner's explanation for lack of treatment, that the surgical recommendation and condition of ill-being are somehow related.

In summary, the Arbitrator finds that Petitioner's osteoarthritic condition was aggravated by the work accident, but only in a temporary nature. As such, the Arbitrator finds that Petitioner's current right knee condition of ill-being, including the surgical recommendation, is not related. All other issues are moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC003308
Case Name	MARKADAS, FOTIS v. VILLAGE OF NILES
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0504
Number of Pages of Decision	11
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Lane Allan Corday
Respondent Attorney	Daniel Egan

DATE FILED: 10/6/2021

/s/*Kathryn Doerries, Commissioner*

Signature

STATE OF ILLINOIS	)
	) SS.
COUNTY OF COOK	)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

FOTIS MARKADAS,

Petitioner,

vs. NO: 16 WC 03308

VILLAGE OF NILES,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Respondent and Petitioner herein, and notice given to all parties, the Commission, after considering the issues of causal connection, permanent partial disability, and Other-PPD credit, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 28, 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.

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.

October 6, 2021

o- 9/21/21
KAD/jsf

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

MARKADAS, FOTIS
Employee/Petitioner

Case# **16WC003308**

VILLAGE OF NILES
Employer/Respondent

On 5/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.16% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2559 BOWMAN & CORDAY LTD
LANE ALLAN CORDAY
134 N LASALLE ST SUITE 1440
CHICAGO, IL 60602

2461 NYHAN BAMBRICK KINZIE & LOWRY
DANIEL R EGAN
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

F. Markadas v. Village of Niles, 16 WC 03308

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
CORRECTED ARBITRATION DECISION

Fotis Markadas
Employee/Petitioner
v.
Village of Niles
Employer/Respondent

Case # **16** WC **03308**

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 **October 15, 2009**. 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 ______

F. Markadas v. Village of Niles, 16 WC 03308

FINDINGS

On **5/4/15**, 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 $**84,329.44**; the average weekly wage was $**1,621.72**.

On the date of accident, Petitioner was **41** years of age, ***married*** with **2** dependent children.

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

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

Petitioner received Full pay pursuant to PEDA for his lost time. There is no claim for overpayment or underpayment of TTD being made.

Respondent is entitled to a credit of $**4,046.43** under Section 8(j) of the Act for medical benefits that have been paid ***if in fact paid***, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, per the Parties' agreement.

ORDER

Respondent shall pay reasonable and necessary medical services of $4,046.43, as provided in Sections 8(a) and 8.2 of the Act, *directly to the medical provider(s) and as is set forth below.*

Respondent shall pay Petitioner permanent partial disability benefits of $735.37/week for 24.5 weeks, because the injuries sustained caused the additional 10% loss of use of the right leg (64.5 weeks of PPD compensation, 30% loss of use of the right leg prior to credit), as provided in Sections 8(e)(12) and 8(e)(17) of the Act, Petitioner previously having received 20% loss of the right leg in Case No. 99 WC 48781 (40 weeks of PPD compensation).

Respondent shall pay Petitioner the benefits that have accrued from 5/4/15 through 10/15/19, 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

May 26, 2020
Date

MAY 28 2020

INTRODUCTION

This matter was heard in its entirety on October 15, 2019. The Respondent disputed whether the Petitioner's current condition of ill-being is causally related to the injury. Petitioner claimed entitlement to various medical expenses due Orthopaedic Surgery Specialists in the amount of $4,046.43, pre-fee schedule. Respondent represented that these bills had recently been received and they were being processed for payment directly to the provider. The Parties agreed these bills should be awarded, and be paid directly to the medical provider, pursuant to §§8(a) and 8.2 of the Act. The Parties stipulated to an average weekly wage of $1,621.72. The Parties stipulated that Petitioner had been temporarily and totally disabled from work from 6/9/15 through 8/13/15, and from 10/26/15 through 1/1/16, a total of 19-1/7 weeks. The Parties agreed that Petitioner received his full pay while off work pursuant to the Public Employees' Disability Act (PEDA), and that there was no claim made for either overpayment or underpayment of TTD benefits. Finally, the Parties disputed to the nature and extent of Petitioner's injury.

STATEMENT OF FACTS

Petitioner testified that he has worked full time for Respondent as a police officer since 2001. He had worked for Respondent prior to 2001 in a civilian's position. While employed in that position, Petitioner sustained an injury to his right knee for which he received a settlement equal to 20% loss of use of the right leg in Case No. 99 WC 48781. (Rx 2) Petitioner underwent a right knee meniscectomy as a result of his February, 1999 injury, per the records of Dr. Jordan Goldstein. (RX 1)

Petitioner testified that his job duties as a police officer in May, 2015, involved work in the traffic unit as a full time patrol officer.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on May 4, 2015. Petitioner testified he was on patrol. He responded to a burglary in progress in the 7200 block of North Harlem. Petitioner testified he was running to the location when he slipped on wet grass and twisted his right knee. His knee hurt. He completed the call and went back to the station. His knee was swollen and he iced his knee. Petitioner was taken by paramedics to Lutheran General Hospital, where he was treated in the ER.

In addition to the injury to his right knee that was the subject of Case No. 99 WC 487891, Petitioner testified that he had sustained another prior injury to his right knee (in 2014) that was not work related. Petitioner presented himself to Dr. Jordan Goldstein at Orthopaedic Surgery Specialists, Ltd (OSS) on May 12, 2014. (RX 2) Petitioner was seen complaining of right knee pain. He reported having arthroscopic surgery 12 years previous for a meniscus tear, but did not know if it was medial or lateral. He reported experiencing a pop in his right knee on May 8, 2014. He was having difficulty bending his knee. He had difficulty walking stairs. He was using a hinged knee brace that he had from his first surgery. On this visit an MRI was ordered.
The MRI was performed on May 14, 2014 and demonstrated chondromalacia in all three compartments of the knee with some small medial lateral compartmental osteophytes. There were some small rounded loose bodies in the posterior aspect of the joint. There were described abnormalities consistent with a posterior horn and body tear of the lateral meniscus. There was abnormal signal in the posterior horn of the medial meniscus compatible with a tear. The ACL was torn. There were multiple ganglion cysts abutting and minimally involving the lateral tibial plateau. (RX 2)

Eventually, on June 16, 2014, Petitioner had surgery to his right knee. Surgery involved a right knee arthroscopy with anterior cruciate ligament reconstruction with allograft, partial anterior horn medial

meniscectomy, partial posterior horn lateral meniscectomy, and removal of two loose bodies at the posteromedial compartment. Dr. Goldstein also described Grade 3 to grade 4 chondromalacia of the trochlea, grade 2 chondromalacia of the medial femoral condyle, full thickness defect with the lateral tibial plateau, fissuring of the lateral femoral condyle, and grade 2 to grade 3 chondromalacia of the medial aspect of the lateral femoral condyle. (RX 2)

After surgery, Petitioner remained under Dr. Goldstein's care. He attended physical therapy. Dr. Goldstein allowed Petitioner to return to work without restriction effective November 5, 2014. Petitioner last saw Dr. Goldstein before the instant accident on February 18, 2015. The record reflects Petitioner stated he was doing well. He denied any instability. He had no pain. He had no complaints. He was working full duty as a police officer. Petitioner was told to continue with his home exercise program. He was told to follow up in two months' time, at which time Dr. Goldstein charted he would likely allow him to get back to full activities/sports as tolerated. (RX 2)

At Lutheran General, Petitioner complained of an injury to his right ankle and right knee. X-rays of the right knee, ankle and foot showed no fractures. The right knee x-ray did show mild degenerative changes in the patellofemoral and femoral tibial joints. The joint spaces were reasonably well preserved. There was a small amount of fluid in the suprapatellar bursa. Petitioner was diagnosed as having sprains of his right ankle and right knee. He was placed in a knee immobilizer and discharged from care. He was told to follow up with his orthopedic physician. (PX 1)

Petitioner testified he saw Dr. Goldstein of OSS on May 8, 2015. (PX 2) Petitioner expressed minimal complaints regarding the ankle. He also expressed minimal complaints regarding his right knee, but Dr. Goldstein felt an MRI would be appropriate. Petitioner stated he felt able to work in a full duty capacity. The MRI was performed on May 10, 2016. It was not compared to any prior exam. The radiologist noted several findings that appear consistent with the surgical findings from June 16, 2014. There was also a moderate joint effusion, intrasubstance degeneration of the menisci with a short segment tear at the free margin of the medial meniscal posterior horn. There was no evidence of ligament or tendon tear. (PX 2, p. 120)

Petitioner returned to Dr. Goldstein on May 20, 2015. At that time, he was allowed to keep working without restriction. He was referred to physical therapy. Petitioner returned to Dr. Goldstein on June 10, 2015. He complained his knee was now locking on him. He complained of difficulty driving. He was using a knee sleeve. Petitioner was placed on light duty and recommended for surgery. (PX 2)

Dr. Goldstein performed surgery on October 26, 2015. (PX 3) Surgery consisted of a partial lateral meniscectomy, and chondroplasty of the trochlea and lateral condyle, and medial femoral condyle. Some torn ACL fibers were debrided. The Arbitrator notes the chondroplasties were performed to areas of abnormality noted in his prior surgery.

Three days after surgery, Petitioner underwent aspiration of 75 ml of bloody fluid from his knee. (PX 2, p. 38) He then underwent therapy at Physical Therapy Institute. (PX 4)

On December 30, 2015, Dr. Goldstein allowed Petitioner to return to work in a light duty capacity. (PX 2, p. 52) The Parties agreed that Petitioner returned to work in a light duty capacity effective January 2, 2016. Petitioner testified he was working at the front desk.

On February 24, 2016, Dr. Goldstein released Petitioner to return to work in a full duty capacity. On that date, the doctor noted that Petitioner was using a knee sleeve, which he said helped a lot. In addition to being released to full duty, Dr. Goldstein discharged Petitioner from care. (PX 2, pp. 59, 64)

Petitioner returned to Dr. Goldstein on June 15, 2016. (PX 2, p. 65) He complained of a dull ache in the right knee. He was working full duty. He received an injection of steroid and lidocaine in his knee. The record reflects that Dr. Goldstein told Petitioner he may be able to try Visco supplementation in the future. Petitioner testified that he didn't receive Visco injections because they were not "approved" by Respondent. Petitioner did not present any evidence that such a request was presented to Respondent. The Arbitrator does note that Dr. Levin, Respondent's IME physician, noted in his report dated February 20, 2017, that visco supplementation was not related to the work injury in May 2015. (RX 3, p. 4)

On this last date of treatment, Dr. Goldstein noted that the PE showed no effusion, warmth, erythema or swelling. He noted range of motion to 115/120 degrees. He noted mild medial lateral joint tenderness. He described a Grade I Lachman. He had normal strength throughout. (PX 2)

Dr. Mark Levin examined Petitioner at Respondent's request on February 20, 2017. (RX 3) Dr. Levin noted Petitioner to have underlying degenerative arthritis of the knee, chronic in nature and this would be present irrespective of the alleged work injury. Dr. Levin noted Petitioner was working without restriction and could continue to do so. He opined Petitioner to be at maximum medical improvement. He felt Petitioner had a meniscal injury and performed an Impairment Rating based upon same. Dr. Levin concluded Petitioner had a 2% lower extremity impairment equivalent to a 1% whole person impairment pursuant to the *AMA Guides to Evaluation of Permanent Impairment* (6th edition, 2nd printing). (RX 3, p. 5)

Petitioner denied any subsequent right knee injuries. Petitioner testified that he continues to experience pain and swelling in his right knee. He gets out of his squad car to stretch his knee. Petitioner testified that he uses ice on his knee and elevates it at home.. Petitioner testified he takes Advil or Tylenol as well. Petitioner did not testify to having any issues involving his right ankle.

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)

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

The Arbitrator finds that Petitioner sustained an additional tear of the lateral meniscus as a result of his work injury. The Arbitrator bases this conclusion on the credible testimony of Petitioner, the pre-accident operative findings (RX 1), the operative report in the instant accident (PX 3), and Dr. Levin's opinions. (RX 3) Dr. Goldstein performed chondroplasties on various areas of arthritis in the right knee in October 2016, that were clearly noted in his prior operative report. There is no discussion as to how, of even if, these areas were aggravated by the instant accident. The Arbitrator is persuaded by the comment in Dr. Levin's report that

Petitioner's underlying degenerative arthritis will be chronic in nature and would be present irrespective of the subject work accident. (RX 3, p. 4)

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 Petitioner presented bills from OSS totaling $4,046.43 (pre fee schedule). (PX 4) The Respondent represented that the bills were being processed. The Arbitrator awards these bills, to be paid directly to the provider pursuant to fee schedule. Respondent is given a credit for payment of these bills, assuming they are paid as represented. In any case, Respondent is to hold Petitioner safe and harmless from payment of said bills.

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

The accident occurred after September 1, 2011. Therefore, the five factors for determining Permanent Partial Disability set forth in §8.1b(b) shall be applied in determining PPD. The five factors to determine Permanent Partial Disability are: 1) AMA Impairment Rating; 2) Occupation of the injured employee; 3) Age of the employee at the time of the injury; 4) Employee's future earning capacity; and 5) Evidence of disability corroborated by the treating medical records. No one factor shall be controlling, but a written explanation is required if an award is greater than the AMA Impairment Rating 820 ILCS 305/8.1b(b).

It is the claimant's burden to prove all aspects of his claim for benefits. This includes entitlement to Permanent Partial disability.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 2% of the lower extremity, or 1% whole person impairment as determined by Dr. Mark Levin, pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. (Rx 3) 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 subjective complaints consistent with Petitioner's exam and underlying arthritic condition. Because of this finding, the Arbitrator therefore gives *greater* weight to 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 police officer 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 is able to perform the regular duties of a police officer. Because of this finding, the Arbitrator therefore gives *greater* weight to this factor in determining PPD.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 41 years old at the time of the accident. Petitioner is neither very old, nor very young, but he likely will have a long work life ahead of him during which he will experience the effects of the injury. Because of finding, the Arbitrator therefore gives *moderate* weight to this factor in determining PPD.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner continues to work for Respondent full duty as a police officer, There does not appear to have been any effect on his earning capacity as a result of the injury sustained. Because of this finding, the Arbitrator gives *appropriate* weight to this factor in determining PPD.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator considers Petitioner's testimony and the records of OSS set forth above. Because of the good result noted at Petitioner's last treatment date of June 15, 2016, the Arbitrator therefore gives *great* weight to this factor in determining PPD.

Based upon due consideration of the above factors, and the Record taken as a whole, the Arbitrator finds that as a result of the injury sustained, Petitioner suffered permanent partial disability to the extent of 30% loss of use of the right leg (64.5 weeks of PPD compensation), pursuant to §8(e)(12) of the Act. Respondent is given credit for the prior 20% loss of the right leg award/settlement in 99 WC 48781 (40 weeks of PPD compensation), leaving a net award to Petitioner of additional 10% loss of use of the right leg (24.5 weeks of PPD compensation), pursuant to §8(e)(17) of the Act. See: Diyan McBride v. S.O.I., 09 IWCC 914

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC024787
Case Name	BURWELL, ALMA v. WALGREEN'S
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0505
Number of Pages of Decision	14
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Michael Karr

DATE FILED: 10/6/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alma Burwell,

Petitioner,

vs. No. 19 WC 24787

Walgreen's,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission notes the last pre-arbitration medical record from Dr. Gornet is dated July 20, 2020. Dr. Gornet discussed recent CT discogram findings[1] and recommended fusion surgery at L5-S1. His note further states: "We have also initiated MRI spectroscopy L3 to S1." Dr. Gornet testified by evidence deposition on August 10, 2020, three days before the arbitration hearing. He did not know whether the MRI spectroscopy had been performed. There are no MRI spectroscopy medical records or bills in evidence.

[1] Petitioner had already undergone an MRI ordered by Dr. Gornet.

The Commission modifies the award of prospective medical care to state that Respondent shall authorize and pay for the treatment recommended by Dr. Gornet, including but not limited to a single-level disc fusion, but excluding an MRI spectroscopy as not medically necessary because the diagnosis and surgical recommendation have already occurred.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 21, 2020, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $461.95 per week for a period of 54 3/7 weeks, from July 30, 2019 through August 13, 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, medical benefits or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay related medical bills in evidence pursuant to §§8(a) and 8.2 of the Act and subject to a credit and hold harmless.

IT IS FURTHER ORDERED BY THE COMMISSION that the MRI spectroscopy is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide prospective medical care in the form of the surgery recommended by Dr. Gornet and the treatment incidental thereto, pursuant to §§8(a) and 8.2 of the Act.

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

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

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

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

October 6, 2021

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

SJM/sk
o-08/18/2021
44

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

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

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

BURWELL, ALMA
Employee/Petitioner

Case# **19WC024787**

WALGREEN'S DISTRIBUTION CENTER
Employer/Respondent

On 10/21/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

0180 EVANS & DIXON LLC
MICHAEL A KARR
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

STATE OF ILLINOIS)
)SS.
COUNTY OF 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)

ALMA BURWELL
Employee/Petitioner

v.

WALGREENS DISTRIBUTION CENTER
Employer/Respondent

Case # 19 WC 24787

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 **August 13, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

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

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

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

F. [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, **July 3, 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 **$23,559.41**; the average weekly wage was **$692.92**.

On the date of accident, Petitioner was **50** 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 **$11,258.30** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$11,258.30**.

Respondent is entitled to a credit of **any benefits paid** under Section 8(j) of the Act. Respondent shall receive credit for **$3,066.56** in medical expenses paid.

ORDER

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

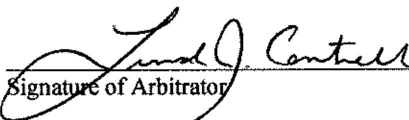
Respondent shall authorize and pay for the treatment recommended by Dr. Matthew Gornet, including, but not limited to, a single-level disc fusion.

Respondent shall pay Petitioner temporary total disability benefits of **$461.95**/week for a further period of **54-3/7** weeks for the period 7/30/19, when she was taken off work by Dr. Don Kovalsky, through the date of arbitration, August 13, 2020, as provided in Section 8(b) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for 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

10/19/20
Date

ICArbDec19(b)

OCT 2 1 2020

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

ALMA BURWELL,)
)
Employee/Petitioner,)
)
v.) Case No.: 19-WC-24787
)
WALGREENS DISTRIBUTION CENTER,)
)
Employer/Respondent.)

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on August 13, 2020, pursuant to Section 19(b) of the Act. The issues in dispute are causal connection, medical expenses, temporary total disability benefits, and prospective medical care. All other issues have been stipulated.

TESTIMONY

Petitioner was 50 years old, married, with no dependent children at the time of the accident. Petitioner is employed at Respondent's Walgreen's Distribution Center Facility in Mt. Vernon, Illinois. She has worked there for five years as a split case picker. The parties stipulated that Petitioner sustained accidental injuries on July 3, 2019. Petitioner testified she was picking up a tote to put on a conveyor belt when she heard a pop and felt pain shoot through her back and down her right leg. She could not walk on her right leg and had to "drag it" to report the incident to her supervisor. She left work and went immediately to Good Samaritan Hospital.

Petitioner testified that prior to July 3, 2019 she had no claims, symptoms, treatment, or diagnostic studies for her low back. Petitioner was provided pain medication in the emergency room and told to follow up with an orthopedic clinic. She testified it took a while to get an orthopedic consultation and they recommended an MRI which was not done. She was examined by Dr. Matthew Gornet who performed injections and ordered physical therapy, which temporarily alleviated her symptoms. She attempted home exercises that made her back pain worse. Dr. Gornet ordered an MRI, CT Scan, and discogram.

Petitioner testified she has stabbing and pulsating pain in her back and she has difficulty walking at times. Standing or sitting for extended periods of time makes her pain worse. She

testified she wants to undergo back surgery as recommended by Dr. Gornet. She is not able to exercise but has lost ten pounds per Dr. Gornet's orders to lose weight.

On cross-examination, Petitioner testified she has smoked cigarettes for fifteen years and currently smokes one-half pack per day. She did not receive treatment between 7/3/19 and 7/30/19 when she was examined in Dr. Kovalsky's office. Petitioner reported to Dr. Kovalsky she was taking Lyrica for her neck for two to three months prescribed by the Orthopedic Center. She testified she had issues with her neck for approximately six months prior to 7/3/19 but she did not miss work due to the condition. On 7/22/19, Petitioner was treated by Dr. Ahn at the Orthopedic Center of Southern Illinois for her right elbow. This appointment was scheduled prior to her 7/3/19 accident. Petitioner testified she told Dr. Ahn about her back and right leg at that appointment but he did not provide any treatment with regard to these body parts.

She testified she babysat her grandchildren, ages 2, 6, and 7, every other weekend in September, 2019 with the assistance of her husband and mother-in-law. She does not currently babysit her grandchildren. She testified she did not recall reporting to her physical therapist that on 10/10/19 her back was sore due to her grandchild accidently hitting her with a door. She testified she received approximately one week of relief from the lumbar injections administered by Dr. Gornet. She testified she received radiofrequency ablations and medial branch nerve blocks that made her symptoms worse and her leg locked up. She does not use any assistive devices. She testified that the discogram caused excruciating pain.

MEDICAL HISTORY

Petitioner reported a consistent history of her accident in the emergency room and complained of back pain worse with movement and palpation. It was noted that the pain was radiating down her right leg. There was also a history of bloody loose stools with generalized abdominal cramping. She was initially seen at Respondent's clinic and was referred to the emergency room to rule out a possible abdominal aortic aneurism. Abdominal examination in the emergency room showed a normal abdominal appearance with normal bowel sounds, and only generalized tenderness. The rectal examination showed guaiac positive stool and tenderness throughout the cervical, thoracic, and lumbar spine. X-rays of Petitioner's abdomen were normal. A CT scan of her abdomen and pelvis was taken that revealed no gross acute abnormalities, with scattered loops of fluid-filled small bowel that may be associated with inflammatory or infectious enteritis.

Petitioner was discharged with regard to her abdomen with a diagnosis of generalized abdominal pain and gastrointestinal hemorrhage, and she was referred to follow up with a physician. There is no record of Petitioner being taken off work.

Petitioner reported to Dr. Don Kovalsky's office on 7/30/19. He took the history of the injury and noted Petitioner had a sudden onset of sharp pain in her back and right leg pain causing her leg to lock. She reported she had to drag her leg at that time. Petitioner was experiencing pain,

numbness, and tingling down her leg into her toes. Examination showed tenderness to the midline of the lumbar region. Range of motion maneuvers produced increased axial back pain along with positive orthopedic tests including positive straight leg raising and Patrick's test. Dr. Kovalsky took x-rays that revealed mild disc degeneration at L5-S1 and mild facet arthritis throughout the lumbar spine. He recommended an MRI, took Petitioner off work, and prescribed medication.

The MRI was not completed and on 8/9/19 Petitioner saw Dr. Matthew Gornet, a board-certified spine specialist. He took a history of the injury that indicated Petitioner was lifting an unexpectedly heavy tote and placing it on a conveyor when she felt a sharp pain in her back that travelled down her right leg. He noted that the recommended MRI was not performed. Petitioner admitted to a history of neck discomfort, but nothing to her low back. Examination was positive for decreased EHL function and ankle dorsiflexion bilaterally at L4-5 with some decreased sensation, but was otherwise normal. Because Petitioner was having difficulty walking and her records documented her dragging her leg, he recommended an emergent MRI scan. The MRI completed the same day showed no major herniation; however, a central beaking of the disc at L5-S1 was a strong suggestion of thinning of the posterior annulus.

Dr. Gornet recommended epidural injections at L5-S1, and if that did not improve Petitioner's condition, a medial branch block with rhizotomies at the same level. If that failed, he recommended a CT discogram at L4-5 and L5-S1. He also recommended physical therapy and kept Petitioner off work, but did not prescribe medication due to Petitioner's other health issues.

Petitioner received steroid injections on 11/5/19 and medial branch blocks on 12/3/19 and 1/7/20. She returned to Dr. Gornet's office on 2/6/20 and reported the steroid injection provided temporary relief, as did the radiofrequency ablations, but neither provided significant, lasting relief. Dr. Gornet believed the next step was a CT discogram at L4-5 and L5-S1.

On 11/26/19, Petitioner was examined by Dr. Daniel Kitchens pursuant to Section 12 of the Act. Dr. Kitchens noted an antalgic gait, pain with flexion and extension, discomfort with straight leg raising both seated and supine, and pain in her right hip with right-sided straight leg raising. He reviewed the medical records, including the MRI study done on 8/9/19 and disagreed with Dr. Gornet that the L5-S1 disc was abnormal. He did not have the original film of the MRI to review at that time. Dr. Kitchens opined Petitioner had a lumbar strain which resulted in low back, right buttock, and leg pain, and that the pain in her right buttock and right leg were referred type pain from her strain. Dr. Kitchens gave no reason as to why seeing a spine specialist for complaints of low back, right buttock, and right leg pain would be inappropriate, nor was there an explanation as to why Dr. Blake's treatment was not appropriate.

Dr. Gornet recommended that Petitioner get cleared by her family physician to see whether she could receive invasive treatment but hoped she could be managed conservatively rather than operatively. If Petitioner could obtain medical clearance, Dr. Gornet again recommended a CT discogram at L4-5 and L5-S1.

Phone conversations of 3/3/20 and 5/27/20 showed Petitioner was still having significant low back pain which was affecting her quality of life. She received medical clearance to schedule a CT discogram that was performed on 6/9/20. The discogram revealed a completely normal L4-5; however, level L5-S1 was provocative with evidence of a posterior annular tear and slight degeneration. On 6/11/20, Petitioner called Dr. Gornet's PA, Nathan Collins, where he advised her to stop taking Hydrocodone due to unfavorable reactions. Petitioner returned to Dr. Gornet's office on 7/20/20 at which time he recommended a one-level fusion at L5-S1.

Dr. Kitchens testified by way of evidence deposition on 2/19/20. His testimony was consistent with his Section 12 report dated 11/26/19. Dr. Kitchens noted ongoing symptoms of back pain and radicular pain into Petitioner's right leg and diagnosed a lumbar strain, which did not require additional medical treatment. Dr. Kitchens testified that epidural injections were not a recommended treatment for a lumbar strain. He believed that if Petitioner tried and failed to improve with physical therapy, medication, and rest there was still a quest for an accurate diagnosis. He did not know of any additional testing that could be done to look for a more accurate diagnosis. He recommended against a discogram, because he found it to be unreliable due to it being subjective, painful, invasive, and lacking in utility. He also opined that the test was not reliable, because it was dependent upon the subjectivity of the tester, despite the fact that there was a control level performed in Petitioner's discogram.

Dr. Kitchens acknowledged that lifting heavy objects can cause a disc injury and that Petitioner gave a consistent history reflected in all the medical records he reviewed. He admitted there were no records documenting low back pain that predated Petitioner's injury. On his first visit, he confirmed that he reviewed only the radiologist's report and not the actual film. He testified that he agreed with the report, which included a central protrusion at L5-S1 and findings that may represent an annular tear. Those findings, he acknowledged, could certainly cause symptoms in a patient's low back. He did not review any of the notes of Dr. Blake and was not aware of whether Petitioner gained any benefit from her care. He reviewed the records of Dr. Kovalsky which showed a consistent history and persistent radicular pain.

Dr. Kitchens believed that strain injuries resolve in about six to eight weeks; however, Petitioner was still symptomatic nearly five months post-injury when he examined her. He acknowledged that her clinical course was inconsistent with a strain injury. He testified that Petitioner had reached maximum medical improvement six to eight weeks after the injury, although she was still reporting pain in her low back and right leg which she never had prior to the accident. He also acknowledged that Dr. Kovalsky's office was in the process of ordering an MRI at the time he claimed Petitioner reached maximum medical improvement.

Lastly, Dr. Kitchens testified that he had no knowledge of whether Petitioner had returned to work since July of 2019. He reviewed none of Dr. Gornet's notes subsequent to 8/9/19 and was shown records and the actual films right before his deposition. He opined that Petitioner's accident

had nothing to do with her current complaints despite the fact there was no other history of injury and he did not review any other medical records documenting any prior pathology or complaints.

Dr. Gornet testified by way of evidence deposition on 8/10/20. Dr. Gornet reviewed Petitioner's prior medical records and noted the history of the injury. He testified that the history of injury was consistent with a disc injury or aggravation of a preexisting condition. He testified to his objective findings of decreased EHL ankle dorsiflexion bilaterally and decreased sensation in the L5 dermatome on the right. He personally reviewed the MRI scan, which he noted showed a beaking of the disc at L5-S1 consistent with a disc injury and thinning of the posterior annulus. His working diagnosis was disc injury at L5-S1 with aggravation of some preexisting facet arthropathy. His recommendation for treatment was an epidural steroid injection at L5-S1 centrally, and then if Petitioner did not improve, medial branch blocks and facet rhizotomies. He believed that Petitioner's injury at work was the cause of her condition based on the history, mechanism of injury, objective clinical examination, and diagnostic studies. Like Dr. Kovalsky, he believed that Petitioner should be off work.

Dr. Gornet testified that when he saw Petitioner on 2/6/20 she reported no lasting improvement from the epidural injections, branch blocks, and rhizotomies. He had to wait for medical clearance to perform the CT discogram because Petitioner was taking anticoagulation medication. He did not see her in clinic due to Covid-19. Dr. Gornet testified that the discogram was done on 6/9/20 that revealed a normal disc at L4-5 used as a control disc, and a central tear at L5-S1 with facet changes and concordant pain. He testified that a spinal fusion was appropriate given the structural issues at L5-S1 and Petitioner's facet and disc problems. He testified he was concerned about a disc replacement procedure due to Petitioner's osteoporosis.

Dr. Gornet testified that the epidural injections were simple conservative treatment that were the standard of practice to obtain best results for his patients. He disagreed with Dr. Kitchens' diagnosis of a strain based on objective evidence. The CT discogram confirmed an annular tear only at L5-S1 and concordant back pain. Objective tests evidence a disc injury at L5-S1 and aggravation of some preexisting facet arthropathy at L5-S1. A lumbar strain has no objective basis for that diagnosis.

Dr. Gornet last saw Petitioner on 7/20/20 at which time he again recommended a single-level fusion. He disagreed with Dr. Kitchens' comments about neurologic/nerve impingement diagnoses. He opined Petitioner has a structural injury to the disc and disc mechanism, which is objectively shown, and not a neurologic compression issue.

CONCLUSIONS OF LAW

Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?
Issue (K): Is Petitioner entitled to any prospective medical care?

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

The record is clear that Petitioner was working full duty without incident prior to the undisputed accidental injury on July 3, 2019. Petitioner credibly testified that prior to that date, she suffered neither symptoms nor required treatment or diagnostic studies for her low back. Following the accident, Petitioner remained symptomatic and has yet to return to her pre-accident baseline. The objective medical evidence on both the MRI study and CT discogram shows clear evidence of injury to her L5-S1 level. The findings on these studies were further buttressed by the temporary relief Petitioner received from the injections performed by Dr. Blake. Based upon the overwhelming evidence establishing structural injury, the Arbitrator finds Dr. Gornet's opinions more persuasive than those of Dr. Kitchens with regard to causation. The Arbitrator finds the opinion of Dr. Gornet linking Petitioner's condition of ill-being to her traumatic work injury well-reasoned and credible.

An employee is entitled to medical care that is reasonably required to relieve the injured employee from the effects of the injury. 820 ILCS 305/8(a) (2011). Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13, 229 Ill.Dec. 77 (Ill. 2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001).

Based upon the chain of events, the objective medical evidence, and Petitioner's credible testimony corroborated by her treating records, the Arbitrator finds that Petitioner has met her burden of proof in establishing that her current condition of ill-being in her lumbar spine is causally connected to her work injury of July 3, 2019. The Arbitrator orders Respondent to authorize and pay for the treatment recommended by Dr. Matthew Gornet, including, but not limited to, a single-level fusion.

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?

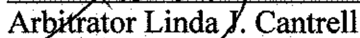
Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes 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).

Based upon the foregoing finding on the issue of causation, Petitioner is entitled to medical care. Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, contained in Petitioner's Group Exhibit 1, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

The parties stipulated that Respondent paid temporary total disability benefits for the period 7/20/19 through 1/21/20, representing 25-2/7th weeks, in the amount of $11,258.30. Respondent disputes liability for payment of additional TTD benefits based on disputed causal connection and liability for medical expenses. Based upon the above findings in favor of Petitioner, the Arbitrator finds Petitioner is entitled to 54-3/7 weeks of temporary total disability benefits at the Petitioner's temporary total disability rate of $461.95, for the period 7/30/19, when she was taken off work by Dr. Don Kovalsky, through the date of arbitration on 8/13/20.

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



Arbitrator Linda J. Cantrell

10/19/20

DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC034796
Case Name	PINI, MICHAEL v. SCF LEWIS & CLARK TERMINALS, LLC
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0506
Number of Pages of Decision	14
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	David Nelson
Respondent Attorney	James Egan

DATE FILED: 10/8/2021

/s/Christopher Harris, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL PINI,

Petitioner,

vs. NO: 18 WC 34796

SCF LEWIS AND CLARK
TERMINALS, 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 jurisdiction, employment relationship, causal connection, medical expenses, prospective medical treatment, temporary total disability (TTD), and permanent partial disability (PPD), and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 9, 2021 is hereby affirmed and adopted.

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

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

The bond requirement in Section 19(f)(2) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, no bond is set by the

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

October 8, 2021

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

CAH/tdm
O: 10/7/21
052

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

/s/*Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PINI, MICHAEL
Employee/Petitioner

Case# **18WC034796**

SCF LEWIS AND CLARK TERMINALS LLC
Employer/Respondent

On 2/9/2021, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0384 NELSON & NELSON
DAVID C NELSON
420 N HIGH ST
BELLEVILLE, IL 62222

2965 KEEFE CAMPBELL BIERY & ASSOC
JAMES F EGAN
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

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

Michael Pini
Employee/Petitioner

Case # **18-WC-34796**

v.

Consolidated cases:

SCF Lewis and Clark Terminals, 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 Linda J. Cantrell**, Arbitrator of the Commission, in the city of Collinsville, Illinois on **September 28, 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 the Longshore and Harbor Workers' Compensation Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On **September 7, 2017,** Respondent ***was not*** 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 $**87,933.56**; the average weekly wage was $**1,691.03**.

On the date of accident, Petitioner was **61** 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 $**30,116.35** for TTD, $**0** for TPD, $**0** for maintenance, and $**9,740.30 in PPD benefits paid under the LHWCA** for other benefits, for a total credit of $**39,856.65**.

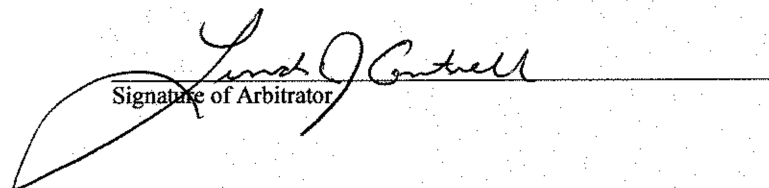
Respondent is entitled to a credit of $**N/A** under Section 8(j) of the Act.

ORDER

The Arbitrator finds Petitioner is pre-empted from pursuing benefits under the Illinois Workers' Compensation Act and this case falls under the federal jurisdiction of the Longshore and Harbor Workers' Compensation Act. Accordingly, all benefits under the Illinois Workers' Compensation Act are denied.

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

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



Signature of Arbitrator

2/4/21
Date

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FEB 9 - 2021

STATE OF ILLINOIS)) SS COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MICHAEL PINI, Employee/Petitioner,

v. Case No.: 18-WC-34796

SCF LEWIS AND CLARK TERMINALS, LLC, Employer/Respondent.

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on September 28, 2020 on all issues. The issues in dispute are whether Petitioner and Respondent were operating under the Illinois Workers' Compensation Act or the Longshore and Harbor Workers' Compensation Act, medical bills, temporary total disability benefits, and the nature and extent of Petitioner's injuries. All other issues have been stipulated.

TESTIMONY

Petitioner was 61 years old, married, with no dependent children at the time of accident. Petitioner was hired by Respondent in 1992 and held the position of Supervisor for 20 years before being promoted to Field Operation Manager on 1/1/17. His office was located at the Municipal River Terminal (MRT) located northwest of the Stan Musial Bridge. Petitioner has worked at the MRT since 2015 where barges are loaded and unloaded. Petitioner reported to Tom Butts, the Vice President of Operations, and he supervised approximately 15 employees, including, but not limited to, supervisors, warehouse leadmen, crane operators, and laborers. A Supervisor's duties, the position Petitioner previously held, included overseeing the operations of the dock, barge unloading, etc. Preston Harris was the Supervisor at the time of Petitioner's accident and Mr. Harris reported directly to Petitioner.

Petitioner testified that his job duties as a Field Operation Manager were different than a Supervisor's. As a Manager, he was in charge of bills of lading, coding accounts payable, payroll, EPA reports, and dealing with vendors, salesmen, and customers. Petitioner testified that Supervisors do not have any of these duties. Petitioner received a business card after he was promoted to Field Operation Manager that identified him as, "MRT Dock Manager". His compensation changed from hourly to salary when he was promoted to Manager. As a Manager, Petitioner worked approximately 85% of the time in his office, 10% in the warehouse, and 5%

occasional nightmares. He testified he and his wife no longer sleep in the same bed because he flails and swings when he has a nightmare and he is afraid of hurting her.

On cross-examination, Petitioner testified that he met with the dock crew in the Supervisor's office located in the warehouse. The product unloaded from the barge is loaded directly onto trucks to be taken off the property. Bills of lading are required before the trucks can leave the property. He testified it is not part of his managerial duties to stay on the dock to supervise the crew. Petitioner was trained in operating the Bobcat and he undertook to clean up the magnetite to avoid contamination of product being unloaded from the barge. Cleaning the grounds is not part of his managerial job duties and the debris was supposed to have been cleaned up the night before. Petitioner testified he has performed sweeping tasks in the past. He testified his office is located approximately 200 feet from the river. He has been able to work full time since being released at maximum medical improvement and he has not missed much work since his release. Petitioner testified it is his job to communicate with the tugboat operators to keep the barges moving quickly.

Respondent called Brice Powers to testify. Mr. Powers has been employed by Respondent for eight years and has held the position of General Manager of the terminal for three years. Mr. Powers oversees all terminal operations, including pricing, customer relations, advertising, and marketing. He is Petitioner's supervisor and is familiar with Petitioner's job duties. Mr. Powers testified that Petitioner is listed as a Field Supervisor who is in charge of overseeing all operations of the dock, crew, and inbound and outbound products. Mr. Powers testified that on the day of Petitioner's accident he was transitioning from logistics manager to general manager. Mr. Powers identified a job description for a Supervisor and testified that on 9/7/17 Petitioner performed all of those duties, in addition to other duties, including timecards and bills of lading. Mr. Powers testified that it was not usual for all employees to help out when necessary, including operating equipment. He testified that clearing the dock of debris and ordering the crew to get to work was expected of Petitioner.

Mr. Powers testified that on 9/7/17 Petitioner did not spend 85% of his day in his office doing paperwork. He testified there was time spend in the work yard on the dock and Petitioner was trained in all job duties of loading and unloading barges. He testified that the Supervisor is in charge of assuring timely loading and unloading, which he alleges was Petitioner's job. He testified that Petitioner was in charge of contacting tugboat operators to move barges in and out quickly so the customers would receive their product in a timely manner.

On cross-examination, Mr. Powers testified he is 30 years old and that the President of the company, Tim Powers, is his father. Mr. Powers testified he did his internship with Respondent and was hired following his internship. His father was the company President at that time. He testified he was not aware that Petitioner had a business card representing him as MRT Dock Manager. His understanding is that all employees are titled either Field Supervisor or Site Supervisor in the company system. He testified that a field supervisor and dock manager are the same position. He testified that Mr. Preston was a supervisor in September 2017, which is an hourly position, and he was subordinate to Petitioner. He testified that Mr. Preston is now a field supervisor and a field supervisor can be salary or paid hourly. Employees job duties do not change based on hourly or salaried pay. He testified that Petitioner was paid a salary in 2017 and

was not entitled to overtime pay. Mr. Powers testified that field supervisors do not have set schedules. Mr. Powers was the district manager in 2017 and his direct supervisor was Tom Butts, the same as Petitioner.

Mr. Powers testified that supervisors and field supervisors interacted with the EPA and do timecards. He could not recall if Mr. Preston ever dealt with the EPA. Mr. Powers worked directly with Petitioner for two weeks when he was doing his college internship with Respondent. Petitioner has worked over 20 years longer for Respondent than Mr. Powers and Mr. Powers currently holds a superior position within the company. Mr. Powers was hired by Respondent as a Business Associate and his job duties involved "learning the business". He could not recall the name of any other employee that held the position Business Associate. He testified that in 2017 he worked out of the Granite City office and did not have occasion to visit the terminal where Petitioner worked. He was not present on the day of Petitioner's accident.

Mr. Powers assumes Tom Butts gave Petitioner the title Dock Manager because he is not aware of a position with that title within the company. He has never observed Petitioner working on payroll or timecards.

MEDICAL HISTORY

On March 14, 2018, Petitioner underwent a right knee arthroscopy to repair a right medical meniscal tear performed by Dr. Michael Milne. Petitioner was released to full duty on April 17, 2018 and MMI on May 15, 2018. Dr. Milne assigned a final disability rating of 3% loss of use of the leg on June 15, 2018.

On June 25, 2018, Petitioner underwent a laminectomy at L2-3 and L3-4. On March 18, 2019, he underwent a decompression at L5-S1. Both procedures were performed by Dr. Donald DeGrange. On August 21, 2019, Dr. DeGrange released Petitioner at MMI.

CONCLUSIONS OF LAW

Issue (A): Was Respondent operating under and subject to the Illinois Workers' Compensation Act or the Longshore and Harbor Workers' Compensation Act?

Petitioner testified he worked in an office on the Municipal River Terminal (MRT). The office itself is not in a building, per se, but is in a converted container which sits on the dock itself. Petitioner's office/trailer sits approximately 200 feet from the Mississippi River. There is no separation between Petitioner's office and the dock yard.

Petitioner testified he is not a supervisor, but a dock manager, and supervises a fifteen-member crew. Petitioner testified he does not perform boat or barge repair or maintenance as those duties are not performed at the MRT facility. Petitioner testified he spent 85% of his day in his office handling paperwork, bills of lading, EPA test results, and payroll. His involvement in payroll is collecting timecards and delivering them to Respondent's Granite City office. Petitioner testified he spent 10% of his day in the warehouse and 5% driving, training, and other matters. Petitioner testified he did not share an office with anyone and had a key to his office. If

he worked in the warehouse or scale house where trucks weigh in at the facility it was to cover an absent clerk.

Petitioner testified it was important to maintain timely schedules for movement of product on and off barges, as well as movement of barges into and out of the dock. If product is not moved on schedule, it is bad for business. Petitioner also testified that along with supervising a crew he would call for barges to be moved in and out of the dock area for loading/unloading.

Respondent's General Manager, Brice Powers, testified there was no Dock Manager position and all employees were categorized as field or site supervisors. He was not aware that Petitioner had a business card that identified himself as Dock Manager for Respondent. Mr. Powers testified that all supervisors worked in the yard at times and it was not likely Petitioner spent 85% of his time in the office as Petitioner alleged. Mr. Powers refuted Petitioner's description of his job duties and testified that Petitioner was out of his office and on the dock far more than he admitted. However, Mr. Powers admitted he was generally in his own office in Granite City and not on the MRT facility. He agreed Petitioner was responsible for supervising a crew to unload and load barges. He further testified that time schedules for the loading and unloading was important for the business/commerce interests of Respondent.

On the date of loss, September 7, 2017, Petitioner testified he met with the crew in the warehouse that morning to give them their orders for the day. After the crew left, Petitioner noticed the bills of lading had been left behind in the warehouse. He testified that he jumped on the closest vehicle, which was a bobcat with a sweeper attachment, and drove across the dock to where the crew was working. After giving the bills to the crane spotter he noticed some leftover product/debris on the dock. He used the bobcat sweeper to clean the area. Petitioner testified it was important for the area to be clean to avoid cross-contamination with incoming product. After he finished cleaning up the debris, Petitioner noticed the crew supervisor and another crew member talking to a truck driver. With the intention of telling his crew to get to work, he turned the bobcat at which time the back wheel slid over the edge of the dock. The bobcat and Petitioner fell approximately 35 to 40 feet into the Mississippi River. There is no dispute that Petitioner sustained injuries to his right knee and lumbar spine resulting in multiple surgeries.

Respondent argues that jurisdiction under the Illinois Workers' Compensation Act is preempted by the Longshore and Harbor Workers' Compensation Act (LHWCA). In determining whether the LHWCA applies to a particular employee, a dual inquiry is used. First, a court must determine if the employee was working on navigable waters at the time of his injury. In Perini, the Supreme Court set forth a test to determine whether an employee is injured upon the actual navigable waters under the pre-1972 version of the LHWCA. Perini, 459 U.S. at 306-07, 103 S.Ct. at 641-42, 74 L.Ed.2d at 474. If so, and the employee establishes the remainder of the LHWCA's requirements, there is jurisdiction under federal law. If the worker was not injured on navigable water, he must meet the "situs" and "status" requirements established in the post-1972 version of the LHWCA to obtain coverage under federal law.

The LHWCA defines status as: "...the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining

area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)". 33 U.S.C §903(a)(2012).

In Expeditors & Production Service Company Incorporated v. Director, Office of Workers' Compensation Programs, United States Department of Labor, 792 Fed. Appx. 279 2019 A.M.C. 2756, The Fifth Circuit Court of Appeals held the LHWCA allows a claimant to seek benefits when the claimant is (1) a maritime employee (2) injured on a covered "situs." 33 U.S.C. §903(a). The court, citing Thibodeaux v. Grasso Prod. Mgmt. Inv., 370 F3d. 486-89 (5th Cir. 2004) further held a "terminal" is a specifically enumerated situs under Section 903 and to qualify under the LHWCA, a covered situs must bear a functional relationship to maritime commerce, further defining a functional relationship requires the situs "be used for loading, unloading, or one of the other functions specified in the LHWCA. *Id.* and Expeditors at 280.

The Fifth District Appellate Court of Illinois adopted the definitions of situs in the case of Uphold v. Illinois Workers' Compensation Commission, et al, 385 Ill.App.3d 567, finding "The 1972 amendments to the LHWCA brought about significant change by expanded the navigable waters to include "certain adjoining land areas". Uphold at 562. The amendment was to extent coverage to "any pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used…in loading, unloading, repairing, dismantling, or building a vessel." The "other adjoining areas" are analyzed by considering their functional relationship to maritime activity.

Respondent's MRT property is a terminal at which barges with various types of product are loaded and unloaded. The terminal directly borders the Mississippi River. Petitioner testified they did not repair, dismantle, paint, or build vessels at the MRT facility in an attempt to show he was not a covered employee under LHWCA. This testimony, however, mischaracterizes the primary business of the facility which is the loading and unloading of barges, not ship repair. The LHWCA identifies loading and unloading as an included situs.

The Arbitrator appreciates that Petitioner's job duties include office and clerical work; however, there is no dispute Respondent's property is a single parcel of land which operates as a marine terminal and Petitioner supervises a crew of fifteen employees that load and unload barges. For Petitioner's argument to succeed, he must argue that his office is not part of the MRT to avoid situs. His office is located on the dock itself, not separated from the water by any other building. The Arbitrator notes case law has established the test is whether the situs is within a contiguous shipbuilding area which adjoins the water. Ala. Dry Dock & Shipbuilding Co. v. Kininess, 554 F.2d 176 (5th Cir. 1977). The same analysis would apply to a free-standing container box-office on a dock or terminal, as here. The container box office is part of the contiguous barge terminal at the MRT. Therefore, the Arbitrator finds this to be a situs covered under the LHWCA.

Further, Petitioner's accident occurred while operating a vehicle on the dock which clearly adjoins the Mississippi River. Immediately prior to Petitioner's accident, he was cleaning up debris in the area in which his crew would be unloading barges and was in the process of directing his crew when the accident occurred. Accordingly, the Arbitrator finds the accident did occur on a situs which falls under the LHWCA.

Petitioner does not fall within the category of employees excluded from coverage under the LHWCA. The LHWCA exempts certain categories of employees if they are covered under the State workers' compensation statute. Those categories are:

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);
(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4) [maritime employers], and (iii) are not engaged in work normally performed by employees of that employer under this Act;
(E) Aquaculture workers;
(F) individuals employed to build any recreational vessel under sixty-five feet in length, or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel;
(G) a master or member of a crew of any vessel; or
(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net. 33 U.S.C. §902(3)(A)-(H)(2012)

The LHWCA coverage extends to any person engaged in maritime employment, including longshoremen (persons engaged in loading and unloading ships) and others engaged in longshoring activities. The status test is applied liberally and even employees who perform support jobs will qualify for coverage under the LHWCA. Even support personnel for the loading and unloading process qualify as maritime workers. Employees engaged in an integral part of the unloading process, even if their duties are performed solely on land, are deemed to engage in maritime employment.

Petitioner describes his job duties as office clerical. He testified that 85% of his time is spent in his office handling paperwork for the EPA, bills of lading, and payroll, implying he falls within paragraph (A) of the exempted employees. This belies the fact Petitioner supervised a crew of fifteen, all of whom reported to him and are required to load and unload barges on a tight schedule to maintain the business schedule of Respondent. Petitioner's job duties also include scheduling tugboats to bring barges in for unloading and taking barges away from the dock in order to maintain a timely schedule. Respondent's general manager testified that all employees are expected to perform any task they are qualified to perform at the terminal when it is necessary. Petitioner did in fact operate a bobcat on the day of his accident, used the attached sweeper to clean up debris on the dock, and supervised his crew to assure work was being performed in a timely manner.

Therefore, the Arbitrator finds Petitioner did not exclusively perform office clerical, secretarial, or data processing work, and is not an employee exempted from the LHWCA.

The Supreme Court created the concept of "twilight zone" under which cases that are "doubtful" would fall and over which federal and state courts could exercise concurrent jurisdiction. Davis v Department of Labor & Industries of Washington, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed 246 (1942). The Illinois Appellate Court has held the doctrine of twilight zone jurisdiction does not apply to employees who are engaged in traditional maritime employment and are injured over navigable waters. Wells v. Industrial Commission, 227Ill.App.3d 379, 214 Ill.Dec. 38, 660 N.E.2d 229 (1995). "Engaged in maritime employment" is defined to include any longshoreman or other person engaged in longshoring activities.

As noted above, at the time of the accident, Petitioner was on the terminal dock, engaging in a clean-up operation and supervising his crew. Situs has been established as Petitioner was working on the terminal dock at the time of his accident. The Arbitrator agrees with Respondent that supervising a crew and performing clean-up at the site of unloading a barge is traditional maritime employment. This claim does not fall within the "twilight zone" because this is not a "doubtful" case with difficult factual questions and jurisdiction under the LHWCA is exclusive.

The Arbitrator is not persuaded by Petitioner's claim he falls within the maritime-but-local sphere because he is not a longshoreman and does not engage in the duties of a longshoreman. The Supreme Court has held a claimant can proceed under State law because neither his general employment nor his duties at the time of his injury had any direct relation to navigation or commerce and, therefore, application of state law could not materially affect the uniformity of maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. Grant Smith-Porter Ship Co. v. Rohde, 257 469, 42 S.Ct. 157, 66 L.Ed. 321 (1921). In Wells, the Illinois Appellate Court held, "if the employment of an injured worker was determined to have no direct relation to navigation or commerce, and the application of local law would not materially affect the uniformity of maritime law, then the employment would be characterized as maritime-but-local, and the State could provide a compensation remedy. Wells, 277 Ill.Ap 3d at 382, citing Director, Office of Workers' Compensation Programs, Department of Labor v. Perini North River Associates, 459 U.S. 297.

The Arbitrator notes Petitioner's job duties required him to supervise a crew in loading and unloading barges of product. He communicated with tugboat operators on a daily basis to keep the loading and unloading process moving. Part of Petitioner's supervisory job duties included handling bills of lading which were necessary to move product off the dock and into the stream of commerce. It is difficult to believe, with a crew of fifteen employees and the pressure of staying on schedule, that Petitioner was rarely on the dock or in the field supervising progress. While the Arbitrator appreciates Petitioner had office responsibilities, he was not an office worker who happened to be on the dock by chance and it would be disingenuous to say he was in the office 85% of his day.

It is clear that Petitioner's job duties had a direct relation to navigation and commerce. Accordingly, the Arbitrator finds the maritime-but-local doctrine also does not apply in this case.

Petitioner argues that strict adherence to LHWCA jurisdiction would leave him without a remedy and argues the twilight zone and maritime-but-local doctrines are designed to avoid claims in which a claimant has to guess where to file a case. Petitioner argues these doctrines

were designed so injured workers on the land side would not be left without a remedy. For the reasons stated above, the Arbitrator finds that neither of these doctrines apply to the present case. Further, Petitioner has received extensive temporary total disability and permanency benefits under the LHWCA.

Based on the above facts and evidence, the Arbitrator finds Petitioner is pre-empted from pursuing benefits under the Illinois Workers' Compensation Act and this case falls under the federal jurisdiction of the Longshore and Harbor Workers' Compensation Act.

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?

Having found that Petitioner is pre-empted from pursuing benefits under the Illinois Workers' Compensation Act and this case falls under the federal jurisdiction of the Longshore and Harbor Workers' Compensation Act, medical benefits are denied.

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

Having found that Petitioner is pre-empted from pursuing benefits under the Illinois Workers' Compensation Act and this case falls under the federal jurisdiction of the Longshore and Harbor Workers' Compensation Act, temporary benefits are denied.

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

Having found that Petitioner is pre-empted from pursuing benefits under the Illinois Workers' Compensation Act and this case falls under the federal jurisdiction of the Longshore and Harbor Workers' Compensation Act, permanent disability benefits are denied.

Arbitrator Linda J. Cantrell

2/4/21
DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC011909
Case Name	PATTERSON, JEFFREY v. DUQUOIN IIP
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0507
Number of Pages of Decision	22
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Kenton Owens

DATE FILED: 10/8/2021

/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

Jeffrey Patterson,

Petitioner,

vs. NO: 18 WC 11909

State of Illinois,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 7, 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.

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.

October 8, 2021

MP:yl
o 10/7/21
68

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CORRECTED

21IWCC0507

PATTERSON, JEFFREY
Employee/Petitioner

Case# **18WC011909**

STATE OF ILLINOIS
Employer/Respondent

On 5/7/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

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

0558 ASSISTANT ATTORNEY GENERAL
KENTON OWEN
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
801 S 7TH ST
SPRINGFIELD, IL 62794-9208

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

MAY -7 2020

Brendan O'Rourke, Assistent 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
CORRECTED ARBITRATION DECISION

JEFFREY PATTERSON
Employee/Petitioner

v.

STATE OF ILLINOIS
Employer/Respondent

Case # **18** WC **11909**

Consolidated cases: D/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 **Michael Nowak**, Arbitrator of the Commission, in the city of **Herrin**, on **December 18, 2019**. Due to Arbitrator Nowak's illness, the Commission reassigned the case to Arbitrator Mason in April 2020 for the purpose of reviewing the evidence and issuing a decision. 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 **intervening accident**

FINDINGS

On **April 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 **$60,000.20**; the average weekly wage was **$1,153.85**.

On the date of accident, Petitioner was **51** 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 $**any benefits paid** under Section 8(j) of the Act.

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's group exhibit 1, as provided in § 8(a) and § 8.2 of the Act.

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

Respondent shall pay Petitioner permanent partial disability benefits of **$692.31**/week for **47.5** weeks, because the injuries sustained caused the **12.5%** loss of the **right and left hands**, as provided in § 8(e)(9) 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

4/28/20 (corrected 5/7/20)
Date

MAY 7 - 2020

PROCEDURAL HISTORY

Arbitrator Nowak conducted a hearing in this case on December 18, 2019. Due to Arbitrator Nowak's illness, the Commission assigned the case to Arbitrator Mason in April 2020 for the purpose of reviewing the transcript and exhibits and issuing a decision.

ARBITRATOR'S FINDINGS OF FACT

Petitioner filed an Application for Adjustment of Claim alleging a repetitive trauma injury arising out of and in the course of his employment with Respondent. Specifically, the Application alleged an accident/manifestation date of April 4, 2018 and injuries to both hands and wrists secondary to repetitive duties. (Arbitrator's Exhibit 2). At trial, Petitioner sought an award of medical expenses as well as permanent partial disability. Respondent disputed liability on the basis of employer/employee relationship, accident, notice, and causal relationship. (Arbitrator's Exhibit 1).

Petitioner currently works for Southern Illinois Health Care [SIH] and has been employed there since May of 2017. (T.12). He testified his job duties include driving a shuttle around in a parking lot. (T.12). He agreed these duties require intermittent hand manipulation but explained he is not typically required to perform intermittent lifting and carrying up to twenty (20) pounds. (T.44-45). On occasion, he might have to pick up a cane or walker for a passenger. (T.45, 60). He stated that the hand activities at Respondent's institutions were "no comparison" to those he performs at SIH, and the job duties performed at the corrections facilities were significantly more intense. (T.61).

Petitioner began his employment with Respondent, the State of Illinois, on November 8, 1985, when he was hired as a correctional officer at Menard Correctional Center. (T.13). He held this position until December of 1993, at which point he transferred to Shawnee Correctional Center, where he also worked as a correctional officer for four (4) years. (T.13). At Shawnee Correctional Center, he worked in security, custody and control. (T.13-14). After four (4) years, he transferred to IYC Murphysboro, where he worked as a Youth Supervisor II for twelve (12) years. (T.14). He then transferred to Southern Illinois Glass House, which is the work release program located in Carbondale [this was also described as Southern Illinois Adult Transition Center]. (T.14). At that facility, Petitioner worked in transport of security, custody and control of inmates, and transported them to and from work sites. (T.14-15).

Petitioner retired from the State on June 1, 2016, at which point he was working at DuQuoin Impact Incarceration Program, where he was a Supply Supervisor II. (T. 15).

Petitioner prepared a written job description, which was admitted into evidence without objection (PX9). The description detailed repetitive and strenuous activities with the upper extremities including lifting and moving inmates' personal property and bedding. (PX9). Petitioner described lifting fifty (50) pounds on a daily basis during "shakedowns" in which officers looked for weapons, homemade intoxicants and drugs. (PX9). Petitioner also described carrying bread racks filled with Styrofoam food trays which were full of food and milk crates while the facility was on lockdown. Petitioner estimated that these weighed between 25 and 40

pounds. (PX9). Petitioner also unlocked shipments of cases of food, clothing, and shoes on a daily basis. The cases weighed between 30 to 60 pounds. He also described pushing hand trucks and dollies, as well as cell doors which weighed anywhere from 60 to 200 pounds. (PX9). Petitioner also turned cell keys and grasped cell doors to open and close them approximately 100 times per day. (PX9). He also used his hands for writing reports and keyboarding on a daily basis. (PX11). He also used his hands to drive and transfer inmates to court and various work assignments. (PX9).

Petitioner also submitted a Work History Timeline into evidence without objection. In this document, he described the work he performed at various correctional institutions with Respondent. The Arbitrator notes that this document comports with Petitioner's testimony at the time of trial. (PX9). Specifically, at both Menard Correctional Center and Shawnee Correctional Center, Petitioner described working as a correctional officer and performing tasks such as turning of keys to open and close cell doors approximately 150-200 times per day, rapping bars on a daily basis, carrying food trays and full milk crates up stairs to feed inmates when the facility is on lockdown, sweeping galleries and picking up trash, hand writing reports on a daily basis, as well as performing inventory and moving inmates' property when they are placed in disciplinary. (PX9). As a Youth Supervisor II at IYC Murphysboro, Petitioner turned keys to open and close doors and gates, keyboarded to enter vehicle information, ordered repairs of vehicles, engaged in physical training with the youth in boot camp and participated in climbing walls and obstacle courses. (PX9).

The document reflects that, at the Southern Illinois Adult Transition Center, Petitioner turned keys to open and close doors, changed tires and performed routine preventative maintenance on vehicles, performed minor repairs and keyboarded to enter counts, answer e-mails and enter audit reports. (PX9).

The document further reflects that, at both Pinckneyville Correctional Center and DuQuoin Impact Incarceration Program, Petitioner worked as a Supply Supervisor. His duties included turning keys, handling cases of food, clothing and shoes to unload trucks, stocking shelves and inventory and performing keyboarding to enter call passes, orders, receipts for delivery and disciplinary reports. (PX11).

Petitioner also reviewed Respondent's DVD depicting the duties of a Correctional Officer at Menard. (T.37) Petitioner testified that the DVD, Job Site Analysis (Petitioner Exhibit 11) and Post Description (Petitioner's Exhibit 15) were accurate representations of correctional officers' work at Menard. (T.16-17). Petitioner likewise confirmed that the Job Site Analysis for Shawnee Correctional Center (Petitioner's Exhibit 16), the video depicting the job duties of a correctional officer at Shawnee Correctional Center (Petitioner's Exhibit 17), and Post Description (Petitioner's Exhibit 20) were accurate depictions of the work at that facility. (T.17). He also confirmed that the Position Description for Southern Illinois Adult Transition Center was accurate. (T.18).

On cross-examination, Petitioner testified that the job duties of a supply supervisor were as hand and arm intensive as those of a correctional officer at Menard, and that he had to use Folger Adams keys at both Menard and as a supply supervisor at DuQuoin. (T.55-56). He testified that he performed activities of bar rapping, using Folger Adams keys to let inmates out,

and dealing with stuck doors at Menard, Shawnee, and IYC Murphysboro work release center. (T.56-57). At Shawnee Correctional Center, he used a regular sized door key but still had to pull open a hinged full-sized steel door. (T.57). He agreed that the doors at Shawnee Correctional Center work better than at Menard, as it is a newer facility. (T.57-58). He confirmed that he did not use Folger Adams keys at Southern Illinois Adult Transition Center, or the Glass House. (T.58). His job at the Glass House was that of a transport driver. (T.58).

In the course of performing the aforementioned job duties, Petitioner began to develop symptoms of numbness and tingling in both hands. He testified these symptoms began with his work as a supply supervisor at Pinckneyville Correctional Center and DuQuoin Impact Incarceration Program. (T.18). He testified that activities such as keyboarding, computer use, lifting, stocking of supplies, and loading/unloading trucks aggravated and caused his symptoms. (T.19). Petitioner testified that, while inmates were available to help with some of these activities, the supplies had to be physically checked in by a supply supervisor. (T.19). Petitioner also described working in the commissary. His duties there involved scanning in merchandise that inmates were purchasing. (T.20). Petitioner likened this to working as a cashier in a grocery store. (T.20). Petitioner testified he began to notice pain and numbness in his wrists and fingers during his workday. (T.20).

While Petitioner testified that his symptoms began approximately fifteen (15) years ago, he just worked through his symptoms, and did not seek any medical treatment before he retired. (T.21-22). His symptoms did not resolve upon retirement, and he noticed tingling and numbness in his hands while he slept or while using his hands. (T.24). He was hopeful that his symptoms would improve with retirement, but when they did not, he ultimately sought medical treatment with his primary care physician, Dr. Clare Fadden. (T.24).

Petitioner presented to Dr. Fadden on September 26, 2017. (T.24) The doctor noted a complaint of "bilateral carpal tunnel pain." She did not otherwise describe Petitioner's symptoms. She recommended that Petitioner undergo EMG/NCV testing. (PX3).

Dr. Glennon performed a bilateral upper extremity EMG and nerve conduction studies on October 26, 2017. He described the results as consistent with mild or borderline bilateral median neuropathy at the wrist. (PX4, PX7).

Petitioner returned to Dr. Fadden on November 21, 2017, following the EMG/NCV. The doctor noted the results of the study. She also noted persistent hand symptoms, left worse than right. She recommended that Petitioner wear cock-up splints at night. (PX3).

Petitioner testified that Dr. Fadden referred him to Dr. Young, an orthopedic specialist. (T. 26). Prior to seeing Dr. Young, Petitioner saw Dr. Kutnik, who diagnosed severe bilateral carpal tunnel syndrome. Ultimately, Petitioner decided to treat locally with Dr. Young. (T. 26-27). Petitioner completed a notice of injury form on April 6, 2018, alleging injury on April 4, 2018, the date he saw Dr. Kutnik, which was the first time he was apprised of his medical condition by a specialist. (RX1) (T.37-38).

On April 4, 2018, Dr. Kutnik noted that Petitioner complained of bilateral hand numbness, with associated nocturnal symptoms and occasionally during the day, when he would drop objects. (PX5). He estimated his symptoms had been present for 3-4 years. Dr. Kutnik noted that Petitioner had previously worked as a corrections officer for more than thirty (30) years, and that his symptoms began during his time there in the years before he retired in 2016. (PX5). On physical examination, Dr. Kutnik noted positive Tinel's, Phalen's and Durkin's testing bilaterally. *Id.* Dr. Kutnik's impression was bilateral carpal tunnel syndrome. Although he indicated Petitioner could try nighttime splinting for the time being, ultimately, his recommendation would be surgical intervention. *Id.*

Petitioner presented to Dr. Young on June 11, 2018 with a history of bilateral hand numbness which began as the result of repetitive motion. (PX6). His symptoms were noted to be moderate, intermittent and aggravated by activities of daily living, including driving, and relieved by no specific activity. *Id.* His symptoms were also aggravated by riding a motorcycle after twenty (20) minutes. *Id.* On physical examination, Dr. Young documented a positive nerve flexion compression test bilaterally, positive Tinel's right greater than left, as well as positive Tinel's on the right at the elbow. *Id.* Dr. Young also reviewed the EMG/nerve conduction study which confirmed borderline bilateral median neuropathy at the wrist. *Id.* He assessed Petitioner as having bilateral carpal tunnel syndrome. He recommended surgical intervention in the form of carpal tunnel releases, beginning with the left side. *Id.*

Dr. Young performed a left carpal tunnel release on June 29, 2018. (PX7). Intraoperatively, Petitioner was noted to have moderate thickening of the transverse carpal ligament. *Id.* Post-operative physical therapy was prescribed. (PX6, PX8). Dr. Young performed a right carpal tunnel release on July 20, 2018. (PX7). He noted intraoperative findings of mild to moderate thickening of the transverse carpal ligament. (PX7).

At the last post-operative visit, on August 31, 2018, Dr. Young's assistant, Tim Jennings, PA-C, noted that, while the numbness and tingling had resolved, Petitioner still had some mild to moderate incisional tenderness. This was also documented on physical examination. (PX6). Jennings released Petitioner from care, indicating Petitioner could return as needed. *Id.*

Dr. Young testified by way of evidence deposition on August 13, 2019. (PX10). He is a board certified orthopedic surgeon who specializes in hand and upper extremity surgery. *Id.* at 4. He sees approximately 200 patients per week and performs 400-500 surgeries per year. He devotes 100% of his practice to treating patients. *Id.* at 6, 8. He does not perform any medical-legal work. *Id.* at 6. He estimated that approximately 10% of his practice involved treating individuals with work injuries. *Id.* at 7.

Dr. Young described various risk factors for developing carpal tunnel syndrome, which include repetitive activities which keep the wrist in either a flexed or extended position, forceful gripping, lifting, carrying, as well as pinching. *Id.* at 8-9. He also identified non-occupational risk factors for developing carpal tunnel syndrome, including obesity, diabetes, rheumatoid arthritis, low thyroid function, and smoking. *Id.* at 9.

Dr. Young confirmed that Petitioner provided him with a job description. He also reviewed Dr. Fadden's and Dr. Kutnik's records. *Id.* at 11. He testified that Petitioner reported having recently retired from the Department of Corrections. He noted that Petitioner was currently working as a shuttle driver for SIH. *Id.* Dr. Young described job duties which were consistent with Petitioner's Exhibit 9, the job description/work history timeline authored by Petitioner and received into evidence. (PX9; PX10, pp.11-17). Dr. Young also confirmed that he has treated other correctional officers for similar conditions from the facilities that Petitioner was employed at. He was aware of the job duties of correctional officers throughout the area. (PX10, p. 17-18). He also confirmed that he reviewed videos of correctional officers performing their job duties, as well as Dr. Sudekum's original report (detailing the generic duties of a correctional officer) which was offered into evidence as Petitioner's Exhibit 13, but rejected by the Arbitrator. (PX13; PX10, p. 17-18).

Dr. Young confirmed that Petitioner associated his symptoms with repetitive use. (PX10, p. 19). He agreed that most of Petitioner's job duties over the years with Respondent were repetitive. He found it significant that Petitioner related the onset or worsening of his symptoms to his job duties, because this would likely indicate that activity is contributing to the development of symptoms or pathology. *Id.* at 20. Dr. Young indicated that Petitioner had other risk factors for developing carpal tunnel syndrome, including his age, weight and motorcycle riding, but that Petitioner did not correlate his symptoms with motorcycle riding. *Id.* at 20-21.

Dr. Young testified he diagnosed Petitioner with bilateral carpal tunnel syndrome, and recommended surgical intervention. *Id.* at 21-22. He also testified that Petitioner's work at Du Quoin Impact Incarceration Program caused, contributed to and aggravated his bilateral carpal tunnel syndrome, specifically, the activities requiring a fairly large amount of forceful gripping, pinching and lifting. *Id.* Dr. Young also described the concept of a latency period, or the interval between the onset of pathology and the manifestation of symptoms. *Id.* at 22-23. He confirmed that this concept was applicable to the condition of carpal tunnel syndrome. *Id.* at 23. Dr. Young also testified that he believed Petitioner to be an honest individual, and that in his experience, the patient is in the best position to describe the onset of their symptoms and the details of their job duties. *Id.* at 27-28. Dr. Young confirmed that the job description provided by Petitioner was consistent with the history provided to him by other correctional officers, and was significant in the formulation of his opinions. *Id.* at 29.

On cross-examination, Dr. Young acknowledged that hypertension is a contributing factor to the development of carpal tunnel syndrome, as well as motorcycle riding. *Id.* at 32, 35. He testified that when a patient is removed from the activities that are causing his symptoms, oftentimes his symptoms would improve, but it depended on how long the patient had the condition and other factors. *Id.* at 39. He also acknowledged that a job which required intermittent hand manipulation and intermittent lifting and carrying up to 20 pounds could result in carpal tunnel syndrome. *Id.* at 43.

On re-direct examination, Dr. Young confirmed that per Petitioner's report, his symptoms began while he was employed with Respondent at DuQuoin Impact Incarceration Program, and that his symptoms began from repetitive motion at this job. *Id.* at 44-45. He also confirmed that Petitioner's work as a supply supervisor could cause symptoms even after he left that

employment. *Id.* at 48. He also confirmed that he believed Petitioner's symptoms were the same in 2018 as when he retired from DuQuoin in 2016. *Id.* at 50. Lastly, Dr. Young again testified that Petitioner's work activities at DuQuoin, as well as Pinckneyville Correctional Center, Southern Illinois Adult Transition Center, Shawnee Correctional Center and Menard Correctional Center contributed to the development of his bilateral carpal tunnel syndrome. *Id.* at 51.

Respondent did not present a contrary opinion pursuant to Section 12 of the Act.

Petitioner testified he rides a motorcycle several times a month. He estimated he rides approximately 400 miles per year. (T.28). Since he is now retired, he fishes as often as possible, and bow hunts. (T.29). He does not suffer from diabetes, gout, hypothyroidism or rheumatoid arthritis. He is 5 feet, 9 inches tall and has maintained a weight of 220 pounds for quite some time. (T.30). Petitioner disagreed that he had been diagnosed with hypertension and indicated he had not been placed on medication for same. (T.52). He confirmed that he purchased wrist splints approximately four to five (4-5) years ago but did not believe anyone prescribed them for him. (T.52-53).

Petitioner testified that the surgery performed by Dr. Young helped improve his symptoms. Following the surgery, he participated in formal occupational therapy and performed prescribed home exercises to increase his flexibility. (T.31). He still performs the exercises on a daily basis. *Id.* He still experiences numbness and tingling in his hands while riding his motorcycle. (T.47).

ARBITRATOR'S CREDIBILITY ASSESSMENT

The Arbitrator authoring this decision did not participate in the hearing and thus did not have a chance to observe Petitioner.

Petitioner's very lengthy tenure with Respondent weighs in his favor, credibility-wise. On paper, Petitioner came across as a hard-working, honest individual. The Arbitrator noted only one inconsistency between his testimony and his medical records. At the hearing, he denied having hypertension (T. 51-52), although Dr. Fadden refers to this condition in her office notes. In the Arbitrator's view, this inconsistency does not undermine Petitioner's overall believability.

ARBITRATOR'S CONCLUSIONS OF LAW

Issue (B): Was there an employee-employer relationship?

Respondent disputes the existence of an employer/employee relationship on the basis that Petitioner's injuries manifested after his retirement from Respondent. However, Petitioner's claim of bilateral hand symptoms is based on repetitive trauma theory and not a single defined traumatic event. The Courts and this Commission have routinely held that a repetitive trauma injury can manifest itself after the termination of employment. *White v. Workers' Compensation Commission*, 873 N.E.2d 388, 392-393 (4th Dist. 2007); *A.C. & S. v. Industrial Commission*, 710 N.E.2d 837, 841-842 (1st Dist. 1999). Courts have explained: "The modern rule allows

compensation even when an injury occurs at a time and place remote from the employment if its cause is something that occurs entirely within the time and place limits of employment." *A.C.& S*, 710 N.E. at 840.

The Arbitrator finds this case to be analogous to the case of *Pasquino v. State of Illinois/Menard Correctional Ctr.*, 12 I.W.C.C. 0809 (2012). In *Pasquino*, the claimant began experiencing tingling in her hands in 2007 but continued to work through her symptoms. *Pasquino v. SOI/Menard Corr. Ctr.*, 12 I.W.C.C. 0809 (2012). She went on personal leave in August of 2008, but did not seek medical treatment because she thought her symptoms would improve. *Id.* In May 2010, twenty-two (22) months after leaving employment with the respondent, Petitioner sought medical treatment for her hand symptoms. *Id.* In awarding compensation, the Commission found the claimant's carpal tunnel syndrome compensable even though the manifestation date of her condition was past the period of employment. *Id.*

Likewise, in the instant case, Petitioner retired from his employment with Respondent on June 1, 2016, sought medical care and treatment for his complaints on September 26, 2017, and underwent a nerve conduction study on October 26, 2017. He ultimately filed a claim alleging a manifestation date of April 4, 2018, the first date a specialist diagnosed his condition and linked it to his employment. The period between Petitioner's retirement and his initial treatment is fifteen (15) months, which is less than the period involved in *Pasquino*.

The Arbitrator also relies upon the case of *Anthony Ramos v. State of Illinois/Menard Correctional Center*, 12 IWCC 0224 (2012). In that case, the claimant was also a State employee who worked at Menard Correctional Center from 1984 until December of 2009, when he retired. The claimant alleged a manifestation date after his retirement, July 7, 2010. In determining that an employer-employee relationship did exist on the alleged date of accident, which occurred after claimant had retired and on the date that the claimant sought medical treatment, the Commission reversed the finding of the Arbitrator and noted that "the accident date in repetitive trauma cases turns on whether certain facts would have become plainly apparent to a reasonable person, and such awareness can arise for the first time after termination of employment." *Ramos*, 12 IWCC 0224 (2012), quoting *White v. Workers' Comp. Comm'n*, 873 N.E.2d 388, 393 (4th Dist. 2007). Further, the Commission reaffirmed the principle that when a claimant is alleging a repetitive trauma injury, the alleged date of accident is considered the manifestation date, and can be determined several ways, including the date the employee requires medical treatment or the date a reasonable person plainly recognizes the injury and its relation to work activities. *Ramos*, citing *Vasquez v. Menard Corr. Ctr.* 2010 IWCC 0826 (2010) and *Durand v. Indus. Comm'n*, 862 N.E.2d 918 (2007). *See also A C & S v. Indus. Comm'n*, 304 Ill.App.3d 875 (4th Dist. 1997) and *Pasquino v. State of Illinois/Menard Corr. Ctr.*, 12 IWCC 0809 (2012) (reiterating the principal established in *Vasquez* that a claimant's manifestation date in a repetitive trauma claim may occur after the term of employment ceases).

The Arbitrator finds the case of *Wayne Harris, Sr. v. State of Illinois/Pinckneyville Correctional Center*, 18 IWCC 0386, which is relied upon by Respondent, to be distinguishable. In that case, the claimant retired from his position in 2013, but did not seek medical treatment or file a claim until three (3) years later, in September of 2016. *Harris v. State of Illinois/Pinckneyville Correctional Center*, 18 IWCC 0386. Here, much like the claimant in

Pasquino, Petitioner sought medical treatment within fifteen (15) months after his retirement with Respondent.

Based upon the aforementioned law, the Arbitrator finds that an employer-employee relationship existed for the purposes of the instant workers' compensation claim.

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

As issues of accident and causal connection in repetitive trauma cases are often intertwined, the Arbitrator addresses these issues as one. *Edwin Doty v. State of Illinois, Big Muddy River Corr. Ctr.*, 15 IWCC 0817 (2015).

In order to better define "repetitive trauma" the Commission has stated:

> The term "repetitive trauma" should not be measured by the frequency and duration of a single work activity, but by the totality of work activity that requires a specific movement that is associated with the development of a condition. Thus, the variance in job duties is not as important as the specific force, flexion and vibratory movements requisite in Petitioner's job. *Craig Briley v. Pinckneyville Corr. Ctr.*, 13 I.W.C.C. 0519 (2013).

"[I]n no way can quantitative proof be held as the *sine qua non* of a repetitive trauma case." *Christopher Parker v. IDOT*, 15 IWCC 0302 (2015).

The Appellate Court's decision in *Edward Hines Precision Components v. Indus. Comm'n* further highlights that there is no standard threshold which a claimant must meet for his or her job to classify as sufficiently "repetitive" to establish causal connection. *Edward Hines*, 365 Ill.App.3d 186, 825 N.E.2d 773, 292 Ill.Dec. 185 (Ill.App.2d Dist. 2005). In fact, the Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." *Id.* at N.E.2d 780. Similarly, the Commission recently noted in *Dorhesca Randell v. St. Alexius Medical Center*, 13 IWCC 0135 (2013), a claimant alleging repetitive trauma must show that work activities are a cause of his or her condition but does not have to establish that the work activities are the sole or primary cause. The Commission also noted that there is no requirement that a claimant must spend a certain amount of time each day on a specific task before a finding of repetitive trauma can be made. *Randell* citing *All Steel, Inc. v. Indus. Comm'n*, 582 N.E.2d 240 (1991) and *Edward Hines supra.*

The Appellate Court in *Darling v. Indus. Comm'n* even stipulated that quantitative evidence of the exact nature of repetitive work duties is not required to establish repetitive trauma injury in reversing a denial of benefits, stating that demanding such evidence was improper. *Darling v. Industrial Comm'n*, 530 N.E.2d 1135, 1142 (1st Dist. 1988). The Appellate Court found that requiring specific quantitative evidence of amount, time, duration, exposure or "dosage" (which in Petitioner's

case would be force) would expand the requirements for proving causal connection by demanding more specific proof requirements, and the Appellate Court refused to do so. *Id.*, at 1143. The Court further noted, "To demand proof of 'the effort required' or the 'exertion needed' . . . would be meaningless" in a case where such evidence is neither dispositive nor the basis of the claim of repetitive trauma." *Id.* at 1142. Additionally, the Court noted that such information "***may***" carry great weight "only where the work duty complained of is a common movement made by the general public." *Id.* at 1142. The evidence shows that Petitioner's job duties involve the performance of tasks distinctly related to his employment as a State correctional facility, many of which are not activities that are even performed by the general public, let alone ones to which the public would be equally exposed.

In *City of Springfield v. Illinois Workers' Comp. Comm'n*, the Appellate Court issued a favorable decision in a repetitive trauma case to a claimant whose work was "varied" but also "repetitive" or "intensive" in that he used his hands, albeit for different tasks, for at least five (5) hours out of an eight (8) hour work day. *City of Springfield v. Illinois Workers' Comp. Comm'n*, 901 N.E.2d 1066, (Ill.App. 4th Dist., 2009). As was noted by the Commission and reiterated in the Appellate Court decision in *City of Springfield v. Illinois Workers' Compensation Comm'n*, "while a [claimant's] duties may not have been 'repetitive' in a sense that the same thing was done over and over again as on an assembly line, the Commission finds that his duties required an intensive use of his hands and arms and his injuries were certainly cumulative." *Id.*

The Commission has also recognized that a claimant's employment need not be the only factor in his or her development of a repetitive compressive peripheral neuropathy. The Commission awarded benefits in a case where the claimant was involved in martial arts activity outside of his employment (*see Samuel Burns v. Pinckneyville Corr. Ctr.*, 14 I.W.C.C. 0482 (2014)), and in another case where the claimant was involved in weight lifting outside of his employment. *See Kent Brookman v. State of Illinois/Menard Corr. Ctr.*, 15 I.W.C.C. 0707 (2015). In the repetitive trauma case of *Fierke*, the Appellate Court specifically held that non-employment related factors that contribute to a compensable injury do not break the causal connection between the employment and a claimant's condition of ill-being. *Id.* at N.E.2d at 849. The Court stated, "The fact that other incidents, whether work related or not, may have aggravated a claimant's condition is irrelevant." *Id.*

Under Illinois law an 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 (Ill. 2003) [Emphasis added]. Even when other non-occupational factors contribute to the condition of ill-being, "[*A*] 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 (3rd Dist. 2000). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Indus. Comm'n*, 834 N.E.2d 583 (2d Dist. 2005). Employers are to take their employees as they find them. *A.C.& S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Comm'n*, 433 N.E.2d 671, 672 (1982). The Supreme Court in *Durand v. Indus. Comm'n* noted that the purpose of the Illinois Workers' Compensation Act is best served by allowing compensation where an injury is gradual but linked to the employee's work. *Durand v. Indus. Comm'n*, 862 N.E.2d 918, 925 (Ill. 2006).

Respondent appears to base a portion of its causal connection dispute on the fact that Petitioner continues to work for another employer, and alleges that his condition is causally related

these activities instead of his cumulative employment with Respondent. However, the Commission has routinely held that when a claimant's condition did not improve after switching to a non-repetitive job, the previous employer is liable even after termination of the employer/employee relationship. *See Rachel Vasquez v. Menard Correctional Center*, 10 IWCC 0826 (2010); *Mastrangeli v. Illinois State Toll Highway Authority*, 12 IWCC 1371 (2012) (wherein claimant's condition worsened after retiring); *See also A.C.& S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist., 1999); and *White v. Illinois Workers' Compensation Comm'n* 873 N.E.2d 388 (Ill. App. 4th Dist. 2007) (holding that repetitive injuries can manifest after the termination of the employer/employee relationship).

Additionally, the issue of causal connection between peripheral compression neuropathy such as carpal tunnel syndrome and the job duties of a correctional officer at Menard Correctional Center has been addressed on numerous occasions in the past by the Commission. *See Nick E Sullivan v. State of Illinois/Menard Corr. Ctr.*, 15 I.W.C.C. 0104 (2015); *James Ryan v. State of Illinois/Menard*, 13 I.W.C.C. 0705 (2013); *Larry Hale v. State of Illinois/Menard Corr. Ctr.*, 13 I.W.C.C. 0201 (2013); *Jimmie Smith v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0959 (2012); *Renee Veath v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 1347 (2012); *Misti Langston v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 1161 (2012); *Sean Wolters v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 1159 (2012); *Timothy Roy v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 1114 (2012); *Virgil Smith v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0786 (2012); *Matthew Lavender v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0663 (2012); *Andrea Pasquino v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0809 (2012); *Darl Prange v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0629 (2012); *Minh Scott v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0888 (2012); *Jason Lane v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0146 (2012); *Shane Lair v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0115 (2012); *Javelins Lewis v. Menard Corr. Ctr.*, 12 I.W.C.C. 0173 (2012); *Frederick Scott Carter v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0342 (2012); *Lucas Mennerich v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0272 (2012); *James Bauersachs v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0411 (2012); *David Couty v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0531 (2012); *Michael Danley v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0434 (2012); *Troy Rushing v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0456 (2012); *Travis Lindsey v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0706 (2012); *Billy Rose v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0459 (2012); *Scott Montroy v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0576 (2012); *Leroy Sumnicht v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0338 (2012); *Jeremy Colvin v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 1158 (2012); *James Wingerter v. State of Illinois/Menard Corr. Ctr.*, 11 I.W.C.C. 0669 (2011); *Sean Starkweather v. State of Illinois/Menard Corr. Ctr.*, 11 I.W.C.C. 0670 (2011); *Greg Mayhugh v. State of Illinois/Menard Corr. Ctr.*, 11 I.W.C.C. 0970 (2011); *Cynthia Pickering v. State of Illinois/Menard Corr. Ctr.*, 11 I.W.C.C. 0671 (2011); *Rachel Vasquez v. State of Illinois/Menard Corr. Ctr.*, 10 I.W.C.C. 0826 (2010); *Robert Walker v. State of Illinois/Menard Corr. Ctr.*, 10 I.W.C.C. 0233 (2010); *Virgil Taylor v. State of Illinois/Menard Corr. Ctr.*, 11 WC 04798 (2012); *Thomas Mezo v. State of Illinois/Menard Corr. Ctr.*, 10 WC 11406 (2011); *Ronald Tuttle v. State of Illinois/Menard Corr. Ctr.*, 10 WC 15865 (2010); *David Shemonic v. State of Illinois/Menard Corr. Ctr.*, 11 WC 000246 (2011); *Steve Richard v. State of Illinois/Menard Corr. Ctr.*, 10 WC 040583 (2011); *Jeffrey Miller v. State of Illinois/Menard Corr. Ctr.*, 10 WC 018448 (2011); *Craig Cowan v. State of Illinois/Menard Corr. Ctr.*, 08 WC 50593 (2008).

Likewise, the Commission has also found the at the job duties of a Correctional Officer at Pinckneyville Correctional Center aggravate and contribute to the development of repetitive injuries. *Bryan Fagerland v. SOI/Pinckneyville Corr. Ctr.,* 16 I.W.C.C. 0248 (2016); *Dustin Bowles v. Pinckneyville Corr. Ctr.*, 14 I.W.C.C. 0842 (2014); *Samuel Burns v. Pinckneyville Corr. Ctr.*, 14 I.W.C.C. 0482 (2014); *Matthew Flowers v. State of Illinois/Pinckneyville Corr. Ctr.*, 14 I.W.C.C. 0232 (2014); *Chris Walter v. Pinckneyville Corr. Ctr.*, 13 I.W.C.C. 0634 (2013); *Craig Briley v. Pinckneyville Corr. Ctr.*, 13 I.W.C.C. 0519 (2013).

In light of the aforementioned law, the Arbitrator finds that Petitioner met his burden on the issues of accident and causation. In support of this finding, the Arbitrator finds the causation opinion of Dr. Young to be persuasive and supported by the evidence in the record. Dr. Young credibly opined that Petitioner's thirty (30) years of work for Respondent at its correctional facilities contributed to the development of his bilateral carpal tunnel syndrome. While Dr. Young acknowledged that Petitioner did have some other risk factors for development of this condition, Petitioner has met his burden of proof that his work activities were at least a factor in the development of his condition. This is the standard set forth in *Sisbro*. Dr. Young relied on Petitioner's detailed job description/work history timeline, which was supported by Petitioner's testimony at the time of trial, and was unrebutted. Additionally, Respondent presented no contrary opinion pursuant to Section 12 of the Act.

<u>Issue (D)</u>: What was the date of the accident?
<u>Issue (E)</u>: Was timely notice of the accident given to Respondent?

Repetitive-trauma injuries occupy an odd niche between accidental injuries, compensable under the Act, and occupational diseases, compensable under the Workers' Occupational Diseases Act. *A.C. & S. v. Indus. Comm'n*, 304 Ill. App. 3d 875, 879, 710 N.E.2d 837, 840 (Ill. App. 1st Dist., 1999). In choosing to cover such injuries as accidental injuries, as noted by the Appellate Court in *A.C. & S.*, the Supreme Court **deliberately** modified the standards for determining the date of injury for repetitive trauma cases in order provide protection for injured workers. *A.C. & S. v. Industrial Commission*, 304 Ill.App.3d 875, 710 N.E.2d 837, 840-841 (Ill. App. 1st Dist., 1999). Even though carpal tunnel syndrome is not treated as an occupational disease in Illinois, we still look to the Occupational Diseases Act for guidance. *Id.*

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.*, 388 Ill. App. 3d 380, 902 N.E.2d 1269 (2009). Hence, the Supreme Court has established a flexible but fair standard for determining manifestation dates. *Durand v. Industrial Commission*, 224 Ill.2d 53, 862 N.E.2d 918 (Ill. 2007). Although the date on which the employee becomes aware that he has a condition related to work was the first method for determining a manifestation date, it is not the only permissible means for alleging or proving manifestation. The manifestation date can be set as: **(a)** the date the employee actually became aware of the physical condition and its relation to work through medical consultation; **(b)** the date the employee requires medical treatment; **(c)** the date on which the employee can no longer perform work activities; or **(d)** when a reasonable person would have plainly recognized the injury and its relation to work. *Durand v. Industrial Commission*, 224 Ill.2d 53, 862 N.E.2d 918 (Ill. 2007), *see also Peoria County Belwood Nursing Home v. Industrial*

Commission, 115 Ill.2d 524, 505 N.E.2d 1026 (Ill. 1987); *Oscar Mayer & Co. v. Industrial Commission*, 176 Ill.App.3d 607, 531 N.E.2d 174 (3rd Dist. 1988); *Three "D" Discount Store v. Industrial Commission*, 198 Ill.App.3d 43, 556 N.E.2d 261 (4th Dist. 1989).

Although a claimant is aware of symptoms and carries a suspicion that these are work-related, the Supreme Court has stated, "The 'fact of injury' is not synonymous with the 'fact of discovery'" *Durand,* N.E.2d at 927. In short, claimants are not charged with filing a claim as soon as they believe they *may* have a work-related condition, nor are they penalized for failing to realize a condition is work-related when the employer feels that he or she should have. In fact, the Supreme Court stated that to rely solely on a claimant's testimony concerning symptoms, without accurate knowledge of the cause of those symptoms, would essentially be asking them to "rely on 'expert' medical testimony from a layperson." *Id.* at 929. The Court likewise noted that the claimants would have had difficulty proving injury with a sketchy and equivocal understanding of same. *Id.* at 930. The standard that "the 'fact of injury' is not synonymous with the 'fact of discovery'" has since become a safety measure employed by all Courts to ensure that the employers do "penalize an employee who diligently worked through" his or her symptoms. *Durand v. Indus. Comm'n*, 862 N.E.2d at 927, 930. In *Durand*, the claimant was not sure her pain was from carpal tunnel syndrome, but "she believed it was work-related" in 1997, some 3 years before her injuries manifested in 2000. *Durand v. Indus. Comm'n*, 862 N.E.2d at 929-30.
In *Oscar Mayer*, the Court embraced the "date of collapse" method of determination (setting the manifestation date on the date of surgery, or the date the employee could no longer work), allowing compensation to be awarded to a claimant despite his full knowledge that his condition was work-related well before he filed a claim because the claimant diligently served his employer until he could no longer do so without intervention for his repetitive injuries. *Oscar Mayer supra.* The Court noted that no prejudice can occur in employing such a method, since it is not until the employee actually misses work for his injuries that the employer becomes adversely affected; and the notice provisions were not impugned as this flexible and fair provision in no way interfered with an employer's ability to effectively investigate the claim.

In *Three "D" Discount,* the claimant sought treatment with his family physician, Dr. Johnson, who referred him to a Dr. Block for evaluation. *Three "D" Discount Store v. Industrial Commission*, 556 N.E.2d 261 (4th Dist. 1989). Dr. Block performed an EMG study and a physical examination of the claimant, and sent the EMG results to Dr. Johnson. *Id.* Dr. Block's report stated that his examination suggested bilateral carpal tunnel syndrome. *Id.* Dr. Johnson discussed the results of the EMG with the claimant and referred him to a Dr. McKechnie. The claimant reported to Dr. McKechnie and gave a history of his symptoms but did not state that his condition was work-related or that Dr. Johnson had so informed him. Dr. McKechnie scheduled the claimant for surgery, and the claimant notified his employer that he required surgery and that it was his physician's opinion that that the condition was related to work. The Appellate Court found that Petitioner's manifestation date was the day he met with Dr. McKechnie and stated the following:

> The evidence in this case establishes that Dr. Carl Johnson discussed Dr. Block's report of the EMG results with petitioner. . . No direct evidence was presented regarding whether Dr. Johnson ever told Petitioner that his injury was work related. . . . It was not until July 10, when petitioner met with Dr. McKechnie, that it became clear that

> petitioner's condition necessitated surgery. . . Based on the evidence of record, it could be reasonably inferred that petitioner first learned that his condition of ill-being was work-related at some point between July 10, and the first of August, 1984. Applying the reasonable person test to these facts, we find that although petitioner persisted in his employment until August 10, a reasonable person in these circumstances would have been on notice that the condition was both work-related and medically disabling on July 10, 1984. *Three "D" Discount Store v. Industrial Commission*, 556 N.E.2d 261, (4th Dist. 1989) [emphasis ours].

In *Linda Peters v. Village of Caseyville*, the Commission gave the most weight to when the claimant possessed a "confirmed diagnosis" of her condition in setting the manifestation date. *Linda Peters v. Village of Caseyville*, 14 IWCC 0796 (2014). The Commission stated:

> The Commission finds that the manifestation date of Petitioner's right carpal tunnel syndrome was March 1, 2012. Although the parties had stipulated to an accident date of September 1, 2010, we find that it is within our discretion to change the accident date to conform-to the evidence. *See Beal v. Town of Normal*, 10 IWCC 380 (2010). The medical records are clear that the first mention of any correlation between Petitioner's right carpal tunnel syndrome and her work duties is the March 1, 2012, office note of Dr. Mirly. Although Petitioner's report of injury on March 2, 2012, indicates a date of accident of "Sept 2011," we find that this is not an appropriate manifestation date in this case because Petitioner did not have a confirmed diagnosis at that time. Based on our determination of the date of accident, we find that Petitioner provided timely notice of her accidental injuries. *Id.*

As the law demonstrates, the method for determining the manifestation date for repetitive injuries is flexible and liberally construed depending upon the facts of the case.

In the case at bar, Petitioner testified that he was first given the diagnosis of carpal tunnel syndrome and realized he had a work-related condition on April 4, 2018, the date he saw Dr. Kutnik, the first specialist with whom he sought treatment. Based upon the precedent in *Peters*, the Arbitrator finds that April 4, 2018 is an appropriate manifestation date under the Act.

With regard to notice, the Arbitrator notes the Illinois Department of Corrections "Incident Report" in RX 1. The handwritten section of this report bears Petitioner's signature and the date April 6, 2018. Petitioner reported having been diagnosed with severe bilateral carpal tunnel syndrome by Dr. Kutnik on April 4, 2018. He also reported that this condition was due to the repetitive motions required during his "30+ years of employment" with Respondent. The signature of a "chief administrative officer" appears at the bottom of this document, next to the date April 9, 2018. RX 1. The Arbitrator also notes that Petitioner filed his Application of Adjustment of Claim on April 19, 2018, only fifteen (15) days after his alleged manifestation date of April 4, 2018.

Pursuant to Commission precedent, the filing of an application constitutes sufficient notice under the Act. *See Brian Waller v. First State Leasing*, 99 I.I.C. 0479 (1999); *James O'Hara v. State of Illinois/Tamms Corr. Ctr.*, 15 IWCC 0101 (2015).

Further, the Arbitrator notes that the purpose of the Act's notice requirement is to enable an employer to investigate an alleged accident, and to protect an employer from unjust or fraudulent claims. *Gano Electrical Contracting v. Indus. Comm'n*, 631 N.E.2d 724, 727 (Ill. App. 4th Dist., 2004); *Thrall Car Manufacturing Co. v. Indus. Comm'n*, 356 N.E.2d 516 (1976). A claim is only barred if no notice whatsoever has been given. *Gano supra*. Section 6(c) if the Act provides that the notice of the accident "shall give the approximate date and place of the accident, if known, and may be given orally or in writing" and that "no defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings * * * unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy." 820 ILCS 305/6. Respondent was clearly notified of the claim by the filing of Petitioner's Application. Respondent thus had ample opportunity to investigate.

In light of the aforementioned, Petitioner has therefore met his burden of proof on the issues of manifestation and notice.

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?

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

Given the above findings as to causal connection, the Arbitrator finds that the medical treatment rendered to Petitioner has been reasonable and necessary in the quest to cure Petitioner of the effects of his work-related injuries. In addition to Dr. Young's testimony establishing the reasonableness and necessity of Petitioner's care and treatment, the Arbitrator notes that Petitioner testified to significant improvement following surgery, although he continues to have some symptoms despite same.

Respondent is therefore ordered to pay the medical expenses contained in Petitioner's group exhibit and shall have credit for any amounts 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 (L): What is the nature and extent of the injury?

Pursuant to §8.1b of the Act, permanent partial disability from injuries occurring after September 1, 2011 is 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 impairment rating. Therefore, the Arbitrator gives no weight to this factor.

(ii) **Occupation**: Petitioner is retired from Respondent's employment but continues to work as a shuttle driver for SIH. The Arbitrator gives some weight to this factor.

(iii) **Age**: Petitioner was 51 years old at the time of his injury. He is a younger individual who must live and work with his disability for an extended number of years. Pursuant to *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016) (wherein the Commission concluded that greater weight should have been given to the fact that Petitioner was younger [46 years of age] and would have to work with his disability for an extended period of time), the Arbitrator places greater weight on this factor.

(iv) **Earning Capacity**: There is no direct evidence that Petitioner's injury reduced his earning capacity, as Petitioner voluntarily retired from Respondent's employment, continues to draw retirement benefits, and has since retained other employment with SIH. The Arbitrator gives some weight to this factor.

(v) **Disability**: As a result of his repetitive job activities, Petitioner developed bilateral carpal tunnel syndrome which required surgical intervention. Petitioner testified that despite the improvement from surgery and physical therapy, he continues to have some residual symptoms. He confirmed that he participated in physical therapy, and Dr. Young gave him exercises to perform on his own to increase his recovery and flexibility. (T.31). He confirmed that he still performs the exercises on a daily basis. *Id.* At trial, he testified he still experiences numbness and tingling in his hands while riding his motorcycle. (T.47).

Based upon the foregoing, the Arbitrator finds that Petitioner sustained serious and permanent injuries that resulted in the 12.5% loss of each hand under Section 8(e) of the Act.

<u>Issue (O):</u> Intervening accident

The law is clear 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." *Dunteman v. Illinois Workers' Compensation Commission*, 52 N.E.3d 718, 727 (4th Dist. 1016) citing *Global Products*, 392 Ill.App.3d at 411, 331 Ill.Dec. 812, 911 N.E.2d at 1046. A work-related 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." *Sisbro,* 207 Ill.2d at 205, 278 Ill.Dec. 70, 797 N.E.2d at 673. As long as there is a "but-for" relationship between the work-related injury and subsequent

condition of ill-being, the employer remains liable. *Dunteman*, 52 N.E.3d at 727, citing *Global Products,* 392 Ill.App.3d at 412, 331 Ill.Dec. 812, 911 N.E.2d at 1046.

Additionally, as discussed above, the Commission has routinely held that when a claimant's condition did not improve after switching to a non-repetitive job, the previous employer is liable even after termination of the employer/employee relationship. *See Rachel Vasquez v. Menard Correctional Center*, 10 I.W.C.C. 0826 (2010); *Mastrangeli v. Illinois State Toll Highway Authority*, 12 I.W.C.C. 1371 (2012) (wherein claimant's condition worsened after retiring); *See also A.C.& S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist., 1999); and *White v. Illinois Workers' Compensation Comm'n* 873 N.E.2d 388 (Ill. App. 4th Dist. 2007) (holding that repetitive injuries can manifest after the termination of the employer/employee relationship).

Respondent provided no proof of an intervening accident at the time of trial. While Dr. Young testified that Petitioner had several other risk factors for the development of carpal tunnel syndrome, he unequivocally testified that Petitioner's cumulative and repetitive job duties for Respondent were a contributing factor in the condition of his ill-being. In light of the aforementioned, Petitioner did not sustain an intervening accident which relieves Respondent of liability in this claim.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC029683
Case Name	CURRAN, MICHAEL T v. ADVANCE MECHANICAL
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0508
Number of Pages of Decision	14
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Richard Greenfield
Respondent Attorney	Richard Sledz

DATE FILED: 10/8/2021

/s/Marc Parker, 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

Michael T. Curran,

Petitioner,

vs. NO: 15 WC 29683

Advance Mechanical Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, 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 31, 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.

The bond requirement in Section 19(f)(2) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

October 8, 2021

MP:yl
o 10/7/21
68

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

CURRAN, MICHAEL T Case# **15WC029683**
Employee/Petitioner

ADVANCE MECHANICAL SYSTEMS INC
Employer/Respondent

On 7/31/2020, 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:

1691 RICHARD O GREENFIELD
415 N LASALLE ST
SUITE 203
CHICAGO, IL 60654

1596 MEACHUM BOYLE & TRAFMAN
RICHARD SLEDZ
225 W WASHINGTON ST SUITE 500
CHICAGO, IL 60606

STATE OF ILLINOIS)

)SS.

COUNTY OF COOK)

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

IN THE WORKERS' COMPENSATION COMMISSION
Corrected ARBITRATION DECISION

Michael T. Curran, Case #: **15 WC 029683**

Employee/Petitioner

v.

Advance Mechanical Systems, 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 **November 21, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒
D. ☐ What was the date of the accident? Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
E. ☒ Was timely notice of the accident given to Respondent?
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 20, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident ***was not*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**90,079.08**; the average weekly wage was $**1,732.29**.

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

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

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

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

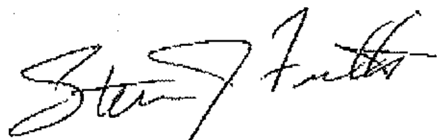
Respondent is entitled to a credit of $**0** under §8(j) of the Act.

ORDER

Because Petitioner failed to prove that an accident did arise out of and in the course of employment, and failed to prove that he gave timely notice of the claimed accident to Respondent, and that he failed to prove his current condition of ill-being was causally related to the claimed accident all benefits under the Illinois Workers' Compensation Act are denied.

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

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



Signature of Arbitrator
ICArbDec p.

July 17, 2020
Date

JUL 3 1 2020

MICHAEL T. CURRAN v. ADVANCE MECHANICAL, 15 WC 029683

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were: ***C:*** Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; ***E:*** Was timely notice of the accident given to Respondent?; ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***J:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***L:*** What is the nature and extent of the injury?

STATEMENT OF FACTS

On January 20, 2015 Petitioner Michael Curran was employed by Respondent Advance Mechanical as a plumber, a position that he had held for about a year and a half. On that day Petitioner was working on a job at Evanston Hospital. He testified that his work that day was on an "acid line" in the hospital. The acid line is made of a special plastic material and collects hazardous materials from doctors' offices, the morgue, and all the laboratories. On January 20, 2015, his specific task was to tie new lines into the existing acid line.

Petitioner testified that there was no way to drain the existing acid line of all liquid, so nothing was done with the pipe before cutting into it. These new pipes were dry.

Petitioner testified that part of his job that day was to cut overhead pipes. He testified that when sawing an existing pipe, water poured out and got onto his clothes and the electric saw. The water spilled onto his waist, leg, and chest. He testified that nothing had been done to drain the pipes that day. Following the spill, despite his shirt and pants being wet, he did not notice any injury. He continued to work the remainder of the day and finished the tie-in. He did not report an accident to his supervisor that day.

Petitioner then described the liquid that spilled on him as "acid waste."

Petitioner was not scheduled to work the week following his claimed accident. He testified that 3 or 4 days later he noticed 3 red marks on his right thigh, right leg, and rib cage. He testified that he contacted his brother George, who was a project manager for Respondent, about his injuries and that his brother told him to report it to the foreman. Petitioner testified that he reported this to his foreman, Ron Zomparelli, when he returned to work.

Petitioner testified that he used over-the-counter lotions to treat his red marks at first. He first sought medical treatment on March 30, 2015 with his primary care physician, Dr. Richard Hayes (Px #1 & RX #2). Petitioner testified that Dr. Hayes treated with him on this date for a severe cough, but that he also asked Dr. Hayes to examine his legs. He also testified that on that date he received a referral to Dr. Dillig at The Skin Care Center in Glenview.

In Respondent's Exhibit #2, Dr. Hayes' March 30, 2015 note, it was noted that Petitioner's skin was normal with no rashes or lesions. Petitioner's Exhibit #1 was the March 30, 2015 clinical note with a March 21, 2019 addendum that noted, "On 3/30/ a burn from 'acid' at work was noted after I had signed the note, Hence this addendum. the burn was inspected, and the patient was referred to dermatology. Te (*sic*) date was 3/30/2015. This incident was remembered clearly." There was no corresponding addendum to the note that skin was normal, and no lesions noted. Petitioner testified that he never asked Dr. Hayes to update his records regarding the claimed acid burn.

Petitioner visited Dr. Gina Dillig on August 24, 2015 on referral from Dr. Hayes (PX #2). He presented with lesions, spots, and moles. Lesions on the thigh and leg, which had been his concern for 3 months. Petitioner did not report a history of acid or other caustic material spilling on his leg. Dr. Dillig performed a general examination of Petitioner and diagnosed Petitioner with dermatitis of the right anterior lower leg, right posterior lateral upper leg, and hands; lentigo of the entire back; multiple nevi on the back, legs, arms, and abdomen; tinea on the feet; actinic keratosis; neoplasm of uncertain behavior on the left chest; neoplasm of uncertain behavior on the right upper back; and a neoplasm of uncertain behavior on the right mid back. Dr. Dillig did not document any opinion that any of her diagnoses were related to a work accident exposure to a caustic liquid.

Dr. Dillig performed "shaving" procedures on Petitioner's right leg. Petitioner testified that he was prescribed a salve for his condition, which would have cost $500, which he did not purchase.

Petitioner testified that after his visit with Dr. Dillig that he called his brother, George Curran with Respondent. The call was transferred to James Horner, and that the plumbing division. Petitioner informed Mr. Horner that he was prescribed a $500 salve for acid burns and that Mr. Horner told him to hire a lawyer.

Petitioner had follow-up visits with Dr. Hayes for respiratory and cough complaints August 25, and September 14, 2015, as well as August 2, November 8, November 22, and December 28, 2016 when Dr. Hayes noted Petitioner's skin was normal

with no lesions (RX #2). On December 28, 2016 Dr. Hayes noted Petitioner presented with a diagnosis of scleroderma, despite noting skin was normal with no lesions.

Petitioner offered his Exhibit A, additional records from Dr. Hayes. PX A contains a handwritten note by Dr. Hayes dated December 9, 2019, stating that two different clinical notes were written on 9/14 2015. The one note had been inadvertently written on Petitioner's son's chart; Michael Curran, Jr. Dr. Hayes noted the inadvertent note was really intended for Petitioner's chart. The clinical chart notes "acid burns from the growing to the knee. This appears to be also allergy related as well. There is also a burn on the R leg and anterior chest." Dr. Hayes assessment was "partial thickness burns legs and Chest from 'acid' sustained at work."

PX A has the identical identifying information as Petitioner's chart (PX #1 & RX #2), particularly PRN CURM1000

During Petitioner's direct examination he indicated that his burn mark was on the front of his right leg. Petitioner displayed a 2 inch by 6 inch darkened area with a lighter area of about 2 inch by 1 inch on the top of the discoloration all on the right shin. He testified that his medical bills were paid through group insurance as he visited the doctors for other conditions. The group insurance was paid through his plumber's local union and Respondent contributes for insurance.

On cross-examination Petitioner confirmed that he did not report an accident to any supervisors on the date of accident. Petitioner also admitted that he showered when he got home from work. When asked about whether he came into contact with acid, Petitioner responded by asking what acid looks like and followed up that he did not inform his supervisor about the spill because it came out as liquid. Water spills are common on plumbing jobs and are generally considered accidents. Petitioner testified that he was not aware of any safety procedures in case of a liquid spill. Petitioner further testified that he never followed up with Dr. Hayes for his claimed acid burns.

Petitioner admitted on redirect examination that he was not aware on January 20, 2015 of whether or not the product on his clothes was acid or water.

Robert Tuxford testified on behalf of the Respondent. Mr. Tuxford is a plumber for Respondent and has worked as a plumber for 40 years. He testified that he kept work logs for Respondent as a supervisor on January 20, 2015. The logs noted that Petitioner worked in the acid waste prep and tie-in. Mr. Tuxford recorded that there was no mess on the floor on the acid waste tie-in. He added that plumbers "above" had cut off and diverted the acid waste line, which meant the line was dry. The line had been shut down. Mr. Tuxford also testified that the acid waste line had been flushed with tap water for 15

to 20 minutes before tie-in work began. Even so, there still could be something left in the line. He admitted that he did not know if there was acid in the line.

Mr. Tuxford confirmed that an accident would be reported to him if one had occurred and it would be noted in his log. He worked with Petitioner at times that day and did not notice that his clothes were wet. No one mentioned Petitioner's clothes being wet or about an accident that day. Mr. Tuxford stated that when water spills out onto plumbers, it is not reported.

Mr. Tuxford testified that he had never encountered a situation where acid poured onto a plumber during work. The safety logs listed the only hazards for Petitioner's job that day as the use of a ladder, pinch points, and burning from a torch. Mr. Tuxford testified that Petitioner worked for Respondent for 2 more months after January 20, 2015. He testified that Ron Zomparelli never reported an accident where water had poured down onto the Petitioner to him.

On cross-examination Mr. Tuxford testified that the lines that Petitioner were working on were coming from a lab that was under construction. He clarified that the lab was not in use on January 20, 2015 and that before work had started for the day they had flushed the lines. According to Tuxford the only acid waste stack that he and Petitioner would have worked on that day was connected to the inactive lab.

Petitioner had a §12 IME with Dr. Joseph Laluya on February 17, 2016, and wrote a report on February 26. The offer of Dr. Layula's report in evidence was refused based on hearsay objection. Dr. Laluya testified by evidence deposition August 5, 2019 (RX #3). He is board-certified in physical medicine and rehabilitation. Dr. Laluya estimated around 10% of his patients presented with skin conditions and that he treats contact dermatitis a "couple of times a month." He estimated that 99% of his practice is treating his own patients.

Dr. Laluya testified that he received an oral history from Petitioner regarding his accident. Petitioner could not point to a specific event that occurred on the claimed date of accident. Petitioner said he noted burning sensation to his right leg and then took a shower. He denied noting any specific burn or irritation to his skin at that time.

Dr. Laluya performed a physical examination of Petitioner. There was a 7 cm by 5 cm area on the left anterior chest wall, which was slightly dry and scaly that was nontender with no erythema, redness, or swelling. There was a 6 cm by 6 cm area in the right groin that was slightly raised and nontender with diminished hair growth. There was a 7 cm by

6 cm nontender area on the right leg that was slightly raised and hypopigmented with decreased hair growth.

Dr. Laluya reviewed Dr. Dillig's diagnosis of contact dermatitis to the right lower extremity and hands. Dr. Laluya testified that a contact dermatitis is when contact with something causes damage to the skin. Dr. Laluya further explained the idea of an acid burn in relation to contact dermatitis:

> "An acid is basically the pH of a given substance and that can cause trauma to the skin for sure. So if you are contacted by some sort of chemical, like in an occupation, you certainly run the risk of developing an it is or an inflammatory change to the skin where the contact occurred."

Dr. Laluya testified that he would not expect for an eruption to arise from contact eight months previous. Dr. Laluya further clarified regarding contact dermatitis, stating that for the contact dermatitis to continue, the contact must continue. Dr. Laluya testified that the cause of a lentigo is UV exposure. He testified that a nevus is more commonly referred to as a mole and is congenital. He also testified that a tinea is a fungal infection; the cause is exposure to fungus. Dr. Laluya testified that the cause for an actinic keratosis is, again, UV exposure.

Dr. Laluya was unable to identify a causal relationship between Petitioner's dermatologic findings in any obvious work related exposure history, including January 20, 2015. He added that contact dermatitis could have been caused by work, but in Petitioner's case there was no documentation of an exposure.

CONCLUSIONS OF LAW

C: Did Petitioner sustain accidental injuries that arose out of and in the course of employment?

The Arbitrator finds that Petitioner failed to prove that he sustained accidental injuries that arose out of and in the course of employment.

Petitioner claims that he sustained an acid burn while that caused a number of skin conditions and disfigurement to his right leg. Petitioner described an incident where he was cutting into an "acid waste" line. He was engaged in connecting new waste lines to existing waste lines when liquid of some sort spilled onto him. Petitioner initially identified the liquid is water but then described it as "acid." Petitioner did not describe the liquid as caustic but did note that he did not initially feel burning or pain. In fact, he

continued to work and continue his assigned task. The Arbitrator finds that this description of an accident causing a chemical burn to be dubious.

The Arbitrator finds Petitioner's credibility questionable. As noted above, he claims he cut into a waste pipe which contained a liquid which caused what he described as an "acid burn" without experiencing immediate pain or feeling a burning sensation. At one point Petitioner inferred that he was cutting into an active, functioning waste line. The Arbitrator finds this inference highly questionable on its face, much less in light of credible testimony by Robert Tuxford that the waste line had been flushed with water and disconnected above.

Also, Petitioner admitted that he did not report that he had been exposed to a caustic liquid on the day of the incident. Petitioner continued to work from January through March 30, 2015 before seeking medical intervention. He consulted his primary physician, Dr. Richard Hayes, for respiratory complaints on March 30, 2015.

The initial clinical note did not mention the claimed work accident or any injury resulting from exposure to a caustic liquid. In fact, Dr. Hayes' note on March 30 initially documented normal skin with no lesions. It was not until March 21, 2019 then any reference to a chemical or acid burn found its way into Dr. Hayes' records. In the addendum Dr. Hayes stated a clear memory of Petitioner's complaints of an acid burn that was work-related but without recording any details of the claimed accident. Dr. Hayes explained in a handwritten note that he had made a clerical error by recording petitioner's report of a work-related acid burn in Petitioner's son's medical chart, although all identifying patient information was identical.

The Arbitrator finds Dr. Hayes' 2019 addendum and its explanation wholly lacking in credibility. The timing of the 2019 addendum, in addition to its unlikely accuracy, was too coincidental with the scheduling of the trial of this matter to be believable. Further, Petitioner's denial that he solicited the 2019 Dr. Hayes addendum was equally lacking in credibility.

Finally, when Petitioner consulted Dr. Gina Dillig, the dermatologist, August 24, 2015, he gave a history of being concerned about lesions on the right thigh and leg for 3 months without mentioning a work-related exposure to a caustic liquid.

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

The Arbitrator finds that Petitioner failed to prove that he gave timely notice of the accident to Respondent within the period specified by §6(c) of the Act.

Petitioner gave unrebutted testimony that although he did not notify his immediate supervisor of his claimed accident on the date of the accident, he had notified his brother George Curran within days of the claimed accident and also his foreman Ron Zomparelli upon his return to work within a week of the claimed accident.

The Arbitrator notes that Petitioner did not call his brother George as a witness or offer his deposition testimony to support his claim of notice within the provisions of the Act. Ordinarily, one would expect a party call upon his brother to support a key allegation to his claim. While George Curran is presumably still employed by Respondent, he has such a relationship with Petitioner that Petitioner's failure to call him as a witness can raise the inference that his evidence would be adverse to Petitioner.

In addition, even though evidence may be unrebutted that evidence can be disregarded if inherently unbelievable. As noted above Petitioner possesses questionable credibility and therefore finds petitioner's testimony regarding notice to Respondent to be unbelievable.

F: Is Petitioner's current condition of ill-being causally related to the accident?

The Arbitrator finds that Petitioner failed to prove that his condition of ill-being is causally related to the claimed work accident January 20, 2015.

The arbitrator first notes that there was no evidence identifying the composition of the liquid that Petitioner testified spilled onto him. Petitioner's reported lack of feeling an immediate burning circumstantially suggest the liquid was not caustic.

As noted above, the Arbitrator did not find Petitioner to be credible. Further, as noted above the Arbitrator did not find Dr. Hayes credible in his March 21, 2019 addendum to Petitioner's medical chart. The Arbitrator took particular note that when Dr. Hayes wrote his March 21, 2019 note claiming Petitioner had reported his work related "acid burn", he did not also amend that part of his March 30, 2015 note that Petitioner's skin was normal and with no lesions. Further, in each succeeding clinical note Dr. Hayes noted Petitioner's skin was normal and with no lesions.

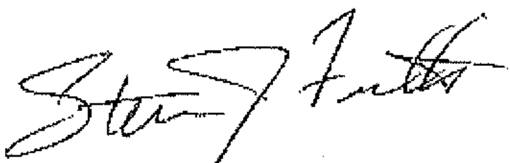
Also, as noted above, Dr. Dillig did not express a causation opinion in her clinical record, primarily for want of Petitioner not reporting the claimed work accident.

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?

Inasmuch as the Arbitrator has found that Petitioner failed to prove that he was injured in a compensable work-related accident, and that he failed to prove he gave timely notice of the claimed accident to Respondent, and that he failed to prove that his current condition of ill being is causally related to the claimed accident, this issue is moot.

L: What is the nature and extent of the injury?

Inasmuch as the Arbitrator has found that Petitioner failed to prove that he was injured in a compensable work-related accident, and that he failed to prove he gave timely notice of the claimed accident to Respondent, and that he failed to prove that his current condition of ill being is causally related to the claimed accident, this issue is moot.



Steven J. Fruth, Arbitrator

April 28, 2020
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC001651
Case Name	LICKENBROCK, SCOTT v. ST OF IL DEPT OF SOUTHWESTERN
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0509
Number of Pages of Decision	21
Decision Issued By	Maria Portela, Commissioner, Thomas Tyrrell, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Caitlin Fiello

DATE FILED: 10/8/2021

/s/Maria Portela, Commissioner

Signature

DISSENT

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Scott Lickenbrock,

Petitioner,

vs. NO: 17 WC 1651

SOI / Southwestern Illinois Correctional Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering all issues, and after being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

Findings of Fact

Petitioner worked as a correctional officer for Respondent from 1995 until he changed positions in 2015. In August 2015, Petitioner became a correctional food service supervisor. Petitioner testified that during his years as a correctional officer, he worked on the tact team for approximately five years; however, he last worked on the tact team in 2005. He testified that the tact team is designed to control unruly inmates. The officers on the team continued to work their normal shifts; however, they underwent specialized training for four hours each month. Petitioner testified that the team practices maneuvers such as cell extractions, cuffing and escorting inmates, and using batons. Petitioner testified that being a member of the tact team requires the use of force as well as gripping and his duties required the use of his arms and hands.

Petitioner also worked as a correctional officer in the segregation unit for five years. He testified that when he worked in segregation, he had to open the chuckholes with Folger Adams keys. He testified it is difficult to open the locks because, "[i]nmates are constantly throwing their juice and food, and the food is getting into the key lock mechanism, and it's all rusty." (Tr. at 24). Petitioner testified that the Folger Adams keys are very hard to turn. He testified that during his five years working in segregation, he noticed pain in his hands, wrists, and elbows; however, the pain was never significant enough that he reported it to anyone. When asked what he did to continue working as a correctional officer despite his symptoms, Petitioner testified that he ignored his pain because he initially believed it was a normal part of aging. Under cross-examination,

Petitioner admitted that he has not worked in the segregation area since 2006. He testified that he only used the Folger Adams keys when he worked in segregation. During that time, he was responsible for eight inmates during each shift and estimated he opened one of the locks around fifty times each shift. Petitioner testified that each shift was 7.5 hours.

Petitioner testified that in his current position as a correctional food supervisor he supervises inmates, helps inmates prepare meals, keeps track of all materials the inmates use to clean the area including toxic materials, and he is in charge of the inmate line when the inmates are served their meals. He testified that in his role as a food service supervisor, opening locks causes the most problems with his hands. He testified:

> "Because our locks, they do not work in dietary. They're rusty, they're old. You really got to work them to get them open. You know, it's just—dietary you're constantly cleaning, so everything is getting rusty, and they just don't—they don't open."

(Tr. at 18). Petitioner testified that maintenance does not have the necessary equipment to fix the malfunctioning locks. He testified that he continues to work in shifts lasting 7.5 hours. He estimated that during each shift, he opens an average of 125 locks. Petitioner testified that some locks take up to 10 seconds to open because they are rusty. Some locks are easy to open and take around two seconds to open.

In the detailed work history Petitioner authored, he wrote that he picks up cases of cans weighing approximately 30 pounds as well as 5-gallon buckets of water used for cleaning several times a day. (PX 6). Petitioner also wrote that he lifts a 100-pound bag of beans three times a week and pushes carts weighing 50-300 pounds once or twice a week. He wrote that he pushes carts weighing up to 600 pounds once a week. The official position description for a food service supervisor indicates the position requires receiving and inspecting items weighing only up to 50 pounds. (RX 3).

On December 15, 2016, Petitioner completed a Notice of Injury alleging an accident date of December 13, 2016. (RX 1). Petitioner wrote that since he began working as a food supervisor, he experienced symptoms he attributed to the excessive number of times he opened doors and locks. Petitioner testified that during the first year and a half that he held his current position he started developing the following symptoms: bilateral constant hand numbness, shooting pain up his arms and into the elbows, and difficulty sleeping at night due to numbness and pain. He testified that if he holds something, sometimes he feels an "electric bolt" run up his arm and he drops items. Petitioner testified that this happened three times at work on the morning of the hearing. He testified that he continues to wake up at night and has worsening pain in his bilateral hands, wrists, and elbows. Petitioner testified that he would like to proceed with the surgery recommended by his treating physician, Dr. Mirly. Petitioner continues to work in his regular position. He testified that he wore splints for a short period, but eventually stopped using them because they did not relieve his symptoms.

The detailed work history Petitioner authored reveals a long history of jobs outside of his employment with Respondent that required the use of fine motor skills as well his bilateral hands,

wrists, and arms. (PX 6). Petitioner's work history includes jobs that involve welding, repairing engines and carburetors, maintaining equipment and vehicles, and maintaining buildings on his family farm. He also wrote that his maintenance duties on the farm include electrical work, plumbing, changing worn bearings, fluids, and filters. During his testimony, Petitioner attempted to minimize the work he performs on the family farm as well as the extent of his small engine repair business.

Petitioner testified that his hobbies include fishing, hunting, and scuba diving. He denied engaging in any activities that involve forceful repetitive use of his arms or hands. Petitioner testified that he rides a motorcycle. He testified that in the year before the hearing he rode approximately 950 miles on his motorcycle. He testified that an average motorcycle ride lasts three to four hours and includes several breaks. Petitioner testified that his motorcycle has handlebars where his hands are position just above shoulder level.

Medical Treatment

On November 28, 2016, Petitioner visited his primary care doctor as a follow up to a hospital visit regarding chest pain he experienced a few days earlier. Petitioner reported having some constant numbness in the right hand that worsened with certain positions like driving. The doctor ordered an EMG/NCS of the bilateral arms and diagnosed Petitioner with carpal tunnel. The results of the December 13, 2016, EMG/NCS were consistent with bilateral mild carpal tunnel syndrome.

Dr. Mirly, a board-certified orthopedic hand surgeon, first examined Petitioner on March 2, 2017. (PX 5). Petitioner complained of bilateral hand pain and numbness, shooting pain up his arms, and pain in his elbows. He reported that since he began working in the kitchen his symptoms have worsened. Petitioner complained of pain particularly in the position of being in the kitchen lifting heavy cans and gave classic symptomatology of carpal tunnel syndrome with frequent nocturnal awakening and shaking of his hands. He also complained that his hands fall asleep when he drives. Dr. Mirly diagnosed bilateral carpal tunnel syndrome, right lateral epicondylitis, and right Wartenberg syndrome. He fitted Petitioner with wrist splints to see if they improved his symptoms.

On March 6, 2018, Dr. Mirly diagnosed Petitioner with bilateral carpal tunnel syndrome, right lateral epicondylitis, and possible right Wartenberg syndrome. He continued to recommend Petitioner wear wrist splints at night and discussed options such as injections or a surgical release for both the lateral epicondylitis and carpal tunnel syndrome. Petitioner wanted to continue to observe instead of undergoing additional treatment. Petitioner returned to Dr. Mirly on December 19, 2019, and reported worsening symptoms in both hands as well as bilateral shoulder pain. Petitioner denied any specific accident or injury and reported his symptoms were severe at night. Dr. Mirly performed bilateral carpal tunnel injections. There are no further office visit notes.

Expert Opinions

Dr. Harvey Mirly—Treating Physician

Dr. Mirly testified via evidence deposition on behalf of Petitioner on September 20, 2019. (PX 7). His testimony was consistent with his office visit notes. He testified that he recommends surgery when there are significant symptoms despite an attempted course of nonoperative treatment. Dr. Mirly testified that the job duties associated with Petitioner's current position are the type of activities that could contribute to or exacerbate carpal tunnel syndrome and lateral epicondylitis. He testified that this opinion is based on Petitioner's work history and his history of working for Respondent for 22 years with Petitioner's symptoms reportedly worsening only when he obtained the food service position.

Dr. Mirly testified that Petitioner never described the percent of time he spent doing each of his job duties. He testified that he does not know how long Petitioner spent locking and unlocking doors. He testified that the only information he knows regarding Petitioner's work duties is reflected in his office visit notes. He assumes Petitioner's duties throughout each day are varied. Dr. Mirly testified that driving a motorcycle can be an aggravating activity due to the exposure to vibration of the handlebars. He agreed that this activity is a contributing factor to the development of carpal tunnel syndrome. Dr. Mirly also testified that some elements of hunting and fishing can also contribute to and aggravate carpal tunnel syndrome.

Dr. Patrick Stewart—Respondent Section 12 Examiner

Dr. Stewart, a board-certified hand surgeon, examined Petitioner on Respondent's behalf on February 18, 2020. (RX 5). Petitioner reported the bilateral carpal tunnel injections Dr. Mirly performed in December 2019 provided relief for approximately one week. He complained of numbness and tingling in the thumb, index, middle, and half of the ring fingers. He complained of discomfort extending up his forearm and reported dropping items. He reported feeling like he had decreased strength and woke up at night. Dr. Stewart reviewed the written job description Petitioner authored and noted that Petitioner was most concerned about having to lock and unlock doors and drawers all day.

After reviewing the records and examining Petitioner, the doctor diagnosed bilateral carpal tunnel syndrome. He wrote:

> "Repetitive, forceful activities with vibration exposure and cold exposure have been linked to an increased risk for developing or exacerbating compression neuropathies such as carpal tunnel. This also includes extremes of wrist position. Scott's greatest concerns are about locking and unlocking the different doors, deadbolts and padlocks. In his description this takes 1 to 3 seconds, depending on the difficulty of getting the lock open. That would essentially correspond to between 6 and 18 minutes total of this activity in a given work day. Though repetitive there certainly is not a requisite significant degree of force in opening a standard door lock or

> padlock. Additionally, the period of recovery between these activities would obviously be far greater than the period of time exposed to this activity. Therefore, this activity would not place him at an increased risk of compression neuropathy because of the lack of requisite force and the period of time between these activities for recovery. Additionally, as a supervisor there is a significant portion of the day where he is not involved directly in the preparation and cleanup…Again there was a significant variability in all of the tasks performed on a given day. Therefore, his work activities have not served as a significant causal or aggravating factor."

Id. Dr. Stewart opined that Petitioner's treatment has been appropriate and that Petitioner would benefit from surgical decompression.

Dr. Stewart testified via evidence deposition on Respondent's behalf on April 14, 2020. (RX 6). He is a board-certified hand surgeon specializing in the arm from the elbow down. He testified that carpal tunnel syndrome and lateral epicondylitis development can be activity related. He testified that the results of his examination of Petitioner were consistent with bilateral carpal tunnel syndrome, but Petitioner did not have significant symptoms of lateral epicondylitis. The doctor testified that he miscalculated the time spent opening and closing locks in his report. Dr. Stewart testified that if each of the 125 locks Petitioner encountered during each shift took one to three seconds to open, then Petitioner only spent two to six minutes each shift opening and closing locks. When asked if he felt Petitioner's bilateral carpal tunnel syndrome is work-related, Dr. Stewart testified:

> "I did feel it was not…I relied on his description of the job, the areas that he felt were most concerning. And, again, there is not the requisite force in repetition in opening those locks. The exposure is very much limited in deference to the amount of time in a given eight-hour work shift. The activities are varied based on the different jobs…So there is an exceptionally large amount of time for recovery from different activities than there is when the activities are occurring."

Id. at 20. He testified that the farm activities and descriptions Petitioner provided of his work on the farm are very hand intensive and there is also exposure to vibration. He testified that operating a farm for 41 years and performing the activities Petitioner described on a continuous basis would put Petitioner at an increased risk for carpal tunnel syndrome.

Dr. Stewart testified that he agreed with Dr. Mirly's surgical recommendation. He testified that the occupational history contained in his report was taken entirely from Petitioner. He agreed that Petitioner indicated he had some symptoms before moving to the food supervisor role and that Petitioner said the new role caused his symptoms to worsen. Dr. Stewart testified that he gave Petitioner free rein to discuss any job activities or positions that he felt contributed to or worsened his condition and Petitioner only discussed the activities in his current role as a food service supervisor. Regarding the effect of the repetitive opening of locks, the doctor testified, "[i]f you

do something 125 times, it's repetitive. If you do something twice, it's repetitive. But at over an eight-hour period where the total sum of the activities takes 6 minutes, is not an at-risk activity." *Id*. at 32. Dr. Stewart testified that Petitioner was most concerned about the master locks he had to open and close. He testified that he knows how much force is required to "…put a key in and open a master lock." *Id*. at 33. Dr. Stewart acknowledged that some of the locks Petitioner encountered each day are of varied ages and might be more difficult to open than others.

Regarding the importance of Petitioner's history of family farming, Dr. Stewart testified:

> "It makes me more concerned that it is the activities—because the activities that were not disclosed, specifically the farming, is very heavy, very repetitive, vibration exposure. Obviously, the cold exposure, because you're working year round…So when I first saw him and didn't feel that it was related to his activities as a supervisor in the food service, I was—I felt that it was idiopathic. I didn't have a significant activity. Obviously, no health-related constitutional risk factors for Mr. Lickenbrock. I now feel that it is more likely related to the years of farming, and the heavy work, and vibration exposure, cold exposure, that are required for that position."

Id. at 53. Dr. Stewart testified that considering the duties Petitioner performs as a food service supervisor, Petitioner's job did not significantly alter or exacerbate the progression of his carpal tunnel syndrome.

<u>Conclusions of Law</u>

Petitioner bears the burden of proving each element of his case by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). He must show by a preponderance of the evidence that he suffered a disabling injury which arose out of and in the course of his employment. *Id*. A claimant alleging an accidental injury due to repetitive trauma must show that the injury is work-related and not a result of the normal degenerative aging process. *See Peoria County Belwood Nursing Home v. Indus. Comm'n*, 15 Ill. 2d 524, 530 (1987). After carefully considering the totality of the evidence, the Commission finds Petitioner did not meet his burden of proving he sustained a work-related injury as a result of repetitive trauma.

Most cases involving claims of repetitive trauma rely heavily on the opinions of medical experts. Here, the Commission also finds the expert opinions most enlightening. After closely reviewing the evidence, the Commission finds the opinions of Dr. Stewart, Respondent's Section 12 Examiner, regarding the lack of causal connection to Petitioner's employment most credible. Petitioner alleges he developed bilateral carpal tunnel syndrome and lateral epicondylitis primarily due to job activities associated with his current position as a correctional food service supervisor. The evidence shows that Petitioner attributed his conditions primarily to the repetitive locking and unlocking of locks throughout the facility as well as duties such as preparing meals and carrying and pushing heavy items. Dr. Mirly, Petitioner's treating physician, opined that Petitioner's job duties caused, aggravated, or worsened Petitioner's bilateral conditions. However, the Commission finds the explanation Dr. Stewart provided in support of his opinion that Petitioner

did not sustain an injury due to work-related repetitive trauma was the most credible. Dr. Stewart's opinion truly took into account the full extent of Petitioner's job as a food service supervisor and the activities he performed outside of work.

Dr. Stewart credibly explained why the amount of key turning Petitioner does each day at work could not cause or exacerbate Petitioner's condition. While Petitioner's assertion that he had to unlock locks up to 125 times per shift initially sounds excessive, Dr. Stewart did the math and credibly explained why that amount of key turning could not have aggravated or worsened Petitioner's condition. Dr. Stewart credibly testified that performing an activity 125 times over an eight-hour shift when the activity takes a total of six minutes each shift is not an at-risk activity for carpal tunnel syndrome. Dr. Stewart also credibly testified that Petitioner's work duties, including the opening of locks throughout his shift, do not require the amount of force and repetition necessary to cause or aggravate Petitioner's condition. Furthermore, the Commission finds Dr. Stewart's opinion that Petitioner's extensive history of working on his family farm most likely caused or aggravated Petitioner's condition credible.

The Commission finds that Petitioner's testimony regarding the extent of the work—or lack thereof—he performs on the farm as well as the extent of his small engine repair business was disingenuous in light of the detailed descriptions he provided in Petitioner's Exhibit 6 prior to the arbitration. Instead, the detailed job description and work history Petitioner authored before both Dr. Stewart's evidence deposition and the arbitration hearing most credibly explains the extent of Petitioner's hand-intensive work performed on the family farm and with his small engine repair business. Once Dr. Stewart learned the true breadth and length of Petitioner's work on the farm, Dr. Stewart credibly explained why Petitioner's history of farm work most likely caused or aggravated Petitioner's condition.

A close review of the evidence reveals that Dr. Mirly did not know the true extent of Petitioner's work on the family farm and his engine repair business. Likewise, Dr. Mirly admittedly did not know the frequency during each shift with which Petitioner performed tasks such as turning keys in locks that the doctor believed could aggravate Petitioner's carpal tunnel syndrome. He did not know how much force Petitioner had to exert when locking and unlocking the doors. Dr. Stewart credibly explained that even if a potentially aggravating activity is repetitive, one must consider the amount of force used. Furthermore, he testified the amount of rest time Petitioner had between these potentially aggravating activities during his shifts. Petitioner's own descriptions of his work duties reveal a lot of varied activities with sufficient rest time between any repetitive activities. Petitioner's job does not require him to perform the same activity for an extensive period.

Finally, the Commission finds that Petitioner failed to prove his past duties as a correctional officer caused or contributed to his current condition of ill-being. Dr. Stewart credibly testified that medically, one is unable to assign causation for a current diagnosis or current symptoms to any of Petitioner's past duties as a correctional officer. Petitioner testified that various positions and duties he performed during his limited time serving on the tact team and working in segregation involved extensive use of his hands, wrists, and arms as well as forceful movements. However, he last served on the tact team in 2005 and has not worked in segregation since 2006. These prior duties ended years before he sought any medical treatment or was diagnosed with

carpal tunnel syndrome and lateral epicondylitis. The Commission finds that Petitioner failed to meet his burden of proving he sustained an accidental injury due to any work-related repetitive trauma.

For the foregoing reasons, the Commission denies benefits to Petitioner because he did not sustain an injury arising out of and in the course of his employment.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on July 27, 2020, is reversed in its entirety and all benefits are denied.

October 8, 2021

o: 8/10/21
TJT/jds
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/s/ *Maria E. Portela*
Maria E. Portela

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

DISSENT

I respectfully dissent from the opinion of the majority and would affirm and adopt the Decision of the Arbitrator. After carefully considering the totality of the evidence, I believe Petitioner met his burden of proving he sustained an injury due to work-related repetitive trauma.

Petitioner has worked as for Respondent for over 20 years primarily as a correctional officer. The evidence shows that even before he obtained his current position as a food service supervisor, he engaged in many work-related activities that required the forceful use of his bilateral hands, wrists, and arms. Respondent does not dispute Petitioner's recitation of his work history. I believe Petitioner testified credibly regarding the impact different work assignments have had on the condition of his hands, wrists, and arms. Petitioner also testified credibly regarding his work history outside of his employment with Respondent as well as his work on the family farm. To bolster its opinion, the majority states that Petitioner's testimony was disingenuous regarding his farm work and his work repairing small engines. However, Petitioner's testimony did not conflict with the information he wrote in Petitioner's Exhibit 6. Instead, Petitioner attempted to add the context necessary for the finder of fact to determine whether he met his burden of proving a compensable injury due to work-related repetitive trauma. The context was necessary to prevent someone from blowing the extent of his outside work on the farm out of proportion. Unfortunately, Dr. Stewart and now the majority have done just that.

Contrary to the majority, I believe Dr. Mirly, Petitioner's treating doctor, provided the most credible opinion regarding the causal connection between Petitioner's condition and his job as a food service supervisor. Dr. Mirly not only is most familiar with Petitioner and his condition, but he also provided sound reasoning in support of his opinion that there is a causal relationship between Petitioner's diagnoses and his current job. Perhaps the most compelling evidence in support of Dr. Mirly's opinion is the undisputed fact that Petitioner did not seek any medical treatment for symptoms such as numbness, tingling, weakness, and pain in his bilateral upper extremities before he became a food supervisor. Despite working for Respondent, in addition to any work he did on the family farm and in his small engine repair "business" for several years, Petitioner's condition did not deteriorate until he began working in his current position. Given that history, and based on Petitioner's report of his job duties, Dr. Mirly determined Petitioner's job duties as a food supervisor at least contributed to his current condition of ill-being. Dr. Stewart never provided an explanation regarding why Petitioner's carpal tunnel syndrome worsened as soon as Petitioner began this new assignment. This glaring omission undercuts the credibility of Dr. Stewart's opinions. Dr. Stewart also failed to explain why Petitioner's job duties with Respondent in the almost two decades before he became a food service supervisor are not relevant given the lack of a formal diagnosis or any medical treatment in the years before the date of accident. Yet Dr. Stewart saw absolutely no problem with identifying Petitioner's 40-year history of performing light work on the family farm as the cause of Petitioner's condition.

I believe the Arbitrator took great care in weighing all the evidence and writing a detailed and well-reasoned Decision. The Arbitrator correctly concluded that Petitioner testified credibly and that the opinions of Dr. Mirly are more credible than those of Dr. Stewart. The most credible evidence supports a finding that Petitioner met his burden of proving he sustained an injury due to repetitive trauma relating to his job duties as a food service supervisor.

For the forgoing reasons, I would affirm and adopt the Decision of the Arbitrator in its entirety.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0509
NOTICE OF 19(b) ARBITRATOR DECISION

LICKENBROCK, SCOTT
Employee/Petitioner

Case# **17WC001651**

SOI/SOUTHWESTERN ILLINOIS CORRECTIONAL CENTER
Employer/Respondent

On 7/27/2020, 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:

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SPRINGFIELD, IL 62794

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

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

JUL 27 2020

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Scott Lickenbrock
Employee/Petitioner

Case # **17** WC **01651**

v.

Consolidated cases: _____

State of Illinois/Southwestern Illinois Correctional 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 **Collinsville, Illinois**, on **June 4, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

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

K. ☒ Is Petitioner entitled to any prospective medical care?

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

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On the date of accident, **December 13, 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 $**69,999.80**; the average weekly wage was $**1,346.15**.

On the date of accident, Petitioner was **51** years of age, ***married*** with **0** dependent children.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, totaling **$1,584.80**, equating to **$180.80** due and owing to Rural Family Medicine Associates, **$965.00** due and owing to Physical Medicine & Rehabilitation, and **$439.00** due and owing to Belleville Hand Surgery, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits.

Respondent shall authorize and pay for prospective medical care as recommended by Dr. Mirly, including but not limited to surgery, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

Linda J. Cantrell
Signature of Arbitrator

7/21/20
Date

JUL 2 7 2020

ICArbDec19(b)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

SCOTT LICKENBROCK,)
)
Employee/Petitioner,)
)
v.) Case No.: 17-WC-1651
)
STATE OF ILLINOIS/SOUTHWESTERN)
ILLINOIS CORRECTIONAL CENTER,)
)
Employer/Respondent.)

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on June 4, 2020, pursuant to Section 19(b) of the Act. The parties agree that on December 13, 2016, Petitioner was employed as a Correctional Food Service Supervisor at Southwestern Illinois Correctional Center. The issues in dispute are accident, causal connection, medical expenses, and prospective medical care. All other issues have been stipulated.

TESTIMONY

On 12/13/16, Petitioner was a 51-year-old Correctional Food Service Supervisor at Respondent's Southwestern Illinois Correctional Center facility. He was hired on March 6, 1995 as a Correctional Officer and held that position until August 2015, at which time he took the position in food services for better pay and retirement. Petitioner detailed his job duties as a Correctional Officer to include performing shakedowns of locked inmate boxes and cells, weapons cleaning requiring assembling small, intricate parts, constant use of keys (including Folger Adams keys), cuffs, and radios. (PX6). Petitioner was on the TACT Team for five years which involved cuffing and escorting inmates, performing cell shakedowns, and baton training. TACT Team was specialized training in addition and concurrent with his duties as a Correctional Officer which took place once a month for four consecutive hours. While attempting to block a full-force baton swing, Petitioner felt a shocking sensation in his wrists, elbows, and shoulders which would hurt for 7 to 10 days following each training session. Baton training involves a lot of force and grip. His last year serving on the TACT Team was 2003. Cell extraction training involved pressure point controls, wrist bends, and arm bars to control unruly inmates. Petitioner worked for two years on the road crew operating chainsaws, weed eaters, blowers, and push mowers. Petitioner worked for two years as an outside grounds officer operating similar equipment. Petitioner worked approximately four to five years in segregation using Folger

Adams keys to unlock rusty chuck holes to feed and pass items to inmates. Petitioner was in charge of eight inmates in segregation. He had to use a Folger Adams key to open locks approximately 50 times per seven and one-half hour shift.

Petitioner detailed his job duties as a Correctional Food Service Supervisor to include opening 125 rusty locks per seven and one-half hour shift. He testified the most difficult lock might take him approximately ten seconds to unlock and the easiest lock might take two seconds to unlock. Petitioner also stocks shelves, fills out logs, prepares meals for staff, cuts vegetables, mixes dressings with a whisk, and opens cans. Petitioner is required to lift 30-pound cans several times per day, 100-pound bags of beans three times per week, and 5-gallon buckets of water several times per day. Petitioner pushes carts weighing 50-300 pounds once or twice per day and carts weighing up to 600-pounds once per week. Petitioner reaches above shoulder level several times per day to obtain product from shelves. Petitioner does not use his hands for fine manipulation. His work shift is 4:30 a.m. to 12:30 p.m.

Petitioner described the locks in the dietary department as sticky, defective, and rusty and the doors would jam requiring him to lift the doors while locking and unlock them. There are approximately 14 secured doors and 24 padlocks in dietary. Automatic locking doors throughout the facility were defective. Many doors that sounded like they had unlocked would still be locked when Petitioner attempted to open them, and this would cause him to jam his wrist, elbow, and shoulder when he went to open the door. Even when the doors are unlocked, they weigh approximately 300 pounds and are difficult to open.

Petitioner began noticing constant numbness in both hands and shooting pain in his arms into his elbows after working in the dietary department for one and a half years. Petitioner testified he had pain in his hands while working as a Correctional Officer due to the rusty locks and Folger Adams keys; however, his pain was not bad enough to seek treatment and he assumed it was due to the aging process. Working with the rusty padlocks in dietary caused his symptoms to worsen to the point of seeking treatment. The pain and numbness interrupt his sleep. Petitioner testified that opening locks causes the greatest problem for his hands because they are rusty and old and you have to work them to get them open. Petitioner testified he dropped three things this morning at work when an "electric bolt" ran up his arm causing him to lose grip.

Petitioner experiences pain in his hands, wrists, and elbows that is worsening. Splints provided only temporary relief of his symptoms. Petitioner has tried conservative measures to improve his condition, but he wishes to have surgery immediately due to the severity of his symptoms. He takes Melatonin and Z-Quill when he has pain to help him sleep.

Petitioner testified he does not suffer from gout, rheumatoid arthritis, diabetes, or hypothyroidism. He is 6'2" tall and weighs 205 pounds and his height and weight have remained unchanged for quite some time. He is a nonsmoker and his hobbies include hunting, fishing, scuba diving and motorcycle riding. Petitioner testified he rode his motorcycle 950 miles last year and his average ride is between three and four hours. He testified he takes frequent breaks when riding. The motorcycle handlebars are just above shoulder level.

Petitioner testified he is an operator of a 200-acre family farm and owner of the farm since 1994. His brother primarily runs the farm. Petitioner works on the farm two months out of the year during crop season to plant, harvest, and apply herbicides and pesticides. He testified he performs preventative maintenance on the farming equipment, including six tractors, a combine, two grain trucks, a sprayer, and seven different types of tillage machinery. He welds broken equipment, changes bearings and oil, and replaces clutches. He repairs and maintains all buildings on the farm, including electrical and plumbing, changing belts on grain drying systems, and replacing broken blower motors. He performs regular maintenance of farm equipment involving kicking the tires and tightening and greasing bearings. Petitioner testified he also operates a small engine repair business where he primarily works on carburetors.

MEDICAL HISTORY

On 11/28/16, Petitioner presented to Rural Family Medicine Associates with complaints of numbness in his right hand that was present all the time. Physical examination revealed tenderness at the right epicondyle and a positive Phalen's test. An EMG/NCS was ordered and same was performed by Dr. Latha Ravi on 12/13/16, revealing bilateral carpal tunnel syndrome.

Petitioner was referred to Dr. Harvey Mirly, a board-certified hand specialist, who evaluated Petitioner on 3/2/17. Dr. Mirly noted Petitioner's complaints of bilateral hand pain and numbness, along with shooting pain up his arms into his elbows. He took Petitioner's work history and noted that his symptoms have been worsening since he was assigned to "food services". Physical examination revealed positive carpal tunnel testing bilaterally, tenderness at the origin of the extensor carpi radialis brevis at the right elbow, pain with resisted extension of the wrist with the elbow fully extended, and positive Tinel's sign with percussion of the superficial radial nerve at the dorsal radial forearm with distal paresthesias over the dorsal aspect of his hand. Dr. Mirly's impression was bilateral carpal tunnel syndrome, right lateral epicondylitis, and right Wartenberg syndrome. Dr. Mirly fitted Petitioner for splints to see if the use of same would result in improvement. On 3/6/18, Dr. Mirly recommended that Petitioner avoid lifting in pronation due to ongoing pain. On 12/19/19, Petitioner presented to Dr. Mirly with complaints of increasing symptoms bilaterally, which were particularly severe at night. Physical examination showed a markedly positive Tinel's sign to the median nerve at the wrist and Dr. Mirly administered bilateral injections in the carpal tunnels.

Dr. Mirly testified by way of deposition. Dr. Mirly testified he is a board-certified orthopedic surgeon who specializes in hand surgery and has been in practice for 26 years. He examined Petitioner on 3/2/17 for bilateral hand pain and numbness and shooting pain in his bilateral arms and pain in his elbows. Petitioner reported an onset of symptoms since 12/13/16 and indicated his symptoms had worsened since working in food service. Dr. Mirly testified he has treated Food Service Supervisors, Correctional Officers, Supply Service Supervisors, all of whom had been employed by the Southern Illinois correctional system. Dr. Mirly testified to the physical examination findings contained in his records and that his diagnoses were carpal tunnel syndrome, lateral epicondylitis, and Wartenberg syndrome. Dr. Mirly testified he initially recommended conservative treatment in the form of splint wear, activity modifications and oral anti-inflammatories to manage Petitioner's symptoms.

Dr. Mirly testified that Petitioner does not have any comorbid risk factors for the development of his conditions. Dr. Mirly knew that Petitioner uses his hands to cook, lock and

unlock the utensils and tools used for cooking, and that he signs out all the utensils for the serving line, cleans, writes, and generally uses his hands constantly in the course of his job duties. Dr. Mirly did not have a percentage breakdown of each of Petitioner's job duties. Based upon that job description in addition to the job duties contained in Dr. Mirly's notes, Dr. Mirly stated within a reasonable degree of medical certainty that Petitioner's job duties would be the type that would contribute to or exacerbate his condition. Dr. Mirly testified a sustained grip, such as holding a knife or lifting items, requires wrist flexion, high repetition, and vibration exposure that can cause the conditions suffered by Petitioner. Dr. Mirly opined that Petitioner's work for Respondent over the last 25 years was a causative factor in the development of his condition and the need for surgery. Dr. Mirly testified that driving a motorcycle can be a contributing factor for the development of carpal tunnel syndrome, but that carpal tunnel syndrome is a cumulative process of occupational and nonoccupational activities and is not solely causative. Dr. Mirly testified that if Petitioner still had continued significant symptoms despite an attempted course of non-operative treatment, his recommendation would be surgical intervention.

Petitioner underwent a Section 12 examination by Dr. Patrick Stewart on 2/18/20. Dr. Stewart reviewed the records of Dr. Vonderheide (Rural Family Medicine Associates), Dr. Mirly, and Dr. Ravi. He noted the EMG revealed mild carpal tunnel syndrome, that Petitioner had undergone splint therapy and injections, but that splints no longer helped and the injections helped Petitioner's condition only briefly. Dr. Stewart also noted Petitioner was otherwise healthy. Upon physical examination, Dr. Stewart noted tenderness over the lateral epicondyle on the right and bilateral tenderness over the medial epicondyles. He also had positive Tinel's bilaterally at the carpal tunnel, positive compression, Phalen's, and reverse Phalen's. There was more weakness than expected in the FDP of the index fingers and FPL bilaterally. There was tenderness over the CMC joint and a positive CMC grind on the right. Petitioner had positive Tinel's sign over the cubital/ulnar tunnel on the left. Dr. Stewart's assessment was that of bilateral carpal tunnel syndrome.

Dr. Stewart stated that repetitive, forceful duties with vibration exposure and exposure to cold have been linked to an increased risk for developing or exacerbating carpal tunnel. He stated that Petitioner's job was repetitive but did not feel Petitioner was placed at a greater risk for the development of carpal tunnel because there is not enough significant requisite force involved in opening a *standard* door or padlock, and because he believed that the period of recovery time in between these activities was greater than the period of time exposed to same.

Dr. Stewart testified by way of deposition. Dr. Stewart is board-certified and specializes in upper extremity surgeries. Dr. Stewart agreed with Dr. Mirly's diagnosis of carpal tunnel syndrome, agreed that all treatment received by Petitioner had been reasonable and necessary, and agreed with Dr. Mirly's surgical recommendation. Dr. Stewart testified consistent with his opinion stated in his Section 12 report that Petitioner's carpal tunnel condition was not causally related to his work duties. He further testified Petitioner did not have any risk factors for developing bilateral carpal tunnel syndrome.

Dr. Stewart testified that Petitioner's farming operations require a significant amount of force with activities and vibration exposure and the exposure to such activities on a continuous basis for over 41 years would place someone at an increased risk for developing carpal tunnel syndrome. Dr. Stewart testified he did not discuss with Petitioner his farming operations, but

reviewed Petitioner's job description of same. Dr. Stewart testified he did not discuss with Petitioner his hobby of riding a motorcycle and was not aware of same when he evaluated him. He agreed that Petitioner had right-sided lateral epicondylitis when Dr. Mirly evaluated him, but disagreed that the condition was still present. Dr. Stewart found Petitioner to be credible.

On cross-examination, Dr. Stewart testified he was not provided with a job site analysis or job duty description of a food service supervisor by Respondent. Dr. Stewart's opinion as to causation is based on the occupational history provided him by Petitioner. Dr. Stewart testified he did not review Petitioner's job duty description regarding farming operations until the morning of his deposition. He was unaware if Petitioner performed the farming activities between 2017 and 2020, but his testimony was based on the assumption he did. It was Dr. Stewart's understanding that Petitioner farmed 30 hours per week, worked for Respondent 37.5 hours per week, and worked for Excel Energy for 25 hours per week, for a total of 92 hours per week between the three jobs.

Dr. Stewart testified he assumes some of the locks at Respondent's facility are of different ages and wear patterns, but he has no knowledge of the level of difficulty in locking and unlocking the locks. Dr. Stewart testified Petitioner monitors kitchen duty and presumes Petitioner's hands are either writing or keeping track of utensils used by the inmates. Dr. Stewart testified he is not aware of what Petitioner is doing with his hands any minute of the workday. He agreed if the locks were in some need of maintenance or replacement, Petitioner would have to use a greater degree of force to unlock a door, drawer, lock, dead bolt, or padlock.

Dr. Stewart testified that Petitioner's farming activities, not his job duties with Respondent, put him at an increased risk of developing carpal tunnel syndrome. He testified this was his causation opinion if Petitioner was still farming. He agreed that the use of vibratory tools can cause or aggravate carpal tunnel syndrome. He was not aware of any of Petitioner's work activities for Respondent from 1995 through 2015. Dr. Stewart testified that activities performed as a grounds crewman could expose a person to vibration, cold, and forceful gripping and performing those activities for 37.5 hours per week could increase Petitioner's risk for developing carpal tunnel syndrome. Dr. Stewart testified Petitioner does not have any nonoccupational risk factors that put him at an increased risk for developing carpal tunnel syndrome.

Dr. Stewart admitted that he had no specific knowledge of what was involved in working in the segregation unit or armory at Respondent's facility, or whether Petitioner ever worked in either capacity. He was also unaware of what a "shakedown" consisted or whether Petitioner performed same. However, Dr. Stewart agreed that if it involved cuffing an inmate who is resisting, that it would potentially require a significant amount of force, including forceful gripping.

CONCLUSIONS OF LAW

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

In a repetitive trauma case, issues of accident and causation are intertwined. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture,* 99 I.I.C. 0961. In order to better define "repetitive trauma" the Commission has stated:

The term "repetitive trauma" should not be measured by the frequency and duration of a single work activity, but by the totality of work activity that requires a specific movement that is associated with the development of a condition. Thus, the variance in job duties is not as important as the specific force, flexion and vibratory movements requisite in Petitioner's job. *Craig Briley v. Pinckneyville Corr. Ctr.*, 13 I.W.C.C. 0519 (2013).

"[I]n no way can quantitative proof be held as the *sine qua non* of a repetitive trauma case." *Christopher Parker v. IDOT*, 15 I.W.C.C. 0302 (2015).

The Appellate Court's decision in *Edward Hines Precision Components v. Indus. Comm'n* further highlights that there is no standard threshold which a claimant must meet in order for his or her job to classify as sufficiently "repetitive" to establish causal connection. *Edward Hines*, 365 Ill.App.3d 186, 825 N.E.2d 773, 292 Ill.Dec. 185 (Ill.App.2d Dist. 2005). In fact, the Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." *Id.* at N.E.2d 780. Similarly, the Commission recently noted in *Dorhesca Randell v. St. Alexius Medical Center*, 13 I.W.C.C. 0135 (2013), a repetitive trauma claim, a claimant must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or primary cause, and there is no requirement that a claimant must spend a certain amount of time each day on a specific task before a finding of repetitive trauma can be made. *Randell* citing *All Steel, Inc. v. Indus. Comm'n*, 582 N.E.2d 240 (1991) and *Edward Hines supra.*

The Appellate Court in *Darling v. Indus. Comm'n* even stipulated that quantitative evidence of the exact nature of repetitive work duties is not required to establish repetitive trauma injury in reversing a denial of benefits, stating that demanding such evidence was improper. *Darling v. Industrial Comm'n*, 176 Ill.App.3d 186, 195, 530 N.E.2d 1135, 1142 (1st Dist. 1988). The Appellate Court found that requiring specific quantitative evidence of amount, time, duration, exposure or "dosage" (which in Petitioner's case would be force) would expand the requirements for proving causal connection by demanding more specific proof requirements, and the Appellate Court refused to do so. *Darling,* N.E.2d at 1143. The Court further noted, "To demand proof of 'the effort required' or the 'exertion needed' . . . would be meaningless" in a case where such evidence is neither dispositive nor the basis of the claim of repetitive trauma." *Id.* at 1142. Additionally, the Court noted that such information "***may***" carry great weight "only where the work duty complained of is a common movement made by the general public." *Id.* at 1142. The evidence shows that Petitioner's job duties involve the performance of tasks distinctly related to his employment as a State correctional facility, many of which are not activities that are even performed by the general public, let alone ones to which the public would be equally exposed.

In *City of Springfield v. Illinois Workers' Comp. Comm'n*, the Appellate Court issued a favorable decision in a repetitive case to a claimant in which the claimant's work was "varied" but also "repetitive" or "intensive" in that he used his hands, albeit for different task, for at least five (5) hours out of an eight (8) hour work day. *City of Springfield v. Illinois Workers' Comp. Comm'n*, 388 Ill.App.3d 297, 901 N.E.2d 1066, 327 Ill.Dec. 333 (Ill.App. 4th Dist., 2009). As

was noted by the Commission and reiterated in the Appellate Court decision in *City of Springfield v. Illinois Workers' Compensation Comm'n*, "while [claimant's] duties may not have been 'repetitive' in a sense that the same thing was done over and over again as on an assembly line, the Commission finds that his duties required an intensive use of his hands and arms and his injuries were certainly cumulative." *Id.*

The Commission has also recognized that a claimant's employment may not be the only factor in his or her development of a repetitive compressive peripheral neuropathy. The Commission awarded benefits in a correctional case where the claimant was involved in martial arts activity outside of his employment with Respondent (*see Samuel Burns v. Pinckneyville Corr. Ctr.*, 14 I.W.C.C. 0482 (2014)), and in another correctional case where the claimant, who was a Correctional Officer promoted through the ranks to Correctional Lieutenant, was involved in weight lifting outside of his employment. *See Kent Brookman v. State of Illinois/Menard Corr. Ctr.*, 15 I.W.C.C. 0707 (2015). In the repetitive trauma case of *Fierke*, the Appellate Court specifically held that non-employment related factors that contribute to a compensable injury do not break the causal connection between the employment and a claimant's condition of ill-being." *Fierke v. Indus. Comm'n*, 309 Ill.App.3d 1037, 723 N.E.2d 846 at 849 (3rd Dist. 2000). The Court stated, "The fact that other incidents, whether work related or not, may have aggravated a claimant's condition is irrelevant." *Id.*

Under Illinois law an 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, 797 N.E.2d 665 (Ill. 2003) [Emphasis added]. Even when other non-occupational factors contribute to the condition of ill-being, "[*A*] 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 (3rd Dist. 2000). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Indus. Comm'n*, 834 N.E.2d 583 (2d Dist. 2005). Employers are to take their employees as they find them. *A.C.& S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Comm'n*, 433 N.E.2d 671, 672 (1982). The Supreme Court in *Durand v. Indus. Comm'n* noted that the purpose of the Illinois Workers' Compensation Act is best served by allowing compensation where an injury is gradual but linked to the employee's work. *Durand v. Indus. Comm'n*, 862 N.E.2d 918, 925 (Ill. 2006).

In light of the aforementioned law, the Arbitrator finds the causation opinion of Dr. Mirly to be well-supported by the law and the medical evidence in the record. The medical evidence shows that Petitioner has no significant comorbid risk factors for the development of his bilateral carpal tunnel syndrome, right lateral epicondylitis, and right Wartenberg syndrome. The Arbitrator is not persuaded by the opinion of Dr. Stewart who opined that Petitioner's work duties in no way even contributed to Petitioner's condition, particularly when he was not aware of Petitioner's work duties prior to 2015, his specific job duties as a food service supervisor or how he uses his hands during a work shift. Dr. Stewart was not aware of the condition of the locks Petitioner used each shift which he referred to as "standard". Dr. Stewart agreed Petitioner's job was repetitive, he would have to use a greater degree of force to unlock a door, drawer, lock, dead bolt, or padlock if the locks were in need of repair or maintenance.

Therefore, the Arbitrator finds that Petitioner met his burden of proof on the issues of accident and causal connection and established that his repetitive injuries are causally related to his employment with Respondent.

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

Based on the above findings regarding accident and causal connection, the Arbitrator finds Petitioner is entitled to medical benefits related to his left and right hands and arms. The Arbitrator finds Respondent has not paid all charges relating to Petitioner's reasonable and necessary medical care. As a result, Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, totaling **$1,584.80**, equating to **$180.80** due and owing to Rural Family Medicine Associates, **$965.00** due and owing to Physical Medicine & Rehabilitation, and **$439.00** due and owing to Belleville Hand Surgery, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

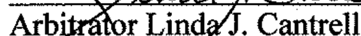
Issue (K): Is Petitioner entitled to any prospective medical care?

All of Petitioner's treatment to date was sought in the quest to diagnose, relieve or cure the effects of Petitioner's injury, and Dr. Stewart agreed that same had been reasonable and necessary.

Dr. Mirly testified that if Petitioner still had continued significant symptoms despite an attempted course of non-operative treatment, which he testified he has, his recommendation would be surgical intervention. Dr. Stewart agreed with Dr. Mirly's surgical recommendation.

Based upon the foregoing, the Arbitrator awards prospective medical treatment as recommended by Dr. Mirly, including, but not limited to, surgery.

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



Arbitrator Linda J. Cantrell

7/21/20
DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC016744
Case Name	CRUZ, ASTRID v. FAMILY DOLLAR
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0510
Number of Pages of Decision	18
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Brenton Schmitz
Respondent Attorney	Emily Schlecte

DATE FILED: 10/8/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ASTRID CRUZ,

Petitioner,

vs. NO: 18 WC 016744

FAMILY DOLLAR,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary disability, causal connection, medical expenses and prospective medical, and being advised of the facts and law, reverses the Decision of the Arbitrator on the sole issue of accident, 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 first notes that the Arbitrator's Decision contained a scrivener's error. The parties did not stipulate to accident; the Respondent disputed accident. (ArbX1) Therefore, the Commission strikes the words, "that Petitioner sustained accidents on 5/15/18 and 5/30/18," in the first sentence, in the fourth paragraph under the Procedural History section, on page three of the Arbitrator's Decision. That sentence will now read, "The parties stipulated that Petitioner and Respondent were operating under the Illinois Workers' Compensation Act (hereinafter "Act"), and that their relationship was one of employee and employer."

Accident

In addition, the Commission views the evidence differently than the Arbitrator regarding whether or not an accident occurred in the course and scope of Petitioner's employment on May 15, 2018. Petitioner testified that her job duties included loading the trucks, recovery, counting the money and making sure the store is clean at night. Petitioner testified that the products carried at the store included, "[d]etergent, dog food, food, deodorant, toothpaste, clothing, shoes, towels, paper towels, toilet tissue, tables, chairs, everything." (T. 10, 11) Petitioner testified that she lifted the items manually. (T. 11) Petitioner further testified the weights of the materials that she would be taking off the truck were more than 50 pounds and up. (T. 12) Petitioner testified that she would unload a truck once a week. (T. 13)

Petitioner testified it would take one hour and 40 minutes to unload a truck. (T. 13) Petitioner further testified that on May 15, 2018, she lifted up a box of four bottles of detergent and each one weighs 128 ounces. (T. 13) The record is not clear whether or not each bottle, or each box, weighed 128 ounces. (T. 13, 14) If the Petitioner lifted a box of four bottles of detergent weighing 128 ounces each, the total weight would be 32 pounds. Therefore, the Commission finds that the Petitioner's testimony regarding all the items sold in the store being delivered in boxes that weighed "more than 50 pounds and up" is not credible.

Petitioner testified that on May 15, 2018, after she went to grab the box of four bottles of detergent, she felt a pain on the left and then the back part and the top part of her shoulder. (T. 14) She clarified the back part meant, "like my back on the left side." (T. 14) Her work shift was from 6:00 a.m. to 3:00 p.m. and this incident occurred around 7:35 a.m. (T. 15) Petitioner did not testify as to how long she had been unloading the truck. Petitioner testified that she notified her supervisor who told her they needed to continue to unload the truck because they needed to open the store. (T. 16) Petitioner did not testify whether all the merchandise on the truck was the same, or lighter or heavier than the detergent bottle box.

Although the Commission takes note of the fact that Petitioner did not fill out an accident report, an accident history consistent with her testimony is in the medical records on May 19, 2018 and May 22, 2018. The Commission finds that the records are not completely consistent with Petitioner's testimony and notes that Community First Medical Center diagnosed a back strain, however, Petitioner complained also complained of upper back pain after lifting. (PX1, 5/19/18) Erie Humboldt Park Health Center documented back and chest pain following a day of heavy lifting and diagnosed a muscle strain "[m]ore focused over thoracic spine and anterior/left chest." (PX5, 5/22/18) The Commission also notes, however, that a year prior, on April 17, 2017, Petitioner's primary care physician documented that Petitioner complained of pain from her neck to the low back. (RX4) Petitioner told Dr. Ramirez that she had imaging done in Puerto Rico and needed surgery. She complained of sharp, shooting pain with radiation down both legs, neck pain during flexion, extension, and right and left lateral bending. (RX4) The Commission finds that Petitioner clearly had pre-existing pain complaints. Nonetheless, six months later, in October, 2017, Petitioner began working for Respondent as an Assistant Manager. (T. 10)

The Commission agrees with the Arbitrator regarding the Petitioner's lack of credibility noting the many inconsistent accident histories Petitioner provided to medical providers thereafter and the Petitioner's report to Dr. Lipov that she had another fall "sometime in July." (PX8, 9/14/18) However, the Commission finds that Petitioner sustained her burden of proving she had an accident on May 15, 2018.

Causal Connection

The Commission agrees with the Arbitrator's Decision regarding Petitioner's failure to testify regarding her prior recommendation for surgery, further tainting her credibility. The Commission further agrees with the Arbitrator that Petitioner failed to prove a causal connection between her work accident and her current condition of ill-being for the following reasons.

The Commission notes that when Dr. Lipov saw Petitioner on September 14, 2018, he documented that Petitioner seemed to have two separate distinct traumas, but it was not quite clear when the traumas occurred. Dr. Lipov notes that, "[i[t seems to the first one was on May 30, 2018, and the second one was sometime in July." (PX10) The same two dates were documented in the accident history in Dr. Sclamberg's note on October 1, 2018, with no mention of the May 15, 2018, incident in either doctor's notes. (PX11)

Petitioner saw Dr. Cary Templin on two occasion, October 19, 2018, and December 21, 2018. Dr. Templin testified that he when she first came into see him, Petitioner reported that on May 15, 2018, she was loading a truck, lifting boxes of detergents with eight gallons of detergents in each one, had onset of neck pain and mid-back pain, with pain extending into the left arm. (PX15, 10) The Commission notes that the amount of bottles documented in the history given to Dr. Templin is double the amount of bottles that Petitioner testified she lifted at trial. Further, Petitioner testified she lifted one box of four bottles, not that she was repetitively lifting.

The Commission further agrees with the Arbitrator that Dr. Templin based his causation opinion on Petitioner's representation that she did not have any prior problems with her neck and low back (PX15, 39) and that he attributed Petitioner's cervical spine condition to "repetitive lifting" on May 15, 2018, while loading a truck with boxes of detergent. (PX15, 26) The Commission also finds that Dr. Templin did not document or testify to any specifics as to the mechanism of injury. Dr. Templin did not testify that he based his opinion on the quantity, weight, number of hours or number of times Petitioner lifted to cause Petitioner's condition. In fact, when asked on cross-examination how many boxes did Petitioner say she was lifting, Dr. Templin responded, "I don't recall." (PX15, 33-34) When asked how much each of the boxes weighed, Dr. Templin responded, "[w]ell if there were gallons of detergent with eight gallons in it, probably anywhere between 60 and 80 pounds." (PX15, 33-34) The Commission finds Dr. Templin's assumptions do not comport with Petitioner's testimony. At most, according to Petitioner's testimony, the box would weigh 32 pounds. Dr. Templin also testified that he did not know Petitioner's lifting requirements at her job. (PX15, 36) Dr. Templin did not review any outside

treating records or physical therapy records, nor did he ask Petitioner details of a July 2018 fall. (PX15, 37)

The Commission further finds that Dr. Templin's testimony regarding causation was equivocal. He testified "[r]epetitive lifting certainly can cause a herniated disc in the neck or aggravation of the spondylotic condition." In answer to how "lifting as such could create an issue with the neck," Dr. Templin testified, "[i]f there's lifting in a repetitive fashion like this, there's going to be twisting involved with it." (PX11, 27) Petitioner never testified that she twisted, and no such history of twisting is documented in either of Dr. Templin's two office notes. The Commission finds Dr. Temple's opinion is therefore not credible and is entitled to little weight. *See*, *e.g.*, S*unny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC, 14 N.E.3d 16, 383 Ill. Dec. 184 (Expert opinions must be supported by facts and are only as valid as the facts underlying them.)

Therefore, the Commission agrees with the Arbitrator and finds that Petitioner's current condition is not causally related to the May 15, 2018, work accident rendering all other issues moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on February 6, 2020, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's Decision regarding accident is reversed.

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

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

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(1) (West 2013)*. Based upon the denial of compensation herein, no bond is set by the Commission.

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

October 8, 2021

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

KAD/bsd
081021
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/s/*Thomas J. Tyrrell*
Thomas J. Tyrrell

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

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

21IWCC0510

CRUZ, ASTRID
Employee/Petitioner

Case# **18WC016744**

18WC016745

FAMILY DOLLAR
Employer/Respondent

On 2/6/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.52% 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:

2553 McHARGUE & JONES LLC
MATTHEW C JONES
123 W MADISON ST 18TH FL
CHICAGO, IL 60602

2542 BRYCE DOWNEY & LENKOV LLC
EMILY SCHLECTE
200 N LASALLE ST SUITE 2700
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
19(b)

Astrid Cruz
Employee/Petitioner
v.
Family Dollar
Employer/Respondent

Case # **18** WC **16744**

Consolidated cases: **18 WC 16745**

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 **Tiffany Kay**, Arbitrator of the Commission, in the city of **Chicago,** on **06/20/19**. 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 prospective medical care

FINDINGS

On the date of accident, **May 15, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**26,000**; the average weekly wage was $**500**.

On the date of accident, Petitioner was **44** 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 $**6097.15** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**6097.15.**

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

ORDER

Petitioner did not prove by a preponderance of evidence that she sustained a compensable accident that arose out of and in the course of her employment on May 15, 2018 or May 30, 2018 in relation to her cervical spine, thoracic spine, lumbar spine, bilateral shoulders, and right knee. Therefore, Petitioner's claim for TTD benefits and prospective medical benefits are denied.

The Arbitrator finds the issue of Respondent's liability for medical expenses regarding these conditions moot. Respondent is awarded a credit for all medical expenses paid regarding Petitioner's cervical spine, thoracic spine, lumbar spine, bilateral shoulders, and right knee.

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

01/31/2020
Date

ICArbDec19(b)

FEB 6 - 2020

PROCEDURAL HISTORY

This case is consolidated with the following case: 18wc16745.

This matter was heard before Arbitrator Tiffany Kay (hereinafter "Arbitrator Kay") on June 20, 2019 in Chicago, Illinois. The submitted records have been examined and the decision rendered by Arbitrator Kay.

The parties proceeded to hearing on disputed issues as to whether Mrs. Astrid Cruz (hereinafter "Petitioner") sustained accidental injuries that arose out and in the course of her employment with Family dollar (hereinafter "Respondent"), whether the condition of ill-being is casually connected to this injury, whether Respondent is liable for unpaid medical bills, and whether Petitioner is entitled to Temporary Total Disability (hereinafter "TTD") Benefits for the period of 06/01/18 through 06/20/19 (representing 55 weeks). (Arb.X1) In addition, at issue is whether Petitioner is entitled to prospective medical care, specifically, the approval of C5-7 anterior cervical discectomy and fusion surgery (hereinafter "ACDF") and right knee arthroscopy. (Arb. X1)

The parties stipulated that Petitioner sustained accidents on 5/15/18 and 5/30/18, that Petitioner and Respondent were operating under the Illinois Workers' Compensation Act (hereinafter "Act"), and that their relationship was one of employee and employer. (Arb.X1) The parties stipulated that Petitioner gave notice of the accident within the time limits stated in the Act, Petitioner's average weekly wage in accordance to §10 of the Act was $500.00, at the time of injury Petitioner was 44 years of age, single and had 0 dependent children. (Arb.X1)

SUMMARY OF FACTS AND EVIDENCE

Petitioner's Prior Medical Treatment

On 4/17/17, Petitioner saw Dr. Esmilkry Ramirez and complained of pain from her neck to the low back. (RX 4). Petitioner told Dr. Esmilkry that she had imaging done in Puerto Rico and needed surgery. (Id). Petitioner complained of sharp, shooting pain with radiation down both legs, neck pain during flexion, extension, and right and left lateral bending. (*Id*). Dr. Ramirez ordered x-rays of the cervical spine, thoracic spine, and lumbar spine. (*Id*).

Petitioner testified that she had prior "casual pain" in her neck and low back, intermittent pain and her doctors recommended Tylenol for pain management. Petitioner testified that she was honest and truthful with her treating physicians, Dr. Mash, and Dr. Citow. Petitioner testified that she never told her treating physicians, Dr. Mash, or Dr. Citow about her prior neck or low back problems.

Testimony and Medical Treatment

Petitioner testified, at the time of trial, she had worked for the Respondent 8 ½ months as of May of 2018. Petitioner testified she began working for Respondent in October of 2017 as an Assistant Manager. Her job duties included loading trucks, recovery, counting store profits, and cleaning the store. Petitioner testified that the store sold products such as detergent, dog food, food, toothpaste, clothing, shoes, towels, tissues and tables with chairs. Petitioner testified that she would manually move most items. In regard to working with trucks, whenever the store received merchandise, it was brought on trucks and then placed on metal platforms where the items would be moved manually. Petitioner estimated that the materials on the trucks weighed up to and sometimes more than 50lbs. Petitioner testified that she unloaded the truck 1 time a week. Petitioner testified, that leading up to May 15, 2018, she had not experienced any problems at work.

On May 15, 2018 Petitioner was working a 6:00am to 3, while unloading product from one of Respondent's trucks, Petitioner testified she was in the process of lifting a heavy box containing multiple bottles of detergent when she turned to place it on a cart and felt sudden onset of pain behind her left shoulder and across the left upper back. Petitioner testified that her supervisor was helping her unload the truck so had immediate notice of the accident. Petitioner testified that she worked the rest of the shift and did not fill out an accident report. Petitioner was informed by her supervisor that she needed to finish her shift as Respondent's store required the product that was on Respondent's truck in order to open. In response, Petitioner took two Tylenol and finished her shift, all while experiencing increasingly significant pain. The following day, Petitioner testified she awoke with an even stronger degree of pain to her rear left shoulder and the left side of her upper back.

Petitioner testified that on May 19, 2018, she went to the ER at Presence Saint Elizabeth, located at 1431 N. Claremont Street, Chicago, IL 60622, and received "first aid.". Petitioner said that she did not see a doctor at Saint Elizabeth, did not receive treatment beyond first aid, and was referred to another ER "in front" of the hospital.

On May 19, 2018, Petitioner was treated by Dr. Borraccini at Presence Saint Elizabeth. (PX 6, p. 7), reported mid/upper back pain, had normal neck range of motion, underwent a thoracic spine x-ray, was diagnosed with a thoracic spine strain, released to light duty, and instructed to follow up with Dr. Ramirez at Prime Care West Town. (*Id*).

On May 19, 2018, Petitioner chose to also go to Community First Medical Center ER located at 5645 W. Addison Street, Chicago, IL 60634, and reported low back pain due to lifting heavy crates on 5/15/18. Petitioner denied cervical spine tenderness and was diagnosed with a back strain. (PX 1).

Petitioner testified that the first time she experienced neck pain was on May 17, 2018. Petitioner testified that the first time she experienced low back pain was on May 30, 2018. Petitioner testified that the first time she experienced right knee pain was on May 30, 2019.

On May 22, 2018, Petitioner went to Erie Humboldt Park Health Center and saw Dr. Adam Del Conte and complained of back and chest pain. (PX 5). Included in the history, Petitioner stated she does not take any of the Naprosyn, flexaril or norco that was prescribed. She stated that the Naprosyn causes hand pain and the other meds cause drowsiness. Petitioner told the physician that since the accident she has been having trouble connecting with her manager to complete her incident report. Petitioner had normal neck mobility and was diagnosed with a muscle strain and overuse. (PX5) Petitioner was advised to "complete an incident report to see if workers' comp could assist with PT if needed." Petitioner reported that she had not returned to work since the May 15,2018 incident. (*Id)*. Upon evaluation, Dr. Conte advised Petitioner to take a few more days off of work and continue taking medication before returning with restrictions and if pain persisted, to return and see him.

On May 29, 2018, Petitioner returned to work. Petitioner testified that she worked a whole shift that day.

Petitioner testified that on May 30, 2018, at the start of her shift, she was asked by her supervisor to arrange Respondent's product throughout the store. In the process of putting away product, Petitioner lifted a 15-20 pound box filled with juice, and while walking it to its correct location, tripped and fell forwards, landing forcefully on her hands and knees. During the fall Petitioner hit her right knee on the ground. Petitioner testified that she felt pain in her hands, neck and lower back. Petitioner testified that her right leg and both hands hit the ground. She testified that after the accident she felt a strong pain in her neck and a pulsating feeling in her left shoulder. She testified that her knee hurt but it was not constant pain it would come and go.

Petitioner testified that prior to her May 15, 2018 and May 30, 2018 accidents she did have casual pain in her lower back that would move up to her shoulders. She had seen doctors for the pain but had not surgery or injections. She also testified that she had not been taking medicine for the pain. Petitioner testified that she had not received any restrictions regarding this pain prior to 2018. She testified that she had not had prior issues with her right knee but did have pain in her legs.

On May 30, 2018, Petitioner underwent a cervical spine x-ray and thoracic spine x-ray which revealed the following: the Cervical spine x-ray had no evidence of acute osseous injury involving the cervical spine with mild degenerative disease at C6-C7). (PX 1). The thoracic spine x-ray revealed no evidence of acute osseous injury involving thoracic spine; mild disc space narrowing at T11-T12; mild degenerative spurring along thoracic spine. (PX 1).

On June 1, 2018, Petitioner followed up with Dr. Kalina, a pain management physician, without a referral, and complained of neck, thoracic spine, and lumbar spine pain. There was no documentation related to Petitioner's knee complaints. Upon evaluation, Dr. Kalina noted that Petitioners pain was aggravated by bending or lifting. As a result, Dr. Kalina took Petitioner off of work completely and recommended an MRI of her cervical spine, lumbar spine, in addition to physical therapy.

Between June 4, 2018 and October 2018, Petitioner attended physical therapy with Dr. Mahmoud Lotfi at Sage Medical Solution. During that time, Petitioner noted pain in her neck, mid and low-back, and her shoulders. Petitioner also noted that she had difficulty sleeping due to her neck, shoulder, and back pain and demonstrated an overall inability to perform job duties due to the degree of pain she was experiencing.

On June 5, 2018, Petitioner underwent cervical, thoracic and lumbar spine MRI's at Edgebrook Radiology. The cervical spine revealed a left-sided disk herniation at C5 and C6, and a 2-3 mm broad-based posterior disk herniation at C6 and C7 which indents the ventral surface of the thecal sac and spinal cord. Petitioner presented to physical therapy on June 6, 2018, where she reported that her back pain had increased. Petitioner also noted that the degree of pain she experienced would gradually return after performing physical therapy. (PX8) The lumbar spine MRI revealed L5/S1 level: 2-3mm posterior disk herniation with mildly extruded nucleus pulposus which indents the thecal sac with mild stenosis and bilateral neuroforaminal narrowing, exacerbated by facet arthrosis and ligamentum flavum hypertrophy. (PX 8). The thoracic spine MRI found normal thoracic curvature present, no fractures or significant subluxations, no significant disc bulges, protrusions, or herniations and no significant spinal stenosis or neuroforaminal narrowing. (PX 8).

On June 13, 2018, Petitioner followed up with Dr. Kalina where she complained that she could "could hardly walk", experienced left-hand numbness and had cramping in her 3rd left finger. Petitioner testified at trial that by June 13, 2018, she was experiencing severe pain radiating down her left arm and into her hand, specifically into her thumb, index, and middle fingers, and that these symptoms continue to the present date. Petitioner was diagnosed with cervical radiculopathy at that time.

In contrast, Dr. Kalina's records on June 13, 2018, stated that Petitioner told Dr. Kalina that her pain and mobility were improving and denied radiating symptoms to the left hand (PX 8). Dr. Kalina noted that Petitioner's upper and lower extremities had normal appearance and tone and she had 5/5 strength. (Id). Dr. Kalina did not record an antalgic gait. (Id).

On June 18, 2018, Petitioner underwent a left shoulder x-ray. (PX 8). The study was unremarkable. (Id). On September 14, 2018, Petitioner reported right knee pain, for the first time. (PX 8). Petitioner told Dr. Lipov that she fell the first time on May 30, 2018 and had another fall "sometime in July". (Id).

On August 17, 2018, Petitioner was referred to Dr. Lipov at the Chicago Pain and Orthopedic Institute for pain management services, where she reported continued neck and lower back pain. At that time, Petitioner underwent an injection to her cervical spine. Petitioner noted that following the injection, her pain was alleviated slightly for three to four days. Subsequently, Petitioner received two additional injections administered by Dr. Lipov to her neck, the first on September 5, 2018 and then again on September 19, 2018; both of which provided only temporary relief of her symptoms. Specifically, Petitioner testified that her neck pain would return to baseline in no more than three days after each injection.

On September 14, 2018, Petitioner presented to Chicago Pain and Orthopedic Institute on where she reported a problem in her right knee which she stated caused pain if she walked too much, resulting in swelling. She related this back to her May 30, 2018 accident. At that time, Dr. Lipov referred Petitioner to Dr. Sclamberg for a further orthopedic consultation who recommended Petitioner receive an MRI of her right knee.

On September 27, 2018, MRI Lincoln Imaging Center performed an MRI of Petitioner's right knee, revealing an underlying medial meniscus tear. Dr. Sclamberg recommended surgery to repair her medial meniscal tear, and on October 22, 2018, Petitioner returned to Dr. Sclamberg and underwent a right knee arthroscopy with partial medial meniscectomy.

On October 3, 2018, Petitioner presented for a Section 12 IME with Dr. Jonathan Citow (hereinafter "Dr. Citow") regarding her neck and back pain. Dr. Citow reviewed Petitioner's MRI taken on June 5, 2018, and noted that it showed C3 and C4 spondylosis, C5 and C6 spondylosis with a left-sided protrusion and bone spur, and C6 and C7 spondylosis with foraminal narrowing. Dr. Citow diagnosed Petitioner with a cervical strain that should have required six weeks of physical therapy. He opined that Petitioner had age-appropriate cervical spondylosis and that she had reached MMI concerning her May 2018 injuries and that she could return to work full duty without restrictions.

Dr. Lipov referred Petitioner for a spine surgery consultation with Dr. Cary Templin of Hinsdale Orthopedic Associates. She was seen on October 19, 2018, at which time, Dr. Templin performed a physical examination of her cervical spine, revealing a positive Spurling maneuver on the left, causing pain extending into the periscapular region and over the left shoulder. Dr. Templin diagnosed her with a cervical herniated disc. Going forward, Dr. Templin did not recommend any additional care for Petitioner's lumbar spine, however he did recommend a left C6 transforaminal injection for Petitioner's cervical spinal condition.

On November 17, 2018, Petitioner denied prior cervical spine and lumbar spine injuries to Dr. Patel. (PX 8).

On December 5, 2018, Dr. Patel from Chicago Pain and Orthopedic Institute administered the C6 transforaminal epidural injection that Dr. Templin had recommended. Petitioner testified at trial that the injection helped to alleviate pain in her neck for only about four days before returning to its original degree of pain. On December 21, 2018, Petitioner returned to Dr Templin, who recommended an anterior cervical discectomy and fusion of C5 and C6, and likely C6 and C7, to address her continuous cervical spinal complaints.

On December 14, 2018, Petitioner presented to Dr. Steven Mash for a Section 12 IME related to her right knee condition. Dr. Mash performed a physical examination, which revealed well-healed arthroscopic incision and full range of motion. Specifically, Dr. Mash opined that he was unable to state whether the treatment she underwent relative to her right knee was causally related to her May 30, 2018 work accident. However, he admitted that it was possible that her right knee condition was related to the May 30, 2018 work

accident. Nonetheless, he opined that the treatment she received, including the right medial meniscus arthroscopy, were reasonable and necessary.

On February 18, 2019, Petitioner was seen by Dr. Sclamberg with increased complaints to her right knee, having fallen down the stairs in her home the week prior. Petitioner testified that she fell while going down to the basement of her house. Petitioner testified that she fell due to low back pain. Petitioner noted pain along the medial and lateral aspects of her right knee and reported swelling. In response, Dr. Sclamberg scheduled Petitioner for an x-ray and MRI of her right knee.

On April 15, 2019, Petitioner returned to Dr. Sclamberg with the completed updated diagnostic testing. Dr. Sclamberg opined that who determined that the results of Petitioner's MRI, which showed a high signal in the posterior horn of the medial meniscus with extension into the inferior aspect, demonstrated a recurrent tear of the medial meniscus. At that time, Dr. Sclamberg recommended a revision arthroscopy of the right knee with Petitioner, which the Petitioner wishes to undergo if approved.

Evidence Depositions

At trial, Petitioner presented the evidence deposition testimony of Dr. Cary Templin taken on April 30, 2019. Dr. Templin is a board-certified orthopedic surgeon, specializing in spine surgery. Dr. Templin testified that he saw Petitioner on October 19, 2018, where Petitioner presented with neck pain and mid-to-low back pain extending into her left arm which resulted from an injury that occurred at work on May 15, 2018. He testified that he performed a physical examination of Petitioner, which revealed a positive Spurling's maneuver to the left, limited extension of the cervical spine and limited lateral rotation. Dr. Templin opined that the pain resulting from Petitioner's positive Spurling's maneuver could indicate an impingement of the nerve on the left side of Petitioner's neck. As for the issues with extension and rotation, Dr. Templin stated that similar to the Spurling maneuver, such a movement can irritate the nerve root when doing so. Dr. Templin opined that both of which was consistent with either C6 or C7 of Petitioner's left side.

Dr. Templin also testified that he conducted a lower back exam on Petitioner which seemed quite normal. Dr. Templin opined that Petitioner suffered a disc herniation at C5-C6 which was causing severe foraminal stenosis to Petitioner's left side, with a disc protrusion at C6-C7. Dr. Templin opined that as for the lumbar MRI, it showed some degenerative changes at L5-S1. Dr. Templin testified that Petitioner's MRI findings correlated with his subjective and objective findings on exam and presentation. Specifically, Dr. Templin opined that Petitioner's C5-C6 disc herniation and radiculopathy explained Petitioner's back pain that extended into her left arm.

Dr. Templin testified that Petitioner's current condition of ill-being is causally related to her accident at work on May 15, 2018. Dr. Templin reasoned that Petitioner's complaints of pain in her upper to mid-back and neck have been persistent since the date of accident. He also testified that Petitioner's mechanism of injury was an injury sufficient to cause her upper back and neck pain.

Dr. Templin testified that he recommended that Petitioner undergo a C6 transforaminal injection in order to target the nerve root responsible for her radicular symptoms and neck pain. The injection was done on December 5, 2018 and gave Petitioner testified that it provided her with minor relief for 3-4 days. Dr. Templin opined that the fact that Petitioner experienced temporary relief from the injection was significant because that indicated that her C5-C6 radiculopathy was potentially the source of her neck and lower back pain. Dr. Templin also testified that Petitioner's injections and physical therapy were reasonable and necessary procedures, and that those procedures were casually related to her work accident.

Dr. Templin testified that he ultimately diagnosed Petitioner with cervical foraminal stenosis and cervical radiculopathy. Dr. Templin further testified that he ultimately recommended an anterior cervical discectomy and fusion of C5-C6 as a result of the herniated disk at C6-C7 based off of Petitioner's significant stenosis. Dr. Templin testified that the fusion surgery would be a reasonable option for Petitioner, given that she continued to report upper back and neck pain as well as radiculopathy symptoms after failure of conservative treatment.

The Arbitrator notes that Petitioner testified that Dr. Sclamberg did not refer Petitioner to Dr. Templin or Dr. Patel for further neck or back treatment.

Respondent presented the evidence deposition testimony of Dr. Jonathan Citow, taken on May 22, 2019 at American Center for Spine and Neurosurgery. Dr. Citow is an orthopedic spine surgeon. Dr. Citow stated that he performed an Independent Medical Examination of Petitioner on October 3, 2018. Dr. Citow testified that Petitioner presented to the Independent Medical Examination with pain in both of her shoulders and upper back with pain extending to her neck and the back of her head with some delayed pain extending towards the left triceps in the upper arm. HE further testified that Petitioner also described pain in her upper chest and lungs. Dr. Citow testified that Petitioner had exquisite tenderness to palpation in both her neck and back.

Dr. Citow testified that he reviewed an MRI of Petitioner's cervical spine performed on June 5, 2018. He opined that he found spondylosis at C3-C4, spondylosis at C5-C6 with a left-sided disc herniation and bone spurring with some foraminal narrowing as well as spondylosis at C6-C7 with some foraminal narrowing. Dr. Citow testified that there was no structural abnormality that correlated with an acute incident that occurred in May of 2018.

Dr. Citow testified that he diagnosed Petitioner with cervical spondylosis. However, he opined that the spondylolisthesis pre-existed Petitioner's May 15, 2018 accident, and the Petitioner only suffered a cervical strain as a result of said accident. Specifically, he testified that Petitioner's spondylolisthesis condition was not causally related to her work accident.

On cross examination, Dr. Citow conceded that spondylolisthesis is a condition that can be asymptomatic, and that it can become symptomatic from a traumatic injury. Dr. Citow also testified that a both a bone spur and a disc herniation can also be asymptomatic. Specifically, Dr. Citow testified that a lifting injury could aggravate a previously asymptomatic spondylolisthesis, bone spur, and disc herniation. Dr. Citow further conceded that symptomatic spondylolisthesis, surgery would in fact be required.

In regard to transportation, Petitioner testified that she would take Uber or Lyft from her house at 2334 N. Moody Avenue, Chicago Illinois to Sage Medical which is approximately 9 miles one-way. Sage Medical would order the car service. Petitioner testified that she looked at the relevant medical bills but was unaware that Sage Medical charged $200 for each date of service where they used Uber of Lyft. After Dr. Lotfi began work at the 147 Harrison Street Location, Sage Medical would order Lyft and/or Uber to his location on Harrison Street. Personnel from Sage Medical or Chicago Pain Institute ordered a car from Lyft or Uber to transport Petitioner to and from each of her diagnostic tests and appointments.

At the time of trial, Petitioner remained off of work at the recommendation of Dr. Templin, pending approval of her recommended cervical fusion surgery. She testified that she does want to undergo the cervical fusion surgery and is seeking approval of the same. She additionally testified that she wishes to undergo the recommended right knee revision arthroscopy for her recurrent meniscal tear and is seeking approval of that surgery at this time.

CONCLUSIONS OF LAW

With respect to issues (C) whether an accident occurred that arose out of and in the course of Petitioner's employment with Respondent, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that her accident on May 15, 2018, arose out of and in the course of her employment with Respondent. In addition, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that her accident on May 30, 2018, arose out of and in the course of her employment with Respondent nor was it casually related to this injury. "A claimant bears the burden of proving by a preponderance of the evidence that his injury arose out of and in the course of the employment." 820 ILCS 305/2 (West 2002). Both elements must be present in order to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483, 137 Ill. Dec. 658, 546, N.E.2d 603 (1987).

A claimant's injury "arises out of" his or her employment if the origin of the injury "is in some risk connected with or incident to the employment, so that there is a causal connection between the employment and the accidental injury." *Saunders v. Industrial Comm'n*, 189 Ill. 2d 623, 627 (2000). A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling the employee's duties. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 45 (1987). 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. With respect to factual matters, it is within the province of the Commission to judge the credibility of the witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences therefrom. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill.App.3d 665, 674 (2009).

18WC16744 - May 15, 2018

Petitioner testified that she occasionally experienced lower back pain prior to her May 30, 2018 accident. However, she testified that she never had any surgeries or injections relative to her lower back, was never prescribed medications, and the pain would come and go. On April 17, 2017, Petitioner was seen by Dr. Ramirez and she informed him that prior to her May 15, 2018 accident she had "pain in neck all the way down to lower back. Pain worse with walking and stairs.... States had some imaging done in Puerto Rico and was told she needed surgery but didn't bring paper with her today."" (RX4) The Arbitrator notes that there was no testimony provided by Petitioner as to why this prior recommendation for surgery was given. In addition, the remaining medical records introduced into evidence, do not reflect Petitioner informing her physicians that she had been given a prior surgical recommendation prior to them providing their individual diagnosis of her current alleged injury.

Dr. Templin testified that Petitioner's current condition of ill-being is causally related to her accident at work on May 15, 2018. Dr. Templin reasoned that Petitioner's complaints of pain in her upper to mid-back and neck have been persistent since the date of accident. He also testified that Petitioner's mechanism of injury was an injury sufficient to cause her upper back and neck pain. The Arbitrator notes that Dr. Templin testified that it was his understanding that the mechanism of injury was "repetitive lifting while loading a truck with boxes of detergent." (PX15) The Arbitrator notes that Petitioner testified that her job duties included loading trucks, recovery, counting store profits, and cleaning the store. Dr. Templin testified that it was his opinion that the surgery that was recommended was related to her injury at work. However, when asked if he had personally

reviewed any of Petitioner's initial medical records on file, he stated "I don't believe so." (PX15) The aforementioned records included items such as Petitioner's physical therapy records, injections, and Petitioner's subjective complaints after her injections. In addition, Petitioner testified that she never told her treating physicians about her prior neck or low back problems. The Arbitrator finds that a comprehensive treatment plan could not have been provided to the Petitioner considering the abundance of missing information regarding Petitioner's history and prior conditions that was not provided to Petitioner's physicians.

On October 3, 2018, Petitioner presented for a Section 12 IME with Dr. Jonathan Citow (hereinafter "Dr. Citow") regarding her neck and back pain. Dr. Citow reviewed Petitioner's previous medical records including her MRI taken on June 5, 2018, and noted that it showed C3 and C4 spondylosis, C5 and C6 spondylosis with a left-sided protrusion and bone spur, and C6 and C7 spondylosis with foraminal narrowing. Dr. Citow diagnosed Petitioner with a cervical strain that should have required six weeks of physical therapy. He opined that Petitioner had age-appropriate cervical spondylosis and that she had reached MMI concerning her May 2018 injuries and that she could return to work full duty without restrictions. Specifically, he testified that Petitioner's spondylolisthesis condition was not causally related to her work accident.

The Arbitrator finds Dr. Citow's opinion more credible than Dr. Templin's. Dr. Templin is the only person to find that Petitioner has severe spinal stenosis which requires surgical intervention. Importantly, Dr. Citow and Dr. Kuritza, the radiologist who interpreted the MRI, found that Petitioner had age-appropriate arthritis and did not find that Petitioner had severe spinal stenosis. In addition, the Arbitrator notes that Petitioner treated primarily with a pain management specialist or chiropractor for her injuries. Dr. Templin was the only orthopedic physician who saw Petitioner and he saw her only twice. Dr. Templin attributed Petitioner's cervical spine condition to "repetitive lifting" on 5/15/18 and estimated that Petitioner lifted boxes weighing 60lbs – 80lbs. In contrast, Petitioner testified that the boxes she was lifting weighed 512oz, or 32 pounds. Dr. Templin also based his causation opinion on Petitioner's representation that she did not have any prior problems with her neck and low back and had a positive Spurling maneuver. This misrepresentation is significant and shows that Dr. Templin was not provided with accurate information at the time of his evaluation. Petitioner failed to provide the fact that she treated for her spine in Puerto Rico and had a prior surgical recommendation. She also omitted the fact that Dr. Ramirez recommended a cervical spine x-ray, thoracic spine x-ray and lumbar spine x-ray prior to the alleged 5/15/18 accident. The Arbitrator notes that the Petitioner testified at trial that other than the May 15, 2018 and May 30, 2018 accidents she had not had any other traumatic accidents involving her back, lower back or knee. These omissions highlight the fact that Petitioner did not provide Dr. Templin with true and accurate information regarding her prior treatment history.

After reviewing the facts presented at trial, exhibits, and testimony the Arbitrator finds that Petitioner did not prove by a preponderance of the evidence that her current cervical spine condition arose out of and in the course of her employment with Respondent.

18WC16745 – May 30, 2018

The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that her current condition of ill-being relative to her right knee arose out of and in the course of her employment with Respondent.

Petitioner testified that she was carrying a box weighing 15 to 20 pounds on that day when she fell on her right knee and consequently supported herself with both hands so she wouldn't fall straight to the floor. As a result, Petitioner testified that she immediately felt pain in her right knee and also noted "very strong" pain in her lower back. Petitioner testified that she never sustained any traumatic injuries to her right knee and was never symptomatic relative to her right knee prior to the May 30, 2018 accident. Additionally, Petitioner

testified that she felt pain in her right knee immediately after her accident on May 30, 2018 but did not receive treatment for the injury until September 14, 2018, 4 months after the injury. On June 4, 2018, during her doctor visit with Dr. Lotfi Petitioner failed to mention the incident even occurred. Then when Petitioner did notify Dr. Lipov of the incident on September 14, 2018, she told the physician she fell in a separate accident in July of 2018. During Petitioner's visit on October 1, 2018 with Dr. Sclamberg Petitioner did report the incident but told him it occurred on May 15, 2018. Petitioner's inconsistent statements to Dr. Sclamberg make it difficult for him render a credible causation opinion or treatment plan and calls into question the nature of Petitioner's alleged right knee injury.

On December 14, 2018, Petitioner presented to Dr. Steven Mash for a Section 12 IME related to her right knee condition. Dr. Mash performed a physical examination, which revealed well-healed arthroscopic incision and full range of motion. Specifically, Dr. Mash opined that he was unable to state whether the treatment she underwent relative to her right knee was causally related to her May 30, 2018 work accident. Petitioner testified that in February of 2019, she fell down her stairs at home. Petitioner testified that this fall was attributed to pain in her lower back. The Arbitrator notes the absence, in Petitioner's medical records, of an explanation by Petitioner that her fall was attributed to pain in her lower back. Petitioner reported inconsistent, vague, and inaccurate medical and accident histories to her various providers, making it difficult to render credible opinions.

Petitioner's lack of credibility is further evidence by the inconsistent statements and omissions made to her numerous providers. After reviewing the facts presented at trial, exhibits, and testimony the Arbitrator finds that Petitioner did not prove by a preponderance of the evidence that her current right knee condition arose out of and in the course of her employment with Respondent.

With respect to issue (F) (J), (K), (O) the Arbitrator finds as follows:

As a finding has been made that the Petitioner's accident did not arise out of and in the course of her employment with Respondent, the other disputed issues are moot.

Signature of Arbitrator

01/31/2020
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC016745
Case Name	CRUZ, ASTRID v. FAMILY DOLLAR
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0511
Number of Pages of Decision	15
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Brenton Schmitz
Respondent Attorney	Emily Schlecte

DATE FILED: 10/8/2021

/s/*Kathryn Doerries, Commissioner*

Signature

STATE OF ILLINOIS	)		
	) SS.		
COUNTY OF COOK	)		

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ASTRID CRUZ,

Petitioner,

vs. NO: 18 WC 016745

FAMILY DOLLAR,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary disability, causal connection, medical expenses and prospective medical, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 6, 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.

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(1) (West 2013)*. Based upon the denial of compensation herein, no bond is set by the Commission. The party commencing

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

October 8, 2021

KAD/bsd
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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
NOTICE OF 19(b) ARBITRATOR DECISION

CRUZ, ASTRID
Employee/Petitioner

Case# **18WC016745**
18WC016744

FAMILY DOLLAR
Employer/Respondent

On 2/6/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.52% 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:

2553 McHARGUE & JONES LLC
MATTHEW C JONES
123 W MADISON ST 18TH FL
CHICAGO, IL 60602

2542 BRYCE DOWNEY & LENKOV LLC
EMILY SCHLECTE
200 N LASALLE ST SUITE 2700
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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Astrid Cruz
Employee/Petitioner
v.
Family Dollar
Employer/Respondent

Case # **18** WC **16745**

Consolidated cases: **18 WC 16744**

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 **Tiffany Kay**, Arbitrator of the Commission, in the city of **Chicago, IL**, on **Jun 20, 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. [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 30, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**26,000**; the average weekly wage was $**500**.

On the date of accident, Petitioner was **44** 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 $**6097.15** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

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

ORDER

Petitioner did not prove by a preponderance of evidence that she sustained a compensable accident that arose out of and in the course of her employment on May 15, 2018 or May 30, 2018 in relation to her cervical spine, thoracic spine, lumbar spine, bilateral shoulders, and right knee. Therefore, Petitioner's claim for TTD benefits and prospective medical benefits are denied.

The Arbitrator finds the issue of Respondent's liability for medical expenses regarding these conditions moot. Respondent is awarded a credit for all medical expenses paid regarding Petitioner's cervical spine, thoracic spine, lumbar spine, bilateral shoulders, and right knee.

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

01/31/2020
Date

ICArbDec19(b)

FEB 6 - 2020

PROCEDURAL HISTORY

This case is consolidated with the following case: 18wc16744.

This matter was heard before Arbitrator Tiffany Kay (hereinafter "Arbitrator Kay") on June 20, 2019 in Chicago, Illinois. The submitted records have been examined and the decision rendered by Arbitrator Kay.

The parties proceeded to hearing on disputed issues as to whether Mrs. Astrid Cruz (hereinafter "Petitioner") sustained accidental injuries that arose out and in the course of her employment with Family dollar (hereinafter "Respondent"), whether the condition of ill-being is casually connected to this injury, whether Respondent is liable for unpaid medical bills, and whether Petitioner is entitled to Temporary Total Disability (hereinafter "TTD") Benefits for the period of 06/01/18 through 06/20/19 (representing 55 weeks). (Arb.X1) In addition, at issue is whether Petitioner is entitled to prospective medical care, specifically, the approval of C5-7 anterior cervical discectomy and fusion surgery (hereinafter "ACDF") and right knee arthroscopy. (Arb. X1)

The parties stipulated that Petitioner sustained accidents on 5/15/18 and 5/30/18, that Petitioner and Respondent were operating under the Illinois Workers' Compensation Act (hereinafter "Act"), and that their relationship was one of employee and employer. (Arb.X1) The parties stipulated that Petitioner gave notice of the accident within the time limits stated in the Act, Petitioner's average weekly wage in accordance to §10 of the Act was $500.00, at the time of injury Petitioner was 44 years of age, single and had 0 dependent children. (Arb.X1)

SUMMARY OF FACTS AND EVIDENCE

Petitioner's Prior Medical Treatment

On 4/17/17, Petitioner saw Dr. Esmilkry Ramirez and complained of pain from her neck to the low back. (RX 4). Petitioner told Dr. Esmilkry that she had imaging done in Puerto Rico and needed surgery. (Id). Petitioner complained of sharp, shooting pain with radiation down both legs, neck pain during flexion, extension, and right and left lateral bending. (*Id*). Dr. Ramirez ordered x-rays of the cervical spine, thoracic spine, and lumbar spine. (*Id*).

Petitioner testified that she had prior "casual pain" in her neck and low back, intermittent pain and her doctors recommended Tylenol for pain management. Petitioner testified that she was honest and truthful with her treating physicians, Dr. Mash, and Dr. Citow. Petitioner testified that she never told her treating physicians, Dr. Mash, or Dr. Citow about her prior neck or low back problems.

Testimony and Medical Treatment

Petitioner testified, at the time of trial, she had worked for the Respondent 8 ½ months as of May of 2018. Petitioner testified she began working for Respondent in October of 2017 as an Assistant Manager. Her job duties included loading trucks, recovery, counting store profits, and cleaning the store. Petitioner testified that the store sold products such as detergent, dog food, food, toothpaste, clothing, shoes, towels, tissues and tables with chairs. Petitioner testified that she would manually move most items. In regard to working with trucks, whenever the store received merchandise, it was brought on trucks and then placed on metal platforms where the items would be moved manually. Petitioner estimated that the materials on the trucks weighed up to and sometimes more than 50lbs. Petitioner testified that she unloaded the truck 1 time a week. Petitioner testified, that leading up to May 15, 2018, she had not experienced any problems at work.

On May 15, 2018 Petitioner was working a 6:00am to 3, while unloading product from one of Respondent's trucks, Petitioner testified she was in the process of lifting a heavy box containing multiple bottles of detergent when she turned to place it on a cart and felt sudden onset of pain behind her left shoulder and across the left upper back. Petitioner testified that her supervisor was helping her unload the truck so had immediate notice of the accident. Petitioner testified that she worked the rest of the shift and did not fill out an accident report. Petitioner was informed by her supervisor that she needed to finish her shift as Respondent's store required the product that was on Respondent's truck in order to open. In response, Petitioner took two Tylenol and finished her shift, all while experiencing increasingly significant pain. The following day, Petitioner testified she awoke with an even stronger degree of pain to her rear left shoulder and the left side of her upper back.

Petitioner testified that on May 19, 2018, she went to the ER at Presence Saint Elizabeth, located at 1431 N. Claremont Street, Chicago, IL 60622, and received "first aid.". Petitioner said that she did not see a doctor at Saint Elizabeth, did not receive treatment beyond first aid, and was referred to another ER "in front" of the hospital.

On May 19, 2018, Petitioner was treated by Dr. Borraccini at Presence Saint Elizabeth. (PX 6, p. 7), reported mid/upper back pain, had normal neck range of motion, underwent a thoracic spine x-ray, was diagnosed with a thoracic spine strain, released to light duty, and instructed to follow up with Dr. Ramirez at Prime Care West Town. (*Id*).

On May 19, 2018, Petitioner chose to also go to Community First Medical Center ER located at 5645 W. Addison Street, Chicago, IL 60634, and reported low back pain due to lifting heavy crates on 5/15/18. Petitioner denied cervical spine tenderness and was diagnosed with a back strain. (PX 1).

Petitioner testified that the first time she experienced neck pain was on May 17, 2018. Petitioner testified that the first time she experienced low back pain was on May 30, 2018. Petitioner testified that the first time she experienced right knee pain was on May 30, 2019.

On May 22, 2018, Petitioner went to Erie Humboldt Park Health Center and saw Dr. Adam Del Conte and complained of back and chest pain. (PX 5). Included in the history, Petitioner stated she does not take any of the Naprosyn, flexaril or norco that was prescribed. She stated that the Naprosyn causes hand pain and the other meds cause drowsiness. Petitioner told the physician that since the accident she has been having trouble connecting with her manager to complete her incident report. Petitioner had normal neck mobility and was diagnosed with a muscle strain and overuse. (PX5) Petitioner was advised to "complete an incident report to see if workers' comp could assist with PT if needed." Petitioner reported that she had not returned to work since the May 15,2018 incident. (*Id)*. Upon evaluation, Dr. Conte advised Petitioner to take a few more days off of work and continue taking medication before returning with restrictions and if pain persisted, to return and see him.

On May 29, 2018, Petitioner returned to work. Petitioner testified that she worked a whole shift that day.

Petitioner testified that on May 30, 2018, at the start of her shift, she was asked by her supervisor to arrange Respondent's product throughout the store. In the process of putting away product, Petitioner lifted a 15-20 pound box filled with juice, and while walking it to its correct location, tripped and fell forwards, landing forcefully on her hands and knees. During the fall Petitioner hit her right knee on the ground. Petitioner testified that she felt pain in her hands, neck and lower back. Petitioner testified that her right leg and both hands hit the ground. She testified that after the accident she felt a strong pain in her neck and a pulsating feeling in her left shoulder. She testified that her knee hurt but it was not constant pain it would come and go.

Petitioner testified that prior to her May 15, 2018 and May 30, 2018 accidents she did have casual pain in her lower back that would move up to her shoulders. She had seen doctors for the pain but had not surgery or injections. She also testified that she had not been taking medicine for the pain. Petitioner testified that she had not received any restrictions regarding this pain prior to 2018. She testified that she had not had prior issues with her right knee but did have pain in her legs.

On May 30, 2018, Petitioner underwent a cervical spine x-ray and thoracic spine x-ray which revealed the following: the Cervical spine x-ray had no evidence of acute osseous injury involving the cervical spine with mild degenerative disease at C6-C7). (PX 1). The thoracic spine x-ray revealed no evidence of acute osseous injury involving thoracic spine; mild disc space narrowing at T11-T12; mild degenerative spurring along thoracic spine. (PX 1).

On June 1, 2018, Petitioner followed up with Dr. Kalina, a pain management physician, without a referral, and complained of neck, thoracic spine, and lumbar spine pain. There was no documentation related to Petitioner's knee complaints. Upon evaluation, Dr. Kalina noted that Petitioners pain was aggravated by bending or lifting. As a result, Dr. Kalina took Petitioner off of work completely and recommended an MRI of her cervical spine, lumbar spine, in addition to physical therapy.

Between June 4, 2018 and October 2018, Petitioner attended physical therapy with Dr. Mahmoud Lotfi at Sage Medical Solution. During that time, Petitioner noted pain in her neck, mid and low-back, and her shoulders. Petitioner also noted that she had difficulty sleeping due to her neck, shoulder, and back pain and demonstrated an overall inability to perform job duties due to the degree of pain she was experiencing.

On June 5, 2018, Petitioner underwent cervical, thoracic and lumbar spine MRI's at Edgebrook Radiology. The cervical spine revealed a left-sided disk herniation at C5 and C6, and a 2-3 mm broad-based posterior disk herniation at C6 and C7 which indents the ventral surface of the thecal sac and spinal cord. Petitioner presented to physical therapy on June 6, 2018, where she reported that her back pain had increased. Petitioner also noted that the degree of pain she experienced would gradually return after performing physical therapy. (PX8) The lumbar spine MRI revealed L5/S1 level: 2-3mm posterior disk herniation with mildly extruded nucleus pulposus which indents the thecal sac with mild stenosis and bilateral neuroforaminal narrowing, exacerbated by facet arthrosis and ligamentum flavum hypertrophy. (PX 8). The thoracic spine MRI found normal thoracic curvature present, no fractures or significant subluxations, no significant disc bulges, protrusions, or herniations and no significant spinal stenosis or neuroforaminal narrowing. (PX 8).

On June 13, 2018, Petitioner followed up with Dr. Kalina where she complained that she could "could hardly walk", experienced left-hand numbness and had cramping in her 3rd left finger. Petitioner testified at trial that by June 13, 2018, she was experiencing severe pain radiating down her left arm and into her hand, specifically into her thumb, index, and middle fingers, and that these symptoms continue to the present date. Petitioner was diagnosed with cervical radiculopathy at that time.

In contrast, Dr. Kalina's records on June 13, 2018, stated that Petitioner told Dr. Kalina that her pain and mobility were improving and denied radiating symptoms to the left hand (PX 8). Dr. Kalina noted that Petitioner's upper and lower extremities had normal appearance and tone and she had 5/5 strength. (Id). Dr. Kalina did not record an antalgic gait. (Id).

On June 18, 2018, Petitioner underwent a left shoulder x-ray. (PX 8). The study was unremarkable. (Id). On September 14, 2018, Petitioner reported right knee pain, for the first time. (PX 8). Petitioner told Dr. Lipov that she fell the first time on May 30, 2018 and had another fall "sometime in July". (Id).

On August 17, 2018, Petitioner was referred to Dr. Lipov at the Chicago Pain and Orthopedic Institute for pain management services, where she reported continued neck and lower back pain. At that time, Petitioner underwent an injection to her cervical spine. Petitioner noted that following the injection, her pain was alleviated slightly for three to four days. Subsequently, Petitioner received two additional injections administered by Dr. Lipov to her neck, the first on September 5, 2018 and then again on September 19, 2018; both of which provided only temporary relief of her symptoms. Specifically, Petitioner testified that her neck pain would return to baseline in no more than three days after each injection.

On September 14, 2018, Petitioner presented to Chicago Pain and Orthopedic Institute on where she reported a problem in her right knee which she stated caused pain if she walked too much, resulting in swelling. She related this back to her May 30, 2018 accident. At that time, Dr. Lipov referred Petitioner to Dr. Sclamberg for a further orthopedic consultation who recommended Petitioner receive an MRI of her right knee.

On September 27, 2018, MRI Lincoln Imaging Center performed an MRI of Petitioner's right knee, revealing an underlying medial meniscus tear. Dr. Sclamberg recommended surgery to repair her medial meniscal tear, and on October 22, 2018, Petitioner returned to Dr. Sclamberg and underwent a right knee arthroscopy with partial medial meniscectomy.

On October 3, 2018, Petitioner presented for a Section 12 IME with Dr. Jonathan Citow (hereinafter "Dr. Citow") regarding her neck and back pain. Dr. Citow reviewed Petitioner's MRI taken on June 5, 2018, and noted that it showed C3 and C4 spondylosis, C5 and C6 spondylosis with a left-sided protrusion and bone spur, and C6 and C7 spondylosis with foraminal narrowing. Dr. Citow diagnosed Petitioner with a cervical strain that should have required six weeks of physical therapy. He opined that Petitioner had age-appropriate cervical spondylosis and that she had reached MMI concerning her May 2018 injuries and that she could return to work full duty without restrictions.

Dr. Lipov referred Petitioner for a spine surgery consultation with Dr. Cary Templin of Hinsdale Orthopedic Associates. She was seen on October 19, 2018, at which time, Dr. Templin performed a physical examination of her cervical spine, revealing a positive Spurling maneuver on the left, causing pain extending into the periscapular region and over the left shoulder. Dr. Templin diagnosed her with a cervical herniated disc. Going forward, Dr. Templin did not recommend any additional care for Petitioner's lumbar spine, however he did recommend a left C6 transforaminal injection for Petitioner's cervical spinal condition.

On November 17, 2018, Petitioner denied prior cervical spine and lumbar spine injuries to Dr. Patel. (PX 8).

On December 5, 2018, Dr. Patel from Chicago Pain and Orthopedic Institute administered the C6 transforaminal epidural injection that Dr. Templin had recommended. Petitioner testified at trial that the injection helped to alleviate pain in her neck for only about four days before returning to its original degree of pain. On December 21, 2018, Petitioner returned to Dr Templin, who recommended an anterior cervical discectomy and fusion of C5 and C6, and likely C6 and C7, to address her continuous cervical spinal complaints.

On December 14, 2018, Petitioner presented to Dr. Steven Mash for a Section 12 IME related to her right knee condition. Dr. Mash performed a physical examination, which revealed well-healed arthroscopic incision and full range of motion. Specifically, Dr. Mash opined that he was unable to state whether the treatment she underwent relative to her right knee was causally related to her May 30, 2018 work accident. However, he admitted that it was possible that her right knee condition was related to the May 30, 2018 work accident. Nonetheless, he opined that the treatment she received, including the right medial meniscus arthroscopy, were reasonable and necessary.

On February 18, 2019, Petitioner was seen by Dr. Sclamberg with increased complaints to her right knee, having fallen down the stairs in her home the week prior. Petitioner testified that she fell while going down to the basement of her house. Petitioner testified that she fell due to low back pain. Petitioner noted pain along the medial and lateral aspects of her right knee and reported swelling. In response, Dr. Sclamberg scheduled Petitioner for an x-ray and MRI of her right knee.

On April 15, 2019, Petitioner returned to Dr. Sclamberg with the completed updated diagnostic testing. Dr. Sclamberg opined that who determined that the results of Petitioner's MRI, which showed a high signal in the posterior horn of the medial meniscus with extension into the inferior aspect, demonstrated a recurrent tear of the medial meniscus. At that time, Dr. Sclamberg recommended a revision arthroscopy of the right knee with Petitioner, which the Petitioner wishes to undergo if approved.

Evidence Depositions

At trial, Petitioner presented the evidence deposition testimony of Dr. Cary Templin taken on April 30, 2019. Dr. Templin is a board-certified orthopedic surgeon, specializing in spine surgery. Dr. Templin testified that he saw Petitioner on October 19, 2018, where Petitioner presented with neck pain and mid-to-low back pain extending into her left arm which resulted from an injury that occurred at work on May 15, 2018. He testified that he performed a physical examination of Petitioner, which revealed a positive Spurling's maneuver to the left, limited extension of the cervical spine and limited lateral rotation. Dr. Templin opined that the pain resulting from Petitioner's positive Spurling's maneuver could indicate an impingement of the nerve on the left side of Petitioner's neck. As for the issues with extension and rotation, Dr. Templin stated that similar to the Spurling maneuver, such a movement can irritate the nerve root when doing so. Dr. Templin opined that both of which was consistent with either C6 or C7 of Petitioner's left side.

Dr. Templin also testified that he conducted a lower back exam on Petitioner which seemed quite normal. Dr. Templin opined that Petitioner suffered a disc herniation at C5-C6 which was causing severe foraminal stenosis to Petitioner's left side, with a disc protrusion at C6-C7. Dr. Templin opined that as for the lumbar MRI, it showed some degenerative changes at L5-S1. Dr. Templin testified that Petitioner's MRI findings correlated with his subjective and objective findings on exam and presentation. Specifically, Dr. Templin opined that Petitioner's C5-C6 disc herniation and radiculopathy explained Petitioner's back pain that extended into her left arm.

Dr. Templin testified that Petitioner's current condition of ill-being is causally related to her accident at work on May 15, 2018. Dr. Templin reasoned that Petitioner's complaints of pain in her upper to mid-back and neck have been persistent since the date of accident. He also testified that Petitioner's mechanism of injury was an injury sufficient to cause her upper back and neck pain.

Dr. Templin testified that he recommended that Petitioner undergo a C6 transforaminal injection in order to target the nerve root responsible for her radicular symptoms and neck pain. The injection was done on December 5, 2018 and gave Petitioner testified that it provided her with minor relief for 3-4 days. Dr. Templin opined that the fact that Petitioner experienced temporary relief from the injection was significant because that indicated that her C5-C6 radiculopathy was potentially the source of her neck and lower back pain. Dr. Templin also testified that Petitioner's injections and physical therapy were reasonable and necessary procedures, and that those procedures were casually related to her work accident.

Dr. Templin testified that he ultimately diagnosed Petitioner with cervical foraminal stenosis and cervical radiculopathy. Dr. Templin further testified that he ultimately recommended an anterior cervical discectomy and fusion of C5-C6 as a result of the herniated disk at C6-C7 based off of Petitioner's significant

stenosis. Dr. Templin testified that the fusion surgery would be a reasonable option for Petitioner, given that she continued to report upper back and neck pain as well as radiculopathy symptoms after failure of conservative treatment.

The Arbitrator notes that Petitioner testified that Dr. Sclamberg did not refer Petitioner to Dr. Templin or Dr. Patel for further neck or back treatment.

Respondent presented the evidence deposition testimony of Dr. Jonathan Citow, taken on May 22, 2019 at American Center for Spine and Neurosurgery. Dr. Citow is an orthopedic spine surgeon. Dr. Citow stated that he performed an Independent Medical Examination of Petitioner on October 3, 2018. Dr. Citow testified that Petitioner presented to the Independent Medical Examination with pain in both of her shoulders and upper back with pain extending to her neck and the back of her head with some delayed pain extending towards the left triceps in the upper arm. HE further testified that Petitioner also described pain in her upper chest and lungs. Dr. Citow testified that Petitioner had exquisite tenderness to palpation in both her neck and back.

Dr. Citow testified that he reviewed an MRI of Petitioner's cervical spine performed on June 5, 2018. He opined that he found spondylosis at C3-C4, spondylosis at C5-C6 with a left-sided disc herniation and bone spurring with some foraminal narrowing as well as spondylosis at C6-C7 with some foraminal narrowing. Dr. Citow testified that there was no structural abnormality that correlated with an acute incident that occurred in May of 2018.

Dr. Citow testified that he diagnosed Petitioner with cervical spondylosis. However, he opined that the spondylolisthesis pre-existed Petitioner's May 15, 2018 accident, and the Petitioner only suffered a cervical strain as a result of said accident. Specifically, he testified that Petitioner's spondylolisthesis condition was not causally related to her work accident.

On cross examination, Dr. Citow conceded that spondylolisthesis is a condition that can be asymptomatic, and that it can become symptomatic from a traumatic injury. Dr. Citow also testified that a both a bone spur and a disc herniation can also be asymptomatic. Specifically, Dr. Citow testified that a lifting injury could aggravate a previously asymptomatic spondylolisthesis, bone spur, and disc herniation. Dr. Citow further conceded that symptomatic spondylolisthesis, surgery would in fact be required.

In regard to transportation, Petitioner testified that she would take Uber or Lyft from her house at 2334 N. Moody Avenue, Chicago Illinois to Sage Medical which is approximately 9 miles one-way. Sage Medical would order the car service. Petitioner testified that she looked at the relevant medical bills but was unaware that Sage Medical charged $200 for each date of service where they used Uber of Lyft. After Dr. Lotfi began work at the 147 Harrison Street Location, Sage Medical would order Lyft and/or Uber to his location on Harrison Street. Personnel from Sage Medical or Chicago Pain Institute ordered a car from Lyft or Uber to transport Petitioner to and from each of her diagnostic tests and appointments.

At the time of trial, Petitioner remained off of work at the recommendation of Dr. Templin, pending approval of her recommended cervical fusion surgery. She testified that she does want to undergo the cervical fusion surgery and is seeking approval of the same. She additionally testified that she wishes to undergo the recommended right knee revision arthroscopy for her recurrent meniscal tear and is seeking approval of that surgery at this time.

CONCLUSIONS OF LAW

With respect to issues (C) whether an accident occurred that arose out of and in the course of Petitioner's employment with Respondent, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that her accident on May 15, 2018, arose out of and in the course of her employment with Respondent. In addition, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that her accident on May 30, 2018, arose out of and in the course of her employment with Respondent nor was it casually related to this injury. "A claimant bears the burden of proving by a preponderance of the evidence that his injury arose out of and in the course of the employment." 820 ILCS 305/2 (West 2002). Both elements must be present in order to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483, 137 Ill. Dec. 658, 546, N.E.2d 603 (1987).

A claimant's injury "arises out of" his or her employment if the origin of the injury "is in some risk connected with or incident to the employment, so that there is a causal connection between the employment and the accidental injury." *Saunders v. Industrial Comm'n*, 189 Ill. 2d 623, 627 (2000). A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling the employee's duties. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 45 (1987). 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. With respect to factual matters, it is within the province of the Commission to judge the credibility of the witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences therefrom. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill.App.3d 665, 674 (2009).

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Petitioner testified that she occasionally experienced lower back pain prior to her May 30, 2018 accident. However, she testified that she never had any surgeries or injections relative to her lower back, was never prescribed medications, and the pain would come and go. On April 17, 2017, Petitioner was seen by Dr. Ramirez and she informed him that prior to her May 15, 2018 accident she had "pain in neck all the way down to lower back. Pain worse with walking and stairs…. States had some imaging done in Puerto Rico and was told she needed surgery but didn't bring paper with her today."" (RX4) The Arbitrator notes that there was no testimony provided by Petitioner as to why this prior recommendation for surgery was given. In addition, the remaining medical records introduced into evidence, do not reflect Petitioner informing her physicians that she had been given a prior surgical recommendation prior to them providing their individual diagnosis of her current alleged injury.

Dr. Templin testified that Petitioner's current condition of ill-being is causally related to her accident at work on May 15, 2018. Dr. Templin reasoned that Petitioner's complaints of pain in her upper to mid-back and neck have been persistent since the date of accident. He also testified that Petitioner's mechanism of injury was an injury sufficient to cause her upper back and neck pain. The Arbitrator notes that Dr. Templin testified that it was his understanding that the mechanism of injury was "repetitive lifting while loading a truck with boxes of detergent." (PX15) The Arbitrator notes that Petitioner testified that her job duties included loading trucks, recovery, counting store profits, and cleaning the store. Dr. Templin testified that it was his opinion that the surgery that was recommended was related to her injury at work. However, when asked if he had personally reviewed any of Petitioner's initial medical records on file, he stated "I don't believe so." (PX15) The aforementioned records included items such as Petitioner's physical therapy records, injections, and Petitioner's subjective complaints after her injections. In addition, Petitioner testified that she never told her treating physicians about her prior neck or low back problems. The Arbitrator finds that a comprehensive treatment plan could not have been provided to the Petitioner considering the abundance of missing information regarding Petitioner's history and prior conditions that was not provided to Petitioner's physicians.

On October 3, 2018, Petitioner presented for a Section 12 IME with Dr. Jonathan Citow (hereinafter "Dr. Citow") regarding her neck and back pain. Dr. Citow reviewed Petitioner's previous medical records including her MRI taken on June 5, 2018, and noted that it showed C3 and C4 spondylosis, C5 and C6 spondylosis with a left-sided protrusion and bone spur, and C6 and C7 spondylosis with foraminal narrowing. Dr. Citow diagnosed Petitioner with a cervical strain that should have required six weeks of physical therapy. He opined that Petitioner had age-appropriate cervical spondylosis and that she had reached MMI concerning her May 2018 injuries and that she could return to work full duty without restrictions. Specifically, he testified that Petitioner's spondylolisthesis condition was not causally related to her work accident.

The Arbitrator finds Dr. Citow's opinion more credible than Dr. Templin's. Dr. Templin is the only person to find that Petitioner has severe spinal stenosis which requires surgical intervention. Importantly, Dr. Citow and Dr. Kuritza, the radiologist who interpreted the MRI, found that Petitioner had age-appropriate arthritis and did not find that Petitioner had severe spinal stenosis. In addition, the Arbitrator notes that Petitioner treated primarily with a pain management specialist or chiropractor for her injuries. Dr. Templin was the only orthopedic physician who saw Petitioner and he saw her only twice. Dr. Templin attributed Petitioner's cervical spine condition to "repetitive lifting" on 5/15/18 and estimated that Petitioner lifted boxes weighing 60lbs – 80lbs. In contrast, Petitioner testified that the boxes she was lifting weighed 512oz, or 32 pounds. Dr. Templin also based his causation opinion on Petitioner's representation that she did not have any prior problems with her neck and low back and had a positive Spurling maneuver. This misrepresentation is significant and shows that Dr. Templin was not provided with accurate information at the time of his evaluation. Petitioner failed to provide the fact that she treated for her spine in Puerto Rico and had a prior surgical recommendation. She also omitted the fact that Dr. Ramirez recommended a cervical spine x-ray, thoracic spine x-ray and lumbar spine x-ray prior to the alleged 5/15/18 accident. The Arbitrator notes that the Petitioner testified at trial that other than the May 15, 2018 and May 30, 2018 accidents she had not had any other traumatic accidents involving her back, lower back or knee. These omissions highlight the fact that Petitioner did not provide Dr. Templin with true and accurate information regarding her prior treatment history.

After reviewing the facts presented at trial, exhibits, and testimony the Arbitrator finds that Petitioner did not prove by a preponderance of the evidence that her current cervical spine condition arose out of and in the course of her employment with Respondent.

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The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that her current condition of ill-being relative to her right knee arose out of and in the course of her employment with Respondent.

Petitioner testified that she was carrying a box weighing 15 to 20 pounds on that day when she fell on her right knee and consequently supported herself with both hands so she wouldn't fall straight to the floor. As a result, Petitioner testified that she immediately felt pain in her right knee and also noted "very strong" pain in her lower back. Petitioner testified that she never sustained any traumatic injuries to her right knee and was never symptomatic relative to her right knee prior to the May 30, 2018 accident. Additionally, Petitioner testified that she felt pain in her right knee immediately after her accident on May 30, 2018 but did not receive treatment for the injury until September 14, 2018, 4 months after the injury. On June 4, 2018, during her doctor visit with Dr. Lotfi Petitioner failed to mention the incident even occurred. Then when Petitioner did notify Dr. Lipov of the incident on September 14, 2018, she told the physician she fell in a separate accident in July of 2018. During Petitioner's visit on October 1, 2018 with Dr. Sclamberg Petitioner did report the incident but told him it occurred on May 15, 2018. Petitioner's inconsistent statements to Dr. Sclamberg make it difficult for him render a credible causation opinion or treatment plan and calls into question the nature of Petitioner's alleged right knee injury.

On December 14, 2018, Petitioner presented to Dr. Steven Mash for a Section 12 IME related to her right knee condition. Dr. Mash performed a physical examination, which revealed well-healed arthroscopic incision and full range of motion. Specifically, Dr. Mash opined that he was unable to state whether the treatment she underwent relative to her right knee was causally related to her May 30, 2018 work accident. Petitioner testified that in February of 2019, she fell down her stairs at home. Petitioner testified that this fall was attributed to pain in her lower back. The Arbitrator notes the absence, in Petitioner's medical records, of an explanation by Petitioner that her fall was attributed to pain in her lower back. Petitioner reported inconsistent, vague, and inaccurate medical and accident histories to her various providers, making it difficult to render credible opinions.

Petitioner's lack of credibility is further evidence by the inconsistent statements and omissions made to her numerous providers. After reviewing the facts presented at trial, exhibits, and testimony the Arbitrator finds that Petitioner did not prove by a preponderance of the evidence that her current right knee condition arose out of and in the course of her employment with Respondent.

With respect to issue (F) (J), (K), (O) the Arbitrator finds as follows:

As a finding has been made that the Petitioner's accident did not arise out of and in the course of her employment with Respondent, the other disputed issues are moot.

Signature of Arbitrator

01/31/2020
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC031394
Case Name	GRIGSBY,TIMOTHY v. DIEPHOLZ AUTO
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0512
Number of Pages of Decision	15
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Gary Stokes
Respondent Attorney	Timothy Steil

DATE FILED: 10/12/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TIMOTHY GRIGSBY,

Petitioner,

vs. NO: 19 WC 31394

DIEPHOLZ AUTO,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of whether Petitioner sustained an accidental injury arising out of and occurring in the course of his employment, whether his left knee condition of ill-being is causally related to the accidental injury, entitlement to temporary disability benefits, entitlement to incurred medical expenses, as well as Respondent's request for special findings under Rule 9040.40(b), and being advised of the facts and law, declines to provide special findings but provides additional analysis 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 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, like the Arbitrator, finds the preponderance of the evidence establishes Petitioner sustained a left knee injury arising out of and occurring in the course of his employment and his condition of ill-being is causally related to that accidental injury. As noted above, Respondent filed a request for special findings. The Commission has discretion as to whether we will find specially upon any questions submitted, and in the Commission's view, the questions submitted do not merit special findings as the answers are inherent in our ultimate determination of compensability. *See*, *Jarrett v. Industrial Commission*, 156 Ill. App. 3d 898, 916-917, 511 N.E.2d 144, 156 (4th Dist. 1987) (It is within the discretion of the Commission whether it will find

specially upon any questions which are submitted in writing; a general finding by the Commission for one part is, in effect, a favorable finding on each special matter necessary to support the general findings). Instead, we will respond to Respondent's arguments on Review.

Before us, Respondent argues the variation in the dates of accident recorded by the treaters is fatal to Petitioner's claim. The Commission disagrees. The Commission believes that rather than focusing solely on the date, we must also analyze whether the reported mechanism of injury, physical examination findings, and diagnoses contained in the medical records corroborate Petitioner's testimony and support a finding that Petitioner sustained a work-related injury.

We begin with Petitioner's description of the September 10, 2019 injury. Petitioner testified that on that date, he was changing big truck tires weighing from 70 to 110 pounds apiece; the process involves hefting the tire to chest height to throw it on the machine, breaking the tire down, then pulling the tire off the machine. T. 11-12. Petitioner testified he injured his left knee while lifting a tire: "I got towards the end of the last tire and I lifted - - went to turn and twist and my foot stuck and I felt a real sharp pain in my [left] knee…" T. 11-12. He explained he felt a pain and a wet sensation on the inner part of his left knee; he stood there a moment, rubbed his knee, and thinking the wet sensation was blood, lifted his pantleg to see if he cut himself. T. 12. Petitioner gathered himself "for a while and the pain kind of subsided a little bit" so he continued working; after completing the job, Petitioner told his boss, Service Manager Nick East, that he had hurt himself. T. 11-12, 13-14. Petitioner further testified his knee continued to hurt thereafter, but he did not seek treatment until a few weeks later:

> I thought maybe it might subside and I kept working and one day it just got worse…I finished out the day, Nick East noticed I was limping, he made a comment about it, and that night it just swelled up so huge and I couldn't sleep and I went to the ER the next day. T. 14-15.

The record reflects Petitioner first sought treatment on October 1, 2019. On that date, Petitioner presented to Carle Hospital where he was evaluated by Valerie Pollard, D.O. Pet.'s Ex. 3. The history recorded by Dr. Pollard is as follows:

> c/o [*sic*] left knee pain, started a few weeks ago -at work and improved. Then eval at ortho>nothing wrong. States 3 days ago-felt a pop in inner lt knee-the pain was bad, today while walking something happened and almost dropped him to his knees. Knee was very swollen last night but better today-with ice. Pet.'s Ex. 3.

Dr. Pollard's "general" musculoskeletal examination revealed "swelling, tenderness and signs of injury present"; the doctor's specific examination findings included decreased range of motion, swelling and bony tenderness, as well as medial joint line tenderness. Pet.'s Ex. 3. Diagnosing a left knee strain and sprain of the medial collateral ligament, Dr. Pollard administered a Ketorolac injection, placed Petitioner in a knee immobilizer, provided crutches and a Naprosyn prescription, and directed Petitioner to follow up with occupational medicine and orthopedics. Pet.'s Ex. 3.

At trial, Petitioner was directed to Dr. Pollard's reference to Petitioner feeling a pop in his left knee "3 days ago," and Petitioner testified that was inaccurate, as he did not say it happened

three days before but rather three weeks before. T. 18. Petitioner further testified the reference to him seeing an orthopedist was similarly incorrect, as he had not seen an orthopedic physician between September 10 and October 1. T. 19.

The next treatment report in the record is the October 8, 2019 evaluation at Carle Occupational Medicine. The note reflects Petitioner initially spoke with Christina Billow, R.N., who recorded the following history:

> 9-15-19 patient was at work working with new car tires about 70-110lbs each. Patient was working with the tires and turned with one and felt a sudden cold sensation in the left knee. Patient continued to work. Over the next several weeks pain had not improved with rest, ice or topical liniments. After 3 weeks of discomfort and increasing pain patient went to Carle ER for evaluation. Pet.'s Ex. 5.

Petitioner was then evaluated by Steve Jacobs, P.A., who memorialized Petitioner's history as follows:

> He is here for evaluation of left knee pain. He believes the injury occurred on September 1, 2019, or thereabouts. He did go to the Emergency Department. My understanding from the Emergency Department is that they did some x-rays, which showed some osteoarthritis. He understands that he does have bilateral knee osteoarthritis. He says he has been working for Diepholz for about six months. He said the incident occurred when he was lifting a heavy truck tire. He grabbed it by the rim, foot was planted twisted a bit and felt a cold sensation in his left knee. Since the incident, he says he has had medial joint line pain and pain underneath the patella. He says no true locking, but it feels like it could lock. Pet.'s Ex. 5.

On examination, PA Jacobs noted mild swelling as well as pain over the medial joint line; PA Jacobs further noted, "We performed some provocative tests for meniscus. It appears that he very likely may have a medial meniscal tear." Pet.'s Ex. 5. PA Jacobs ordered a left knee MRI, advised Petitioner to continue wearing a brace and using crutches, and imposed modified duty restrictions, sitting work mostly. Pet.'s Ex. 5. The Carle records reflect Petitioner was re-evaluated on October 22, 2019, and PA Jacobs documented Petitioner had persistent knee pain and his meniscal signs remained positive for medial meniscal tear, however no further follow-up would occur until there was a compensability determination; in the interim, PA Jacobs directed Petitioner remain under modified duty restrictions. Pet.'s Ex. 5.

At hearing, Petitioner testified Respondent did not authorize the workup recommended by PA Jacobs, so he ultimately used his private insurance to seek treatment through his primary care facility. T. 24. The record reflects that on January 2, 2020, Petitioner was evaluated by Debora O'Brien, P.A. Pet.'s Ex. 7. PA O'Brien noted Petitioner presented for knee pain with a history of injury as follows:

> The patient had an injury in September that aggravated his left knee. The patient states that he was lifting tires, twisting and turning, and with 1 particular activity, he immediately felt a pain in his left knee, along with a burning/cool sensation.

> Patient states that for short period of time he was switched to a different position at work, hoping that the decreased activity would help with the pain. In addition, he did see Orthopedics. X-ray did not identify any concerning change in the bony structure of the knee. However, over the past 3-4 weeks, knee pain has increased again, as he has been doing the same physical activity at work. The patient states that over the past 7-10 days, he has had some episodes in which the knee will actually lock into place, causing him severe pain. Pet.'s Ex. 7.

Examination revealed decreased range of motion, swelling, and tenderness at the medial and lateral joint lines. Noting Petitioner had increased knee pain and was "now having issues with the knee locking in place, which is concerning for tendon or ligament damage," PA O'Brien ordered an MRI. Pet.'s Ex. 7. The MRI was completed on January 10, 2020, after which PA O'Brien referred Petitioner for a surgical consultation with Dr. Leslie Manohar. Pet.'s Ex. 6, Pet's Ex. 8.

The initial evaluation with Dr. Manohar took place on January 21, 2020. The record reflects a chief complaint of "Left knee pain and disability" and Dr. Manohar summarized the history of injury as follows:

> "The patient had an injury in September that aggravated his left knee. The patient states that he was lifting tires, twisting and turning, and with 1 particular activity, he immediately felt a pain in the left knee, along with a burning/cool sensation. Patient states that for short period of time he was switched to a different position at work, hoping that the decreased activity would help with the pain" PA Obrien [*sic*] 1/2/2020
>
> Patient works as a mechanic and he believes that this happened in August of 2019. He has to lift tires and down [*sic*] off the car. He has been having pain and disability since August of 2019. He feels a catching and locking in the left knee. He complains that he has catching, clicking, fall risk catheter [*sic*], giving out, limping, locking, numbness, pain, pain with activity, popping, stiffness swelling, tingling, weakness. Pet.'s Ex. 8.

On examination, Dr. Manohar observed decreased and painful left knee range of motion as compared to the contralateral side, tenderness to palpation of the left medial joint line, and small effusion; Dr. Manohar interpreted left knee X-rays taken that day as showing relatively well-preserved joint spaces of all three compartments. Dr. Manohar concluded Petitioner had exhausted non-operative treatment options for a most likely diagnosis of a left medial degenerative meniscus tear that is causing mechanical symptoms and affecting quality of life. The doctor noted Petitioner had pre-existing arthritis in the knee which would not necessarily improve with arthroscopy, however "addressing the meniscus tear will help alleviate the mechanical symptoms which seemed to be the patient's biggest concern"; the doctor further noted "he does have what appears as though a large complex medial meniscal tear and radiologist does suspect that this possibly a component of a bucket handle meniscus tear." Pet.'s Ex. 8.

Having considered the medical evidence in its entirety, the Commission finds a consistent history of a left knee injury while lifting a heavy truck tire and twisting is repeatedly documented

throughout. We further find the various providers documented similar physical examination findings of decreased range of motion, swelling, and medial joint line tenderness. While Respondent emphasizes Petitioner's testimony that the accident could have happened a few days before or after September 10, 2019, the Commission does not find this statement damages Petitioner's case. Again, as detailed above, the medical records corroborate that a work-related accident occurred. The Commission believes the September 10, 2019 accident date is based on Petitioner's best recollection, and his admission that the accident "could have" occurred within a few days of September 10, 2019 demonstrates Petitioner's honesty and reinforces our finding that Petitioner is credible.

The Commission further notes analysis of the accident issue must include the Form 45 completed by Nick East on October 2, 2019. Therein, East memorialized that Petitioner suffered an accident "Approx 2-2.5 weeks ago." Pet.'s Ex. 2, Resp.'s Ex. 1. East further documented Petitioner's injury was a "Left knee, ligament strain" which occurred when "Lifting tires to machine, twisting to lift tires from ground to tire machine." Pet.'s Ex. 2, Resp.'s Ex. 1.

At trial, Petitioner testified he brought the emergency room note to East right after he left the emergency room on October 1, 2019, and he did not know what East did with respect to completing an accident report. T. 30. The following exchange occurred regarding Petitioner's statements to East:

> Q. You actually had two conversations with Nick East, correct, when the incident occurred and then later after you got the restrictions?
> A. Right.
>
> Q. So when Counsel asked you, you know, he didn't complete the report until October 2nd, you didn't know a report was ever completed?
> A. Was ever made, no.
>
> Q. Until I showed you the report - -
> A. Right.
>
> Q. -- correct? But you had - - you indicated in your direct testimony you had your first conversation on the day it occurred, correct?
> A. Yes.
>
> Q. And again, just to - - the conversation with him subsequently was just to give him the work restrictions and then he completed an accident report after that?
> A. I gave him the ER papers after I left the ER and walked in there and told him that, you know, I was turning this in to work comp and he says I vaguely remember you hurting yourself and that was the end of that conversation. T. 40-41.

This testimony evidences that East prepared the Form 45 outside of Petitioner's presence, and as such the details incorporated therein are from East's own recollection. The Commission finds it significant that East documented Petitioner's accident occurred "Approx 2-2.5 weeks ago"; this is consistent with and corroborates Petitioner's claim of an accident on September 10, 2019.

Respondent next argues Dr. Manohar's causation opinion is not credible because the doctor admitted she did not know what the aggravating event at work was that caused Petitioner's condition. The Commission disagrees. The Commission finds Respondent's argument is predicated on a single response taken out of context and does not accurately reflect Dr. Manohar's conclusions. The Commission first observes Dr. Manohar's testimony demonstrates her familiarity with Petitioner's job and the mechanism of injury:

> And he does a very heavy labor-intensive job where, I'm sure you guys are familiar, but he's a mechanic, has to be on his feet for seven to eight hours a day, squatting, bending. He lifts these very heavy tires, the way he explained to me, and they can be 50 to 100 pounds. He's going to lift those up. And he has to twist. And he had one particular activity at work where he had immediate pain in his knee, and then he continued to try to work. And just continued to be exacerbated and had a catching and locking sensation in his knee. Pet.'s Ex. 14, p. 8 (Emphasis added).

The Commission further emphasizes Dr. Manohar repeatedly stated the work accident aggravated Petitioner's condition. When first asked about causal connection, Dr. Manohar testified, "But so I mean, he has - - he's had definitely aggravation of his knee from this injury that he had at work. And even if he had some pre-existing arthritis, the work-related twisting and heavy lifting and laboring that he does has aggravated his pre-existing condition." Pet.'s Ex. 14, p. 16. Dr. Manohar later confirmed that it is her opinion that the lifting incident in September 2019 was an acute exacerbation of a pre-existing condition and the cause of Petitioner's need for surgery. Pet.'s Ex. 14, p. 50. The Commission finds Dr. Manohar's conclusions are based on an accurate understanding of the facts, and are credible and persuasive. Further, as detailed in the Arbitrator's Decision, the Commission finds Dr. Walsh's opinions are not credible or persuasive.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 2, 2020, as amended above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $581.52 per week for a period of 35 4/7 weeks, representing October 1, 2019 through October 22, 2019 and February 24, 2020 through October 8, 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 to Petitioner temporary partial disability benefits in the amount of $7,581.21, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $45,120.74 for medical expenses, as provided in §8(a), subject to §8.2 of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $73,600.00. 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.

October 12, 2021

/s/ *Deborah J. Baker*

DJB/mck

O: 8/18/21

/s/ *Stephen Mathis*

43

/s/ *Deborah L. Simpson*

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

GRIGSBY, TIMOTHY
Employee/Petitioner

Case# **19WC031394**

DIEPHOLZ AUTO
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:

1551 STOKES LAW OFFICES
GARY J STOKES
200 N GILBERT
DANVILLE, IL 61832

2593 GANAN & SHAPIRO PC
TIMOTHY C STEIL
411 HAMILTON BLVD SUITE 1006
PEORIA, IL 61602

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Timothy Grigsby
Employee/Petitioner

v.

Diepholz Auto
Employer/Respondent

Case # **19** WC **31394**

Consolidated cases: ____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Springfield**, on **October 8, 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. [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. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[x] 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, **09/10/2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$45,358.56**; the average weekly wage was **$872.28**.

On the date of accident, Petitioner was **60** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, for those charges of Carle Hospital totaling $32,941.74 (PX15) and Carle Physicians Group totaling $12,179.00 (PX16), as provided in Sections 8(a) and 8.2 of the Act.

Temporary Partial Disability

Respondent shall pay Petitioner temporary partial disability benefits of $7,581.21 representing varying sums per week for 17 & 5/7ths weeks, commencing 10/23/2019 through 02/23/2020, as provided in Section 8(a) of the Act.

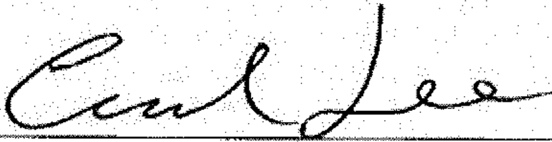
Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $581.52/week for 35 & 4/7ths weeks, commencing 10/01/2019 through 10/22/2019 and 02/24/2020 through 10/08/2020, as provided in Section 8(b) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for 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

11/24/20

Date

DEC 2 - 2020

FINDINGS OF FACT

Petitioner has been employed as an auto and truck mechanic for approximately 40 years and was employed in that capacity by Respondent, Diepholz Auto Group, on September 10, 2019. On that date, Petitioner was lifting truck tires weighing 70 to 110 pounds each onto a machine in order to remove them from the rims. Petitioner lifted each tire chest high in order to get those tires onto, and remove them from, the machine.

As Petitioner lifted the last tire and turned to set the tire down, his left foot stuck as he twisted. Petitioner immediately experienced a sharp pain and wet sensation on the inner (medial) side of his left knee. Petitioner stood still for a while and then lifted his pant leg to see if he had accidently cut himself. The sharp pain on the inner side of Petitioner's left knee subsided somewhat, and he was able to complete his shift. Petitioner then reported the incident to his service manager, Nick East, before going home.

Petitioner attempted to walk it off over the ensuing three weeks but the pain on the inner portion of the left knee failed to go away. Mr. East noticed Petitioner limping and commented on it. When the swelling in the left knee progressively worsened, Petitioner went to the Emergency Room to be evaluated (PX3).

The October 1, 2019 emergency department records report complaints of left knee pain that began ". . . a few weeks ago at work. . ." (PX3). "Swelling, tenderness and signs of injury" were observed along the inner (medial joint line) side of Petitioner's left knee. X-rays were taken and Petitioner's left knee was wrapped. Petitioner was given crutches and instructed to schedule a follow up with his primary care physician for further evaluation and treatment.

On October 8, 2019, Petitioner reported to Occupational Medicine and was seen initially by Ms. Billow, a registered nurse. Ms. Billow recorded a history of injury detailing Petitioner's turning with a new tire and experiencing pain and a sudden cold sensation in the left knee. Ms. Billow reported that "after 3 weeks of discomfort and increasing pain patient went to Carle ER for evaluation" (PX5). Physician assistant notes from the same date report the same history of injury with ongoing pain on the inner (medial joint line) side of Petitioner's left knee since the injury. Mr. Jacobs noted swelling in the affected area. The Physician assistant diagnosed a likely medial meniscus tear and ordered an MRI to confirm (PX5).

Respondent refused to authorize care, and Petitioner was forced to seek alternative means of paying for the MRI. The left knee MRI was finally conducted on January 10, 2020 which confirmed a "Complex tear of the body and posterior horn" of the medial meniscus with a ". . . posterior horn tear with posteriorly flipped fragment" (PX6). The radiologist also reported a "likely degenerative tear. . ." of the lateral meniscus (PX6). Petitioner was immediately referred to an orthopedic surgeon, Dr. Leslie Manohar.

Dr. Manohar recorded a history of Petitioner injuring his left knee while lifting and twisting with a tire in September and experiencing immediate pain in the left knee that had persisted since the date of injury (PX8). Dr. Manohar examined Petitioner and noted swelling, as well as tenderness, along the inside (medial) portion of Petitioner's left knee. Dr. Manohar diagnosed a complex medial meniscus tear with a likely degenerative tear of the lateral meniscus in Petitioner's left knee, along with pre-existing arthritis (PX8).

Dr. Manohar performed left knee surgery on February 24, 2020 which was described as a left knee arthroscopy with partial medial and lateral menisectomies (PX9). Subsequent to surgery, Petitioner completed a number of physical therapy treatments (PX10), received a synvisc one injection (PX8), and was fitted for a left knee brace. Petitioner is scheduled for a follow up with his surgeon later in October to evaluate the results of the left knee injection and discuss further treatment options.

Petitioner testified that the left knee continues to ache, with pain on the inner and outer sides of the left knee that increases with activity. Petitioner notices occasional locking and popping as well. The restrictions placed upon Petitioner subsequent to surgery (5 lbs maximum, 4 hours/day, no squatting, bending) remain in place as of the date of Arbitration (PX12). Respondent has acknowledged it cannot accommodate those restrictions (PX13).

CONCLUSIONS OF LAW

In support of the Arbitrator's decision relating to: **(C) Did an accident occur that arose out of and in the course of petitioner's employment by the respondent,** and **(D) What was the date of the accident**, the Arbitrator finds the following facts:

Petitioner suffered a complex tear of the medial meniscus in his left knee when he was lifting a truck tire from a chest-high machine and turned to set the tire down. Petitioner's left foot stuck in place as he turned, and he immediately experienced sharp pain and a "wet" sensation on the inner (medial) side of his left knee. The incident occurred on September 10, 2019.

Petitioner reported the incident to his service manager, Nick East, on the same day but did not immediately seek medical attention. Instead, Petitioner continued working, hoping the pain and swelling would resolve on its own. Three weeks later, on October 1, 2019, Petitioner reported to Carle Emergency (PX3).

The contradictory and erroneous intake form initially references left knee pain that began a few weeks earlier at work. The note states Petitioner was evaluated at orthopedics and then mistakenly states the accident was 3 days ago instead of 3 weeks ago (PX3). Petitioner denies that he was evaluated by orthopedics between September 10 and October 1, and denies that anything happened 3 days earlier. The tire incident was 3 weeks earlier. There is no record of any medical note, orthopedic or otherwise, between September 10, 2019 and October 1, 2019. Nor is there any corroboration of any incident having occurred 3 days earlier. There is, on the other hand, considerable corroboration of an injury occurring approximately 3 weeks prior to presentation at Carle Emergency. Respondent's form 45 references injury approximately "2 - 2.5 weeks ago" while mounting and balancing tires (PX2).

Petitioner was not aware that Mr. East failed to complete the accident report until after Petitioner returned from Carle Emergency on October 1, 2019. Petitioner did recall, however, Mr. East admitting he vaguely remembered their conversation about the tire incident several weeks earlier. No one refuted Petitioner's testimony.

Notes from Petitioner's initial evaluation at occupational medicine quotes Petitioner as having experienced the initial left knee pain while lifting and turning with a tire and then reported to Carle ER after "... 3 weeks. . ." of pain and discomfort (PX5). Histories reported to Mr. Jacobs, the physician's assistant, Dr. Manohar, Petitioner's surgeon, physical therapy and to Dr. Walsh, Respondent's IME, were all consistent. Dr. Walsh admitted that Petitioner suffered an aggravation of a preexisting condition in the tire changing incident, though he claims the aggravation was only temporary (RX3, p. 31).

Petitioner sustained a work related injury on September 10, 2019 while lifting a truck tire and twisting to set it on the ground.

In support of the Arbitrator's decision relating to: **(F) Is the petitioner's present condition of ill-being causally related to the injury**, the Arbitrator finds the following facts:

Petitioner's current condition is causally connected to the injury sustained on September 10, 2019 while lifting a truck tire and twisting to set it on the ground.

Petitioner's surgeon, Dr. Manohar, testified that the September 10, 2019 injury suffered by the Petitioner while lifting and turning with the truck tire was an acute exacerbation of preexisting degenerative joint disease in Petitioner's left knee that prompted his surgery and caused his current condition (PX 14, p.16, PX14, Dep. X5). Dr. Manohar described the incident as "... the straw that breaks the camel's back" (PX 14, p.20).

Dr. Manohar testified that any pre-existing arthritis in Petitioner's left knee was "mild" at the time of injury (PX 14, p.48). X-rays taken on October 1, 2019 reported only mild degenerative changes including a "small" effusion and "small" osteophytes (PX 4).

Dr. Walsh, Respondent's IME, admitted that Petitioner suffered an aggravation of a pre-existing degenerative condition in the injury of September 10, 2019 (PX3, p.31). However, Dr. Walsh opined that the aggravation was only temporary (RX3, p. 31). Dr. Walsh testified that the temporary exacerbation "probably" resolved within a month after the September 10, 2019 injury (RX3, p.49), but admitted there is no medical record after September 10, 2019 stating, or even suggesting, a resolution of symptoms (RX3, p.49). Dr. Manohar's testimony is more credible than that of Dr. Walsh for a number of reasons.

According to Dr. Walsh, Petitioner's complex medial meniscus tear of the left knee pre-dated the events of September 10, 2019 (RX3, p.37), though he could not say precisely when the tear would have occurred (RX3, p.46). Petitioner was admittedly working in a very heavy and strenuous job on a full-time basis for over a year and a half prior to September 10, 2019 without complaint. There are no records prior to September 10, 2019 of Petitioner ever having complained of pain on the inner (medial) side of the left knee (RX3, p.39). The only complaints of knee pain in the year and half prior to September 10, 2019 were of the right knee, not the left (PX1). There are no records of Petitioner ever having received treatment, of any kind, for the left knee prior to September 10, 2019 (PX1).

Dr. Walsh also admitted that a given condition can have more than one cause (RX3, p. 38) and traumatic meniscal tears "typically occur relative to a torsional (*twisting*) movement" such as that described by Petitioner (RX3, p. 50). Dr. Walsh appeared to concede multiple causes when asked whether Petitioner's left knee condition was related to the September 10, 2019 injury: "... the operative report describes a degenerative meniscul tear, which, of course, would be due to the arthritis of aging, **and now there's also the trauma the patient described**" (RX#, p. 24-25 emphasis added).

Finally, Dr. Walsh opined that if Petitioner had suffered an acute tear, torn tissue would have likely stuck between bone fragments causing a locking sensation (RX3, 59). Dr. Walsh failed to read, or recall, Petitioner's complaints that the left knee felt like it could lock in October 2019 (PX5) and complaints it was locking soon thereafter (PX7). Dr. Manohar explained that Petitioner's MRI clearly revealed a large flipped fragment that was causing the catching sensation and the feeling that the knee was locking up (PX14, p. 10).

The Arbitrator adopts the opinions of Dr. Manohar over those of Dr. Walsh. Petitioner suffered a complex medial meniscus tear in the left knee on September 10, 2019 that, at the very least, aggravated pre-existing degenerative joint disease and led directly to the February 24, 2020 surgery and Petitioner's left knee condition as of arbitration on October 8, 2020.

In support of the Arbitrator's decision relating to: **(J) Were the medical services that were provided to petitioner reasonable and necessary**, the Arbitrator finds the following facts:

Respondent's dispute surrounding the medical bills incurred from October 1, 2019 through September 16, 2020 pertains to liability and not the reasonableness of the services rendered or of charges incurred. Respondent's IME, Dr. Walsh, testified that all of Petitioner's medical treatment to date has been reasonable and necessary (RX3, p. 26).

In light of the findings above, all medical bills contained within Petitioner's exhibit #15 (Carle Hospital) and #16 (Carle Physician Group) are awarded pursuant to the medical fee schedule.

In support of the Arbitrator's decision relating to: **(K) What amount of compensation is due for temporary total disability and temporary partial disability**, the Arbitrator finds the following facts:

Petitioner testified that he was placed on crutches by the Carle Emergency Room physician and immediately returned to work and advised his manager. Petitioner testified that Respondent did not offer a light-duty position until October 23, 2019. Petitioner returned to the light duty, part-time position consistent with his restrictions at that time. Petitioner worked the part-time light duty position from October 23, 2019 through February 23, 2020 and had surgery on February 24, 2020. Petitioner testified that Respondent has not offered a light duty position since that date and he has not returned to any form of work since February 23, 2020. Respondent offered no rebuttal. Petitioner remains on light duty restrictions per his surgeon as of October 8, 2020, the date of arbitration.

In summation, Petitioner has been temporarily totally disabled for two periods, October 1, 2019 through October 22, 2019 and February 24, 2020 through October 8, 2020 (date of arbitration) for a total of 35 & 4/7ths weeks. Petitioner has been temporarily partially disabled for one period from October 23, 2019 through February 23, 2020 for a total of 17 & 5/7ths weeks. Weekly earnings during the period of temporary partial disability varied but gross wages paid total $4,080.00 (PX17). Petitioner would have earned a total of $15,451.82 in the full performance of his duties over the same 17 & 5/7ths week period were it not for the injury. Two-thirds of the difference between gross earnings paid, and full pay had he not been injured, totals $7,581.21.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC012517
Case Name	MOTYASHOK,VOLODYMYR v. KAUNAS EXPRESS
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0513
Number of Pages of Decision	20
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Matthew Belcher, Jason Carroll
Respondent Attorney	Charlene Copeland, David Spada

DATE FILED: 10/12/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VOLODYMYR MOTYASHOK,

Petitioner,

vs. NO: 13 WC 12517

KAUNAS EXPRESS INC., VILIUS
KUKARENAS, and INJURED WORKERS'
BENEFIT FUND

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein, Injured Workers' Benefit Fund ("IWBF"), and notice given to all parties, the Commission, after considering Petitioner's Motion to Dismiss Respondent's Review and the issues of medical expenses, temporary total disability, and permanent partial disability, and being advised of the facts and law, denies the Motion to Dismiss Respondent's Review, 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 ordered Respondent to pay for reasonable and necessary medical services, pursuant to the fee schedule, of: $900.00 to Anesthesia Associates of La Porte; $2,175.00 to Dr. Boryslavska; $927.00 to La Porte County EMS; $58,294.70 to La Porte Hospital; $4,534.00 to La Porte Hospital Physicians; $1,395.00 to La Porte Radiology, Inc.; $250.00 to Lakeporter Cardiovascular; $1,132.00 to Maple City Emergency Physicians; $1,805.00 to Maurice Ndukwu, PC; and $6,032.00 to St. Mary and Elizabeth Medical Center.

Respondent IWBF argues that the award of the bills from St. Mary and Elizabeth Medical Center is in error because these bills were written off, resulting in a zero balance. Petitioner argues that Respondent should reimburse him for the $1,234.18 in charges from St. Mary and Elizabeth Medical Center that were paid by Medicaid, but agrees that Respondents are not responsible for the remaining $4,797.82 that was written off.

Both parties rely on *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427 (2011). In that case, the Commission awarded $165,289.16 in medical expenses to the claimant. Tower asserted that the claimant's wife's group health insurance carrier paid $52,671.82 of the charges, the claimant paid $1,183.27, and the medical service providers wrote off the $111,298.35 balance of their charges. The appellate court agreed with Tower that the maximum that Tower could be required to reimburse the claimant for medical expenses was the amount that was actually paid to the service providers. *Id*. at 436-37.

In this case, a review of the bills from St. Mary and Elizabeth Medical Center indicates that Medicaid paid $1,234.18 of the charges and that the remaining balances were written off. The Commission has previously relied on *Tower Automotive* and its progeny to award medical expenses paid in part by Medicare as a negotiated rate. See, *e.g*., *Dean v. Glenbrook North High School District 225*, Ill. Workers' Comp. Comm'n, No. 05 WC 20611, 20 IWCC 0140. Accordingly, the Commission affirms the Arbitrator's award of medical expenses but modifies the award to reflect the $1,234.18 actually paid to St. Mary and Elizabeth Medical Center or the negotiated rate for these services.

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 filed May 20, 2019, is modified as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondents shall pay to Petitioner the sum of his reasonable and necessary medical bills pursuant to the fee schedule and §§8(a) and 8.2 of the Act, for the services provided by: Anesthesia Associates of La Porte, representing $900.00; Dr. Boryslavska, representing $2,175.00; La Porte County EMS, representing $927.00; La Porte Hospital, representing $58,294.70; La Porte Hospital Physicians, representing $4,534.00; La Porte Radiology, Inc., representing $1,395.00; Lakeporter Cardiovascular, representing $250.00; Maple City Emergency Physicians, representing $1,132.00; and Maurice Ndukwu, PC, representing $1,805.00. Respondents shall also pay to Petitioner the sum of his reasonable and necessary medical bills pursuant to the fee schedule and §§8(a) and 8.2 of the Act, for the services provided by St. Mary and Elizabeth Medical Center, representing $1,234.18 or the negotiated rate for these services.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondents pay to Petitioner the sum of $760.96 per week for the period from January 23, 2013 through October 17, 2013, for a period of 38 and 2/7ths weeks, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondents shall be given a credit for any benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondents pay to Petitioner the sum of $684.86 per week for a period of 70.55 weeks, as provided in §§8(e)(9), 8(e)(11), and 8(d)2 of the Act, for the reason that the injuries sustained caused a 10% loss of use of the left hand, a 15% loss of use of the left foot, and a 5% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondents shall have

credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury. 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-Employers to pay the benefits due and owing the Petitioner. In the event the Respondent-Employers fail to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to §§5(b) and 4(d) of this Act. Respondent-Employers shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employers that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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

October 12, 2021

o: 10/7/21
MEP/kcb
049

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

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0513
NOTICE OF ARBITRATOR DECISION

MOTYASHOK, VOLODYMYR Case# **13WC012517**
Employee/Petitioner

KAUNAS EXPRESS INC & IWBF
Employer/Respondent

On 5/20/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.35% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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0000 VILIUS KUKARENAS
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0639 ASSISTANT ATTORNEY GENERAL
CHARLENE C COPELAND
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

VOLDOYMYR MOTYASHOK
Employee/Petitioner

v.

KAUNAS EXPRESS, INC. & IWBF
Employer/Respondent

Case # **13** WC **12517**

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 and APRIL 29, 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 **JANUARY 22, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**59,354.87**; the average weekly wage was $**1,141.44**.

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

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

ORDER

As detailed in the attached memorandum discussing the *Findings of Fact and Conclusions of Law:*

- The Arbitrator finds the Respondent shall pay Petitioner the sum of **$684.86** per week for a period of **70.55 weeks**, as provided in **Sections 8(e)9, 8(e)11, and 8(d)2** of the Act, because the injury to the Petitioner caused **a 10% loss of use of the left, hand, a 15% loss of use of the left foot,** and **a 5% loss of use of the person-a-whole.**; and,

- The Arbitrator finds the Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $900.00 to Anesthesia Associates of La Porte, $2,175.00 to Dr. Halyna Boryslavska, $927.00 to La Porte County EMS, $58,294.70 to La Porte Hospital, $4,524.00 to La Porte Hospital Physicians, $1,395.00 to La Porte Radiology, Inc., $250.00 to Lakeporter Cardiovascular, $1,132.00 to Maple City Emergency Physicians, $1,805.00 to Maurice Ndukwu, PC, and $6,032.00 to Saint Mary and Elizabeth Medical Center, as provided in Sections 8(a) and 8.2 of the Act.; and,

- The Arbitrator finds the Respondent shall pay Petitioner temporary total disability benefits of $760.96/week for 38 2/7 weeks, commencing January 23, 2013 through October 17, 2013, as provided in Section 8(b) of the Act.; and,

- The Arbitrator finds the Respondent shall pay those benefits that have accrued in a lump sum, and shall pay the remainder, if any, in weekly payments.

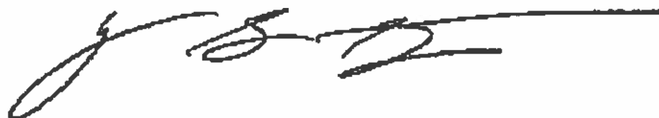
FURTHERMORE:

Injured Workers' Benefit Fund

The Injured Workers' Benefit Fund was named as a co-respondent in this matter and the Illinois State Treasurer is ex-officio custodian of the Injured Workers' Benefit Fund. 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

MAY 20, 2019
Date

MAY 2 0 2019

VOLODYMYR MOTYASHOK v. KAUNAS EXPRESS and INJURED WORKERS BENEFIT FUND

13 WC 12517

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried before Arbitrator Steffenson on February 28, 2019 and April 29, 2019 in Chicago. All issues were in dispute. (Arbitrator's Exhibit 1). The parties agreed to receipt of this Arbitration Decision via e-mail and requested a written decision, including findings of fact and conclusions of law, per Section 19(b) of the Act. (Arbitrator's Exhibit (*hereinafter*, AX) 1).

FINDINGS OF FACT

Volodymyr Motyashok ("Petitioner") testified in Ukrainian with the assistance of a professional interpreter. He testified he was born on March 12, 1961. As of January 22, 2013, he was legally married with two dependent children under the age of eighteen.

He testified he was employed by Kaunas Express, Inc. ("Respondent") as of January 22, 2013. He began working for Respondent in October or November of 2011. He explained Respondent is a trucking company owned by Vilius Kukarenas with its main office located in Naperville, Illinois. Petitioner possessed a commercial driver's license and operated a Volvo eighteen-wheel semi-truck while employed by Respondent.

Petitioner testified he was referred to Respondent as a potential employer by an acquaintance who was already driving a truck for them. The acquaintance provided him with Respondent's phone number. Petitioner testified he met with Respondent's owner, Mr. Kukarenas, as well as with the owner's wife, to discuss employment. The meeting occurred at Respondent's main office in Naperville, Illinois. He was offered and accepted the position of truck driver at that meeting. Respondent owned the truck Petitioner drove for the company. Besides himself, Petitioner testified Respondent had two additional truck drivers to operate the three trucks owned by Respondent. The trucks were kept at Respondent's facility in McCook, Illinois.

Petitioner testified he typically worked Monday through Friday for Respondent. The owner's wife worked as Respondent's dispatcher and would notify Petitioner as to where he would be driving the truck. Once he was made aware as to his first trip of the week, he drove from his home in Chicago to the truck yard in McCook to pick up the truck for the week. He left his personal vehicle at the truck yard while he was gone for the week. He typically drove around 3,000 miles each week as a truck driver for Respondent. He drove the truck throughout the Midwest region. While on the road, he testified he normally slept in his truck at night.

Once his trips were completed for the week, he returned the truck to the yard in McCook and dropped of his paperwork, including his mileage logs and other relevant documents. Petitioner testified that Respondent provided him a fuel card, which he used while on the road to fill the truck with diesel fuel. Respondent was also responsible for any repairs to the truck that became necessary.

Petitioner testified he created a company he called V.M. Express, which he intended to one day use to create his own trucking company. When working for Respondent, he received checks for his work paid out to V.M. Express. He testified he was told by Respondent it would "be better" if they did it this way rather than provide him checks made out to his name. Although he intended to one day start his own trucking company, Petitioner testified he still had not done so. Petitioner testified he was paid approximately $0.40 per mile while driving the truck for Respondent.

Petitioner's paychecks from Respondent were entered into evidence. (Petitioner's Exhibit 14). Additionally, a one-page summary of his wages earned was also entered into evidence. (Petitioner's Exhibit (*hereinafter*, PX) 15). The Arbitrator notes there are forty-six checks listed but they are not all representative of the same period. The checks represent a fifty-two-week period from January 20, 2012 through January 17, 2013. Petitioner earned a total of $59,354.87 over that fifty-week period.

On Tuesday, January 22, 2013, Petitioner was driving his truck from Iowa to Michigan as instructed to by Respondent. On that day, he was traveling east on Interstate 80 in Indiana. While operating his vehicle on this road in La Porte, Indiana, he was involved in a motor vehicle crash. Petitioner testified he skidded on a patch of ice causing him to lose control of his truck. He crashed the truck into the trailer of another truck traveling on the same road. Petitioner testified he was pinned in the cab of his truck.

A crew of first responders arrived on the accident scene. It took approximately one hour for Petitioner to be freed from the crashed vehicle. He testified the temperature at that time was very cold, which he estimated at -15 degrees to -18 degrees Centigrade (5 degrees to -0.4 degrees Fahrenheit). He was taken by ambulance to La Porte Hospital in La Porte, Indiana.

Petitioner was admitted into the hospital for several days following his accident. His initial examination was positive for chest pain, bruising throughout his body, and arthralgias. (PX 1 at 484). His body was cool to the touch from exposure and he was actively rewarmed while in the emergency room. (PX 1 at 484). He was diagnosed with, among other things, generalized vasal spasm due to the prolonged exposure to the ambient sub-freezing temperature. (Id.).

He underwent surgery to repair a de-gloving injury he sustained to his left foot in the crash. (PX 1 at 55-56). The surgery was completed on the date of his accident and was performed by Dr. Przemyslaw M. Kamien. (PX 1 at 55-56). Dr. Kamien noted the injury to his left foot was a "...very complex laceration that is essentially a degloving injury with a large flap that starts on the dorsal surface of the foot and then extends medially to the plantar surface of that foot." (Id.).

The following day, he underwent a second surgery to his left hand. (PX1 at 537-538). Dr. Kamien performed this second surgery as well, which included removal of two glass foreign bodies as well as irrigation and debridement. (PX 1 at 537-538). His second and third extensor tendons were also repaired in this surgery. (Id.). Petitioner was ultimately released from the hospital six days after his accident on January 28, 2013. (Id. at 42-43). He also sustained a sternal fracture, multiple rib fracture, pulmonary contusions, and orthopedic injuries in the crash. (Id. at 42).

Petitioner testified the owner of Respondent, Mr. Kukarenas, and the owner's wife visited him during his hospital stay. They also picked up Petitioner's wife on their way to the hospital and she visited with them as well. Petitioner reported testified he told Mr. Kukarenas how his accident occurred while in the hospital.

Following his discharge from the hospital, Petitioner had his first follow up visit with Dr. Halyna Boryslavska, whom was Petitioner's primary care doctor at the time. Petitioner testified this initial visit occurred on February 1, 2013 and took place at his home. He explained it was hard for him to travel at the time due to his injuries. At that initial visit, Dr. Boryslavska, in addition to his multitude of physical injuries, also diagnosed Petitioner with post-traumatic stress disorder. (PX 2).

Over the next several weeks, Petitioner continued to follow up with Dr. Boryslavska during home visits and eventually at her office located at Advanced Family Clinic in Chicago. (PX 2). At her recommendation, he underwent a course of physical therapy at Saint Mary and Elizabeth Medical Center from July 16, 2013 through August 15, 2013. (PX 3). He was ultimately released from treatment by Dr. Boryslavska at his final visit of October 17, 2013. (PX 2).

Following his release from treatment, Petitioner testified he chose not to return to work for Respondent. Instead, he began driving a truck for another company in November of 2013. Prior to and since January 22, 2013, Petitioner testified he has not sustained any injuries involving his left foot or hand. He testified that Respondent did not pay for any of his related medical bills nor was he compensated for his time off work. Respondent was not covered by a workers' compensation insurance policy on the date of Petitioner's accident. (PX 11).

Petitioner testified he continues to drive a truck for a living. With the passing of time, he testified he has had a significant resolution of his symptoms. He testified, however, that he will feel discomfort in his left foot when pressing the clutch down in his truck. He noted it was not so much pain but a discomfort. He explained the truck he operates requires that he use a clutch to shift gears.

CONCLUSIONS OF LAW

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

Issue A: *Operating under and subject to Act*

The Arbitrator finds that Respondent was operating under and subject to the Illinois Workers' Compensation Act on January 22, 2013.

Respondent Kaunas Express, Inc. was operating and subject to the Illinois Workers' Compensation Act ("Act") pursuant to Section 3 of the Act. Section 3 of the Act states an employer will be automatically subject to the provisions of the Act when it is engaged in certain extra hazardous enterprises or business.

Specifically, Respondent is automatically subject to the Act pursuant to Section 3, paragraph 3, which indicates a business is automatically covered when it is engaged in the, "Carriage by land, water or aerial service and loading or unloading in connection therewith, including the distribution of any commodity by horse drawn or motor vehicle where the employer employs more than 2 employees in the enterprise or business." Here, Respondent was engaged in the business of distributing goods by truck across the State of Illinois and neighboring states. Further, Respondent had at least two other employees in addition to Petitioner.

Additionally, Respondent is automatically subject to the provisions of the Act by way of paragraph 15 of Section 3 which states, "Any business or enterprise in which electric, gasoline or other power-driven equipment is used in the operation thereof." Respondent is subject to the provisions of the Act through the operation of its power-driven semi-tractor trailers.

Section 1(b)2 of the Illinois Workers' Compensation Act provides three bases for acquiring Illinois jurisdiction: (1) if the contract for hire is made in Illinois; (2) if the accident occurred in Illinois; and (3) if the claimant's employment is principally localized in Illinois, regardless of where the contract for hire was made or where the accident occurred.

Here, the accident did not occur in Illinois but rather in Indiana. However, jurisdiction is proper in Illinois because both the contract of hire occurred in Illinois and Petitioner's employment was principally located in Illinois.

First, Petitioner testified he met with the owner, Mr. Kukarenas, as well as with the owner's wife, to discuss employment at Respondent's main office in Naperville. Petitioner was offered and accepted the position of truck driver at that meeting. Because the contract for hire was made in Illinois, jurisdiction is proper.

Additionally, Petitioner's employment was principally located in Illinois. The seminal case interpreting the phrase "principally located" is *Patton v. Industrial Comm'n,* 137 Ill.App.3d 738, 498 N.E.2d 539 (1986). To determine where a claimant's employment is principally located, the Commission should first and foremost look upon where the employment relationship is centered. (*Patton,* 137 Ill. App. 3d at 744). Only if such situs cannot be established is the alternative test of domicile and substantial working time to be considered. (Id.).

The factors which determine the situs of the employment relationship include: (1) where the employment relationship is centered, i.e., the center from which the employee works; (2) the source of remuneration to the employee; (3) where the employment contract was formed; (4) the existence of a facility from which the employee received his assignments and is otherwise controlled; and (5) the understanding that the employee will return to that facility after the out-of-state assignment is complete. (*Patton,* 137 Ill. App. 3d at 744).

In applying the factors outlined in *Patton*, the court in *Montgomery Tank Lines v. Industrial Comm'n*, (1994) 263 Ill.App.3d 218, 640 N.E.2d 296 held that the situs of the claimant's employment relationship with the Respondent was clearly in Illinois. The claimant, a truck driver, received his dispatch orders from an office in Illinois, received his paycheck from an office in Illinois, turned in his paperwork in to the office in Illinois, and washed his trailer out

at the office in Illinois. (*Montgomery Tank Lines*, 263 Ill.App.3d 223, 640 N.E.2d at 300). Claimant's runs also usually began and ended in Illinois. (Id.).

In the case at bar, all materials and equipment were kept at the yard in McCook, Illinois. Petitioner was required to pick up and drop off his truck at the yard in McCook when starting and when completing a trip. Petitioner picked up his paychecks at the yard in McCook as well. In fact, every aspect of Respondent's trucking business was handled out of either the McCook or Naperville locations. The situs of Petitioner's employment relationship is Illinois. Because the situs can be clearly established, the alternative test involving domicile and substantial working time need not be considered. (*Patton,* 137 Ill. App. 3d at 744). For these reasons, jurisdiction is proper in Illinois.

Issue B: *Employee-Employer relationship*

The Arbitrator finds there was an employee-employer relationship between Petitioner and Respondent that on January 22, 2013.

The Act states an employee is one who is compensated for services provided to the State, municipal corporation, or business. Determining whether and employer-employee relationship exists is a factual question based upon several considerations. *Bauer v. Industrial Commission*, 51 Ill.2d 169 (1972). Once a business is defined as an employer under the Act, a separate and independent evaluation must be conducted to determine whether an employment relationship exists. The Act provides several factors to consider in determining whether an employment relationship exists:

1. The right to control the manner in which the work is being performed;
2. The method of payment;
3. The right to discharge;
4. The skills required to perform the work;
5. The ownership of tools, materials, and equipment used in the work;
6. The relationship of the work performed to the employer's purpose; and
7. The deduction of withholding taxes.

Courts have consistently held that the employer's right to control the manner of the employee's work is the single most important determinative factor, even where the other factors may conflict. (*Bauer v. Industrial Commission*, 51 Ill.2d 169 (1972); *Belloumini v. United States*, 64 F.3d 299 (U.S. Ct. of App., 7th Cir. 1995); *Ware v. Industrial Commission*, 318 Ill.App.3d 1117 (1st Dist. 2000); *Labuz v. Illinois Workers' Compensation Commission, et al. JKC Trucking*

Co., Inc., 981 N.E.2d 14 (Ill. App. 1st Dist. 2012)). In *Labuz*, the Commission determined that an employer-employee relationship existed where the Plaintiff, a truck driver for Defendant, was required to start each of his trips at Defendant's facilities, drive its truck, and obtain Defendant's authorization for any truck repairs. (Id.). The Appellate Court upheld this determination despite Defendant's contention that Plaintiff was an independent contractor, arguing it did not withhold taxes from his pay. (Id.).

In this case, it appears that Respondent attempted to hold Petitioner out as an independent contractor rather than an employee. However, the Arbitrator finds Respondent failed in its attempts to do so. Like the Plaintiff in *Labuz*, Petitioner was a truck driver for Respondent, a trucking company. Respondent owned the truck and directed Petitioner where he would be driving every work week. It also handled necessary repairs for its trucks and supplied money for fuel. Although Petitioner created a company entitled V.M. Express and was compensated under that name without taxes being withheld, all other factors indicate he was an employee truck driver for a trucking company. As such, the Arbitrator concludes that on the date of Petitioner's accident, there was an employee-employer relationship between Petitioner and Respondent.

Issues C, D, and E: *Accident, Date of accident, and Notice*

Section1(b)3(d) of the Act provides, "To obtain compensation under this Act, an employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment."

The determination of whether an injury to a traveling employee arose out of and in the course of employment is governed by different rules than those that are applicable to other employees. (*Venture-Newberg Perini Stone & Webster v. Illinois Workers' Comp. Comm'n*, 2012 IL App (4th) 110847WC, ¶ 12). A traveling employee is one who is required to travel away from the employer's premises to perform his or her job. (*Cox v. Illinois Workers' Comp. Comm'n*, 406 Ill.App.3d 541, 545 (1st Dist. 2010)). The test whether a traveling employee's injury arose out of and in the course of employment is the reasonableness of the conduct in which he or she was engaged at the time of the injury and whether that conduct might have been anticipated or foreseen by the employer. (*Venture-Newberg Perini Stone & Webster*, 2012 IL App (4th) 110847WC, ¶ 14.)

Here, Petitioner worked for Respondent as a truck driver. On January 22, 2013, he crashed Respondent's truck when he lost control due to ice on the road. The contemporaneous medical records indicate his crash occurred on that date and this corresponds with his unrebutted testimony. Further, Petitioner testified Respondent's owner visited him while he

was in the hospital. The Arbitrator notes Petitioner was in the hospital from January 22 through 30, 2013. This visit therefore occurred within forty-five days of the accident and is enough to satisfy the notice requirement of the Act.

Petitioner's work duties required him to travel away from Respondent's premises. He was a traveling employee as of the date and time of his accident. His operation of the truck was reasonable, and Respondent could anticipate that the operation of a truck could result in a crash on icy winter roads. Accordingly, Petitioner's accident arose out of and in the course of his employment by Respondent and Respondent was provided with timely notice of the accident.

Issue F: *Causal connection*

To prevail on a claim for benefits under the Act, an employee must establish, among other things, that his or her current condition of ill-being is causally connected to a work-related injury. (*Elgin Board of Education School Dist. U-46 v. Illinois Workers' Comp. Commission*, 409 Ill.App.3d 943, 948 (2011)).

The Arbitrator has reviewed and considered the medical evidence as well as the testimony. Petitioner credibly testified regarding his accident, injuries, treatment, and ongoing issues related to his injuries. There was no evidence to suggest that any other accidents or injuries have affected his condition.

The Arbitrator finds that Petitioner has proven by a preponderance of the evidence that his current condition of ill-being as it relates to his left hand, left leg, and fractured ribs is causally related to his work accident of January 22, 2013.

Issues G, H, and I: *Earnings, Age, and Marital status*

Petitioner submitted into evidence his paycheck stubs from his employment by Respondent. There were forty-six checks dated from January 26, 2012 through January 17, 2013. Petitioner also admitted into evidence a summary of these paycheck stubs. The Arbitrator notes the checks are not all evenly spaced but were dated typically six to eight days a part. In some weeks, he received two checks. Petitioner testified without rebuttal that he was paid by the number of miles driven.

The Arbitrator notes the best evidence indicates the first check reflected is for the seven-day period of January 20-26, 2012. The final check paid him through January 17, 2013.

This totals fifty-two-weeks and is the best evidence to calculate his average weekly wage. For this fifty-two-week period prior to the date of his accident, he earned $59,354.87. This equates to an average weekly wage calculated pursuant to Section 10 of the Act of $1,141.44.

Next, Petitioner testified without rebuttal that he was born on March 12, 1961 making him fifty-one years of age on the date of his accident. This was also confirmed by his date of birth listed within his medical records. Further, Petitioner testified without rebuttal that he was legally married with one minor dependent child 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 $1,141.44. Additionally, he was fifty-one-years-old, married, and had one dependent child.

Issue J: *Medical bills*

Section 8(a) of the Act states a Respondent is responsible "for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury..." A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. (*Gallentine v. Industrial Comm'n*, 201 Ill.App.3d 880, 888 (2nd Dist. 1990)). The Arbitrator finds that medical services provided to Petitioner have been reasonable and necessary. Respondent has not paid all appropriate charges.

The outstanding medical charges were admitted into evidence without objection by Respondent. (PX 13). Respondent proffered no evidence to dispute the reasonableness and necessity of the treatment. Petitioner was admitted into the hospital on the date of his accident and underwent surgeries directly related to his injuries. Upon his release from care, he received home medical care from Dr. Boryslavska until he was able to leave his home and travel to her office. Thereafter, he underwent ongoing conservative follow up care before his final visit on October 17, 2013.

For these reasons, Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $900.00 to Anesthesia Associates of La Porte, $2,175.00 to Dr. Halyna Boryslavska, $927.00 to La Porte County EMS, $58,294.70 to La Porte Hospital, $4,524.00 to La Porte Hospital Physicians, $1,395.00 to La Porte Radiology, Inc., $250.00 to Lakeporter Cardiovascular, $1,132.00 to Maple City Emergency Physicians, $1,805.00 to Maurice Ndukwu, PC, and $6,032.00 to Saint Mary and Elizabeth Medical Center, as provided in Sections 8(a) and 8.2 of the Act.

Issue K: *TTD*

Petitioner claims to be entitled to temporary total disability benefits from January 23, 2013 to October 17, 2013, which represents a period of 38 2/7 weeks. A claimant is temporarily totally disabled from the time an injury incapacitates him from work until he is as far recovered or restored as the permanent character of his injury will permit. (*Westin Hotel v. Indus. Comm'n*, 372 Ill.App.3d 527, 542 (1st Dist. 2007)).

In determining whether a claimant remains entitled to receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether he is capable of a return to the workforce. (*Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n*, 236 Ill.2d 132, 148 (2010)). Once an injured employee's physical condition stabilizes, he is no longer eligible for TTD benefits. (*Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 118 (1990)).

Here, Petitioner sustained injuries on January 22, 2013 and was admitted into La Porte Hospital until he was ultimately discharged on January 28, 2013. Due to the severe nature of his injuries, Dr. Boryslavska came to Petitioner's home throughout February. By March he was able to go to her office for treatment but remained unable to walk until April. (PX 3 at 3).

Dr. Boryslavska referred him for a course of physical therapy that he underwent throughout July and August of 2013 at Saint Mary and Elizabeth Medical Center. During this same period, Petitioner continued to follow up with Dr. Boryslavska for ongoing treatment as well as medication management. He finally completed his medical care on October 17, 2013 and his condition had stabilized. He remained off work during this entire period due to his injuries.

Wherefore, Respondent shall pay Petitioner temporary total disability benefits of $760.96/week for 38 2/7 weeks, commencing January 23, 2013 through October 17, 2013, as provided in Section 8(b) of the Act.

Issue L: *Nature and 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 neither party submitted into evidence an AMA rating report. 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 as a truck driver and his job duties are physical in nature. His injuries will cause greater disability that to an individual with a less physical job. As such, the Arbitrator gives ***some weight*** to this factor.

With regards to factor (iii) of Section 8.1b of the Act:

iii. The Arbitrator notes that the Petitioner was 51-years-old at the time of the accident. The Arbitrator therefore gives ***some weight*** to this factor.

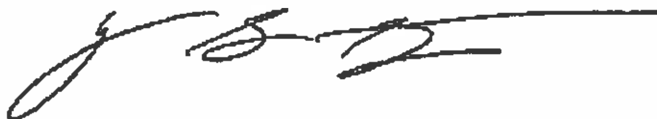
With regards to factor (iv) of Section 8.1b of the Act:

iv. The Arbitrator notes that the record is devoid of any evidence of an impairment of earnings because of this January 22, 2013 work accident. As such, the Arbitrator therefore gives ***no 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 received extensive medical treatment and has been noted to have an ongoing disability regarding his left foot. Dr. Boryslavska reported on October 17, 2013, the Petitioner to be complaining of left ankle difficulties when walking, range of motion issues, and depression concerns. (PX 2). The medical records also confirm the Petitioner underwent a significant surgical procedure to his left foot that was followed by notable post-surgical care and therapy. (PX 1 at 55-56). Due to the Petitioner's medically documented injuries and other physical complaints, the Arbitrator therefore gives ***significant weight*** to this factor.

Based on the above factors, and the entire record, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of **a 10% loss of use of the left hand, a 15% loss of use of the left foot, and a 5% loss of use of the person-as-a-whole** pursuant to **Sections 8(e)9, 8(e)11, and 8(d)2,** and Section 8.1b of the Act.



Signature of Arbitrator

MAY 20, 2019
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC028078
Case Name	GERALD THOMPSON v. AMSTEAD RAIL
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0514
Number of Pages of Decision	21
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Aaron Chappell
Respondent Attorney	Julie Pagano

DATE FILED: 10/12/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GERALD THOMPSON,

Petitioner,

vs. NO: 19 WC 28078

AMSTEAD RAIL,

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 statute of limitations, accident, notice, causation, temporary total disability benefits, medical expenses both current and prospective, and the Arbitrator's denial of Respondent's *Ghere* objection, and being advised of the facts and law, changes the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Arbitrator found that Petitioner proved a repetitive traumatic accident which caused conditions of ill-being of his hands, elbows, and left thumb. The Commission agrees with the Arbitrator's analysis on the issues of statute of limitations, accident, causation, notice, temporary total disability, and award of medical expenses both current and prospective. Therefore, the Commission affirms and adopts those portions of the Decision of the Arbitrator.

One of Petitioner's treating doctors, Dr. Bradley, testified at arbitration under a subpoena issued by Petitioner. He treated Petitioner's elbows. Dr. Bradley also reviewed Petitioner's prior medical records, including those of Dr. Kutnik, who treated Petitioner's hands. Dr. Bradley noted that Dr. Kutnik diagnosed Petitioner with left thumb basal joint arthritis and right wrist arthritis. When Dr. Bradley was asked how those conditions would arise, Respondent issued a *Ghere* objection because they did not have notice that Dr. Bradley would testify about those conditions. Petitioner responded that the objection was not applicable because Dr. Bradley was not a section 12 examining doctor but rather a treating doctor. The Arbitrator overruled Respondent's objection.

Referring generally to arthritis, Dr. Bradley testified that it incorporates various conditions. However, he opined that the "repetitive impact, repetitive lifting, the repetitive pushing and pulling will accelerate arthritis and often times make asymptomatic arthritis symptomatic." Therefore, he believed the repetitive physical activity "could certainly aggravate an underlying degenerative condition like that."

If a *Ghere* objection was appropriate in this instance, it is difficult to see how Respondent was actually "surprised" by the testimony or prejudiced by his very limited testimony about Petitioner's hand conditions. In his records, Dr. Bradley noted that he examined Petitioner's hands even though he was not specifically treating them. In addition, the Arbitrator seemed to be much more persuaded by Petitioner's testimony about his job activities to find causation to his hand conditions than Dr. Bradley's testimony. Therefore, The Commission finds that even if the Arbitrator's denial of Respondent's *Ghere* objection was erroneous in this instance, that would have been harmless error.

Incidentally, the Commission notes a clerical error in the "FINDINGS" section of the Decision of the Arbitrator. The Arbitrator indicated Petitioner's average weekly wage was $1,239.92. However, in the Request for Hearing form the parties stipulated to an average weekly wage of $1,239.29. However, the Commission also notes that in her award, the Arbitrator used the correct average weekly wage to calculate benefits.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $826.19 per week for a period of 52&5/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that in the FINDINGS Section in Decision of the Arbitrator the average weekly wage is changed from $1,239.92 to $1,239.29

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner out-of-pocket expenses contained in Petitioner's Group Exhibit 1 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of 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.

October 12, 2021

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

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

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

DLS/dw
O-8/18/21
46

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

THOMPSON, GERALD Case# **19WC028078**
Employee/Petitioner

AMSTED RAIL D/B/A AMSTED INDUSTRIES INC
Employer/Respondent

On 10/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

2795 HENNESSY & ROACH PC
JULIE M PAGANO
415 N 10TH ST SUITE 200
ST LOUIS, MO 63101

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)

GERALD THOMPSON
Employee/Petitioner

v.

AMSTED RAIL, D/B/A AMSTED INDUSTRIES, INC.
Employer/Respondent

Case # **19** WC **28078**

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 **August 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. ☒ 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, **8/5/2019**, 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 **$64,443.15**; the average weekly wage was **$1,239.92**.

On the date of accident, Petitioner was **61** years of age, ***married*** with **0** dependent children.

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

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

Respondent is entitled to a credit of **$6,875.86** under Section 8(j) of the Act for payment of nonoccupational disability benefits.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, contained in Petitioner's Group Exhibit 1, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall reimburse Petitioner for out-of-pocket expenses contained in Petitioner's Group Exhibit 1. Petitioner testified he is an insured under this wife's health insurance plan who paid a portion of his medical expenses, for which Respondent is not entitled to a credit under Section 8(j) of the Act.

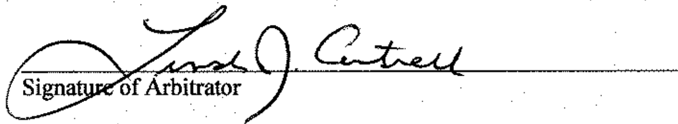
Respondent shall pay temporary total disability benefits of $826.19/week from August 12, 2019 through the date of arbitration, August 14, 2020, representing 52-5/7 weeks.

Respondent shall authorize and pay for the treatment recommended by Dr. Bradley, including but not limited to, a left and right lateral epicondylectomy and extensor tendon repair.

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

10/21/20
Date

ICArbDec19(b)

OCT 2 8 2020

STATE OF ILLINOIS)
) **SS**
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

GERALD THOMPSON,)
)
Employee/Petitioner,)
)
v.) Case No.: 19-WC-28078
)
AMSTED RAIL, d/b/a AMSTED)
INDUSTRIES, INC.,)
)
Employer/Respondent.)

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on August 14, 2020, pursuant to Sections19(b) and 8(a) of the Act. The issues in dispute are accident, notice, causal connection, medical expenses, temporary total disability benefits, and prospective medical care. All other issues have been stipulated. Petitioner moved to file an Amended Application for Adjustment of Claim to include injury to Petitioner's left thumb. Petitioner's oral motion to amend is granted.

TESTIMONY

Petitioner was 61 years old, married, with no dependent children at the time of arbitration. He testified he has worked for Respondent for 26 years and has held the position of slinger helper for 16 years. Petitioner prepared a job description of his various positions with Respondent that was admitted as Petitioner's Exhibit 11. Petitioner makes bolsters for railroad and freight cars. He claims a repetitive trauma injury to his bilateral hands, wrists, and elbows as a result of his work activities.

Petitioner testified he is required to lift scrap steel of various sizes in his slinger helper position. He uses a rollover hoist to lift a 5,000-pound steel mold, which is on chains. When the mold is suspended in the air he pulls it to the other side of the line along with another slinger helper. He does this 120 times a day. When the mold is dropped off to the other side, Petitioner then has to pull the 2,000-pound hoist back to its original position. He does this an additional 120 times a day. Petitioner testified that he "works the chains" and yanks and pulls up and down on chains to lower molds onto patterns. He also lifts seven to ten-pound bottles that he puts in the pattern where the mold is made. He has to push and pull 2,000-pound flasks down a rail, but

sometimes the flasks become stuck and he has to use a 20-pound steel pry bar to separate them so the flasks can move smoothly down the line. He performs these tasks repeatedly throughout his entire shift.

Petitioner's job duties require the use of tools such a shovel and sledgehammer. He shovels hard packed foundry sand, weighing approximately 20 pounds, into a four to five-foot high hopper. He also pushes a wheelbarrow that he fills with sand. He does this constantly for approximately one hour per shift while cleaning up the line at the end of his shift and when the line breaks down. Petitioner lifts scrap steel of various sizes and weights while cleaning up the line. He uses a sledgehammer to beat steel off a metal flask or uses a pry bar to flatten the metal so it will sit flat on a table before they can "ram a mold." Petitioner testified that the force, movement, and prying from use of these tools "tears" up his arms, hands, and elbows.

Petitioner testified he uses his hands and fingers to manipulate small parts and he turns and manipulates knobs and work controls to operate the rollover hoist. Petitioner testified that his hands would be in awkward positions when he twists knobs and pushes buttons while pushing the mold on the hoist. Petitioner testified that when another slinger helper is in a bind, it is his responsibility to go over and help so the line keeps moving. All of Petitioner's job duties are performed at a fast pace as 120 molds are expected in an eight-hour shift.

When Petitioner began working for Respondent he started out laboring on the pouring floor, working twelve-hour days, six days a week. This job required a lot of shoveling and digging. He would also have to use his hands to pull metal pins out of molds that had just been poured. When the pins would get stuck, he would have to bang one pin against another. Petitioner testified that banging metal against metal would jar his hands and wrists. He also worked in the core room as a core blower operator prior to working as a slinger helper.

Petitioner testified he previously had bilateral carpal tunnel syndrome for which he filed a workers' compensation claim and underwent bilateral carpal tunnel surgeries in 2016. In August 2019, Petitioner saw Dr. Jonathon Brooks at Multicare Specialists for pain in his bilateral hands, wrists, and elbows. Dr. Brooks ordered physical therapy. Petitioner testified it was around this time that he notified the nurse in Respondent's medical dispensary of his condition. Petitioner testified Respondent sent him to be evaluated at Midwest Occupational Medicine on 8/9/19. Dr. Brooks ordered a nerve conduction study and referred Petitioner to Dr. Shawn Kutnik for further evaluation. Dr. Kutnik administered injections in Petitioner's wrists and thumbs that he alleges did not alleviate his symptoms. Petitioner underwent surgery on his right wrist and left thumb, followed by physical therapy, that provided only a 20% improvement in his symptoms. He testified he still has pain in his left wrist, right thumb, and elbows.

Petitioner testified he treated with Dr. Bradley who ordered MRIs of his elbows that revealed a large tendon tear in his right elbow and a tear in his left elbow, with scar tissue and inflammation. Dr. Bradley recommended bilateral elbow surgery which Petitioner desires to undergo to alleviate the pain. Petitioner testified he is on light duty restrictions by Dr. Brooks and Dr. Bradley which Respondent will not accommodate.

Petitioner testified he rides a motorcycle approximately 12 times per year, but only rode approximately 10 times last year because it is too painful to hold the clutch. He enjoys fishing a couple of times per month but the last time he attempted to cast his fishing pole he threw the pole in the lake because his hand grip is weak.

On cross-examination, Petitioner testified this is his sixth workers' compensation claim filed against Respondent. His claim for date of accident 12/22/15 involved repetitive trauma to his bilateral hands. He agreed he had elbow pain in 2015 as well; however, no treatment was received on his elbows and his symptoms were minor at that time. He testified he continued to work ten to twelve-hour days, five days per week, and his elbow symptoms progressively got worse. He agreed he received $31,000 in permanent partial disability benefits to settle his prior claim involving his hands. Petitioner testified he sustained a right shoulder injury in 2011 while prying a flask down a rail. He received injections in his shoulder for that injury.

Petitioner testified he received short-term disability from 8/12/19 through 5/6/20. His wife's health insurance carrier, United Healthcare, has paid some of his medical expenses related to the present claim. Petitioner testified the rollover he operates has an electric motor to lift it, but manpower is required to push the rollover. He testified his job involves heavy labor and is hand intensive. He has suffered two work-related hernias while employed by Respondent.

Dr. Matthew Bradley testified live at arbitration. Dr. Bradley is a board-certified orthopedic surgeon. He testified he initially examined Petitioner on 7/14/20 for complaints of bilateral elbow pain. He stated Petitioner would have pain in his elbows at the end of his work shifts, but after 26 years of repetitive heavy work, the elbow pain did not go away. Examination revealed pain on the outside of both elbows and pain with wrist extension. Dr. Bradley's impression was bilateral lateral epicondylitis caused by repetitive lifting. Dr. Bradley agreed with Section 12 examiner, Dr. Brown's, recommendation to obtain MRI scans of the elbows.

Dr. Bradley testified the right MRI showed epicondylitis and signs of chronic inflammation, chronic scar tissue formation, and signs of a more acute injury with a tear and inflammation. He observed similar findings on the left MRI, including epicondylitis and a significant amount of scar tissue. Dr. Bradley recommended bilateral elbow surgeries. Dr. Bradley testified that the surgeries would be staged and Petitioner would initially require light duty restrictions; however, he estimated Petitioner would be back to unrestricted full duty work in three to four months. He believed Petitioner's prognosis was good.

Dr. Bradley testified that when he evaluated Petitioner he spent considerable time reviewing Petitioner's job duties that Petitioner itemized in a three-page report. Dr. Bradley testified his job duties involved heavy lifting, shoveling sand, moving a hoist, a lot of pushing and pulling, and lifting scrap iron off the ground that weighs up to 100 pounds. Dr. Bradley testified that Petitioner's work duties caused his condition of ill-being in his bilateral elbows and is consistent with the development of this chronic epicondylitis. Dr. Bradley testified that Petitioner did not have any hobbies or perform any activities, including sports or weightlifting, that would have led to the development of lateral epicondylitis. Dr. Bradley further explained that lateral epicondylitis is an activity generated condition that results in tears to the epicondyle

tendon, it does not develop due to comorbidities such as smoking, diabetes, or high blood pressure. However, lateral epicondylitis and the kind of symptoms that Petitioner was experiencing comes from micro traumas from chronic repetitive forceful work. It was his opinion that Petitioner's work activities were a large contributing factor in his development of bilateral lateral epicondylitis. Dr. Bradley recommended surgery for Petitioner's bilateral elbow condition and did not believe that his elbows would improve without surgery.

Dr. Bradley testified that he reviewed Petitioner's medical records, including the records from Dr. Kutnik. He noted that Dr. Kutnik also believed Petitioner had lateral epicondylitis but only treated his bilateral hand conditions including left thumb basal joint arthritis and right wrist arthritis. Dr. Bradley testified that he also treats patients for these conditions. He stated that the kind of arthritis found in Petitioner's right wrist and left thumb are caused genetically and from "wear and tear." He testified that the repetitive impact, lifting, pushing and pulling will accelerate arthritis and often times make asymptomatic arthritis symptomatic. Once the arthritis in his hand and thumb were aggravated, and conservative measures failed to improve his symptoms and surgery was required. Dr. Bradley explained that Petitioner's arthritis likely became symptomatic due to his work. Specifically, he stated that repetitive lifting, pushing, pulling, shoveling, and prying at work aggravated his underlying degenerative condition, necessitating surgery.

On cross-examination, Dr. Bradley admitted Petitioner reported a history of elbow symptoms since 2016. Dr. Bradley did not review Dr. Paletta's medical records, records from Multicare Specialists dating back to 2015, a nerve conduction study performed in December 2015, Dr. Richard Katz's IME report, or MRIs of Petitioner's wrists performed in September 2019. Dr. Bradley testified that his opinion is based on Petitioner's three-page job duty description, Dr. Kutnik's medical records, Dr. Brown's IME report, his physical examination and diagnostic studies. He agreed his opinion may change if Petitioner's job duty description was inaccurate. Dr. Bradley agreed he did not treat, evaluate, or diagnose Petitioner's hands when he initially saw him in July 2020. Dr. Bradley testified he did not believe riding a motorcycle or fishing would increase Petitioner's risk of developing lateral epicondylitis due to a lack of weight, repetitiveness, and stresses.

Respondent called Jason Hoovan to testify at arbitration. Mr. Hoovan has been employed with Respondent for nine years and has held the position of Molding Superintendent for one and a half years where he supervises slinger helpers. Mr. Hoovan was previously a molding lead supervisor for four years and has known Petitioner for approximately six years. Mr. Hoovan testified the job duties of a slinger helper include operating a rollover that is maneuvered with buttons and a knob. The rollover lists a flask filled with sand off of a table and moves it to a cope rail when it is set down on flat skids. Petitioner repeats these duties between 75 to 120 times per shift.

Mr. Hoovan testified that Petitioner's job duty description of a slinger helper is not accurate. Petitioner is not required to bend over a wash bucket dipping cores as that position was not assigned to the department Petitioner worked and the position no longer exists. Petitioner is not required to bend over and chop and hook up chains as that position is assigned to another

department. Petitioner's job duties also do not include pushing and pulling stock flasks and rollers, manually pushing and pulling rollers to hook and unhook rammed flasks, pushing core plates, pushing sand boxes, lifting barrels and risers, lifting core boxes or flasks, lifting pins and clamps, pushing full pin and clamp carts, pulling chains to hook up flasks to cranes, pushing core plate parts, loading cores, CO2 blower, bending over to scrape hopper, bending over a table to ram cores, reaching to grab chains on crane, loading cores and flooring cups on top shelves, etc. Mr. Hoovan testified that a majority of the duties described in Petitioner's Exhibit 11 were assigned to other employees and/or departments and were not performed by Petitioner as a slinger helper. Mr. Hoovan testified that Petitioner's job duties included primarily operating a rollover. His job duties do not require him to operate vibratory tools or drills.

Mr. Hoovan testified that Petitioner is required to lift a riser to place on a cope pattern that weighs 3 to 5 pounds. He may be required to pick up some flasks or steel scrap at the end of a shift during clean up that weighs a maximum of 15 pounds. If the steel scrap was stuck to a flask, it would be the employee that put the flask on or the employee that chained the flask to move it to the line that has the duty of unjamming the steel, not Petitioner. Mr. Hoovan testified Petitioner may be required to push a wheel barrel full of sand during clean up or when the line was down, but it was not part of his regular work duties. He is required to bend to position a skid under the line that weighs 12 pounds. Petitioner may shovel sand approximately 20 to 30 minutes per shift. He has to put a bottle on the pattern that weighs 8 pounds.

Mr. Hoovan testified Petitioner's supervisors report directly to him and they never notified him of a work-related accident involving Petitioner. He did not recall if Petitioner ever personally reported an injury to him. Mr. Hoovan testified Petitioner has some reprimands involving safety and reporting a work-related injury one year after it occurred. He testified Petitioner almost pinned another employee while not properly operating the rollover. Petitioner was also reprimanded for loafing on the job. Mr. Hoovan was not sure which reprimands were dropped or did not result in disciplinary action.

On cross-examination, Mr. Hoovan testified he has never held the position of slinger helper and is not experienced in the position other than filling in for a couple of minutes to relieve an employee. He has never worked as a laborer or in the core room where Petitioner previously worked. He had not personally observed Petitioner's work performance in the last one and a half years since being promoted to Superintendent. Out of the last six years, he has observed Petitioner's work performance every day for approximately two to three years. Mr. Hoovan agreed that the job duties outlined in Petitioner Exhibit 11 are job duties Petitioner may have performed during his 26 years of employment in various positions with Respondent. He agreed Petitioner used a shovel in the performance of his job, but he has never seen him use a sledge hammer and does not know why Petitioner would use one in his position.

MEDICAL HISTORY

Medical records were admitted with regard to Petitioner's prior carpal tunnel syndrome claim. On December 23, 2015, Dr. Paletta evaluated Petitioner and obtained a history of his work activities. Dr. Paletta noted Petitioner worked for Respondent for over twenty years and was

employed as a slinger helper where operated a hoist with a coworker. The hoist is directed and manipulated by hand and requires forceful gripping and manipulation. The hoist runs with an electric motor and there is a low level of vibration. It is operated with the arms at about shoulder level. He reported they do 120 molds per 8 to 10-hour shift, plus scrap, five days per week.

Dr. Paletta believed that Petitioner's bilateral hand complaints were consistent with carpal tunnel syndrome, which was confirmed by electrodiagnostic testing, and bilateral carpal tunnel releases were recommended. Dr. Paletta opined that Petitioner's work activities contributed to his development of bilateral carpal tunnel syndrome and the surgical releases were performed. On October 31, 2016, Dr. Paletta noted Petitioner's improvement and his symptoms of compression neuropathy had resolved, but he still had some pain with forceful grip. Dr. Paletta placed him at maximum medical improvement.

Petitioner filed a workers' compensation claim alleging bilateral carpal tunnel syndrome as a result of his work activities on 12/22/15. Respondent settled this matter with Petitioner for 7.5% loss of use of each hand, plus payment of unpaid TTD benefits, payment of out-of-pocket expenses, and payment of unpaid medical bills.

While treating with Dr. Paletta for carpal tunnel syndrome, Petitioner underwent therapy at Multicare Specialists where he was treated by Dr. Kevin Bell and Dr. Corey Voss. On August 5, 2019, Petitioner was seen by Dr. Bell as well as Dr. Jonathon Brooks, a chiropractor in the same practice, with complaints of bilateral hand and elbow pain. It was noted that the symptoms had been ongoing for about a year and that his pain was significantly worse than the last time he was seen. Dr. Brooks noted that Petitioner was a slinger helper, running and pushing a hoist that picks up molds that weigh thousands of pounds repetitively multiple times a day. Petitioner stated that his hands and elbows gradually worsened over the past several months. Upon physical examination, it was noted Petitioner's elbow and wrist strength were decreased and his bilateral wrist extension and flexion were decreased. He had positive Phalen's and Tinel's bilaterally. Dr. Brooks initially believed that Petitioner may have bilateral carpal tunnel syndrome and ulnar neuropathy. Physical therapy was initiated that day and Petitioner was given restrictions to avoid activities that aggravated his symptoms. Petitioner returned to Dr. Brooks without any improvement in his symptoms. Dr. Brooks recommended a nerve conduction study, continued physical therapy, and restricted him from any repetitive activities.

Petitioner notified his employer of his condition on August 8, 2018, when he saw the company nurse at the dispensary. The company nurse referred Petitioner to Midwest Occupational Medicine. On August 12, 2019, Dr. Brooks took Petitioner off work.

On August 20, 2019, Petitioner underwent a nerve conduction study at Neurological & Electrodiagnostic Institute of St. Louis with Dr. Dan Phillips. Dr. Phillips noted that the electrodiagnostic findings for carpal and cubital tunnel syndrome were negative. However, Dr. Phillips noted that Petitioner described stiffness and locking of his fingers in the morning, tenderness over the first CMC and MCP joints of the thumbs worse on the left and tenderness over the epicondyles. Dr. Phillips recommended anti-inflammatories.

Petitioner returned to Dr. Brooks following the nerve conduction study and opined Petitioner's symptoms and complaints were likely arthritic changes rather than nerve compression such as recurrent carpal tunnel syndrome. Upon physical examination, Dr. Brooks noted tenderness over the CMC and MCP joints as well as epicondyles. Dr. Brooks recommended NSAIDs and continued therapy and restrictions. Over the course of the next month, Petitioner reported improvement with therapy, but his symptoms were still noticeable and included pain and numbness in both hands and elbows. Dr. Brooks recommended MRIs of the bilateral wrists and referred Petitioner to Dr. Shawn Kutnik for an orthopedic evaluation.

On September 11, 2019, Petitioner underwent a left wrist MRI at Gateway Regional Medical Center. According to the radiology report, the MRI revealed left wrist osteoarthritis, greatest in the first CMC joint, and a chronic partial tear of the medial aspect of the triangular fibrocartilage complex. A right wrist MRI was also obtained and evidenced a degenerative appearing TFCC tear and effusion within the distal radial ulnar joint space.

On September 25, 2019, Petitioner was evaluated by board certified orthopedic surgeon, Dr. Shawn Kutnik. Dr. Kutnik noted that Petitioner presented with a significant number of symptoms concerning both arms, including constant aching pain in both elbows and burning pain radiating down the forearms. He also had pain to both thumbs, left worse than right, and pain in the right wrist. It was noted that his symptoms were aggravated by increased use. Dr. Kutnik noted that Petitioner had undergone therapy, activity modification, anti-inflammatories, and home exercises; however, his symptoms persisted. Dr. Kutnik reviewed the nerve conduction study and performed a physical examination, noting tenderness over the lateral epicondyles to both sides, pain over the right radiocarpal joint and ulnar carpal side, mild pain to the CMC joint, and positive grind test. Dr. Kutnik diagnosed Petitioner with bilateral epicondylitis, wrist arthritis, and CMC arthritis. Dr. Kutnik performed a cortisone injection on the right wrist and left thumb basal joint. He recommended Petitioner continue physical therapy and return in a month.

On October 23, 2019, Petitioner returned to Dr. Kutnik and reported the cortisone injections helped for a couple of weeks and his symptoms returned. Petitioner's pain was worse in in his right wrist. Dr. Kutnik recommended a right wrist arthroscopy and debridement to alleviate his symptoms. Petitioner underwent surgery on November 14, 2019 consisting of a right wrist arthroscopy with extensive debridement. Petitioner returned to Dr. Kutnik on November 27, 2019 and reported improvement in his right wrist; however, he continued to have pain to the left thumb. Dr. Kutnik recommended surgery on the left thumb. On January 16, 2020, Dr. Kutnik performed a left thumb basal joint arthroplasty and left hand flexor carpal radiallas transfer to first metacarpal and suspensionplasty.

Following the left thumb surgery, Petitioner followed up with Dr. Kutnik who noted Petitioner's pain was generally controlled, gave him a thumb spica splint, and ordered therapy. Petitioner returned to Dr. Kutnik on April 8, 2020 and reported ongoing, but improved, pain in his thumb. Dr. Kutnik ordered additional physical therapy

On May 6, 2020, Petitioner reported to Dr. Kutnik he was not back to using his hands fully. He described having issues opening jars and was still having ongoing pain at the elbow. Dr. Kutnik recommended lateral epicondylar debridement.

On May 29, 2020, Petitioner was evaluated by Dr. David Brown at Respondent's request pursuant to Section 12 of the Act. Dr. Brown noted that Petitioner had worked for Respondent for 26 years and was currently employed as a slinger helper. They discussed his job activities and Petitioner consistently reported that as a slinger helper, his job entails pushing a hoist over to a pattern then pulling it away approximately 120 times a day. His job also requires him to shovel sand and use a pry bar to clear jams. Dr. Brown performed a physical examination and reviewed Petitioner's MRIs. He agreed with Dr. Kutnik's diagnosis of primary osteoarthritis of the right and left wrists as well as primary osteoarthritis at the base of the right and left thumbs at the first CMC joint. Dr. Brown noted Petitioner had undergone surgery with Dr. Kutnik, but he did not believe that any further treatment would resolve his continued symptoms. Dr. Brown also stated Petitioner may benefit from additional conservative treatment consisting of steroid injections, NSAIDs, and additional therapy. With respect to Petitioner's bilateral elbow complaints, Dr. Brown opined that Petitioner's symptoms were consistent with bilateral epicondylitis but believed MRIs were necessary to confirm the diagnosis and establish severity.

Dr. Brown reviewed a work analysis prepared by Respondent and medical records, and opined that Petitioner's work activities did not cause or permanently aggravate the arthritis in his wrist or the base of his thumb. Respondent's work analysis reviewed by Dr. Brown was authored on January 18, 2016 and Dr. Brown concluded the activities do show repetitive motion, but not the motion that is indicative of carpal tunnel syndrome. Petitioner was not evaluated by Dr. Brown for carpal tunnel syndrome, but rather wrist and thumb arthritis and lateral epicondylitis, which he concluded were not caused by his work activities.

On July 14, 2020, Petitioner was evaluated by board certified orthopedic surgeon Dr. Matthew Bradley for bilateral elbow pain. Dr. Bradley noted Petitioner had ongoing elbow, hand, and wrist pain dating back to 2016. Prior to his evaluation, Petitioner had previously been treated for carpal tunnel syndrome, right wrist arthritis, and left thumb arthritis. However, his elbow symptoms persisted and became increasingly painful. Upon physical examination, Dr. Bradley noted Petitioner had pain to palpation over the lateral epicondyle and the insertion of the extensor wad on both elbows. He also had pain to resisted wrist extension at both lateral epicondyles as well as dorsal wrist capsules.

Dr. Bradley discussed Petitioner's work activities with him, and he consistently reported that over the past 15 years he pushed and pulled a heavy hoist across the room and that for the past 26 plus years Petitioner pushed wheelbarrows and sand and shoveled sand repetitively. Dr. Bradley reviewed a three-page job description provided by Petitioner and noted his work activities over the past 26 years. Dr. Bradley believed Petitioner was suffering from chronic lateral epicondylitis as a direct sequela of his chronic repetitive work duties over the past 26 years. Dr. Bradley also recommended MRIs of Petitioner's bilateral elbows and gave him work restrictions of no repetitive lifting greater than 5 pounds and to avoid activities using his elbows.

On July 17, 2020, Petitioner underwent an MRI of the left elbow. The radiologist noted mild lateral epicondylitis that could be acute or chronic and mild insertional triceps tendinopathy. An MRI of the right elbow was also performed that revealed lateral epicondylitis, probably with an acute and chronic component without full thickness tear, and mild degenerative changes in the elbow joint.

Petitioner returned to Dr. Bradley on July 21, 2020 who appreciated acute and chronic right epicondylitis with a partial tear to the deep fibers of the extensor tendon. He reviewed the left elbow MRI and noted acute and chronic lateral epicondylitis. Petitioner's physical examination was unchanged. Dr. Bradley recommended surgery on the right elbow, in the form of a right lateral epicondylectomy and extensor tendon repair. Petitioner's work restrictions remained the same.

CONCLUSIONS OF LAW

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

In a repetitive trauma case, issues of accident and causation are intertwined. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture,* 99 I.I.C. 0961. In order to better define "repetitive trauma" the Commission has stated: "The term "repetitive trauma" should not be measured by the frequency and duration of a single work activity, but by the totality of work activity that requires a specific movement that is associated with the development of a condition. Thus, the variance in job duties is not as important as the specific force, flexion and vibratory movements requisite in Petitioner's job." *Craig Briley v. Pinckneyville Corr. Ctr.*, 13 I.W.C.C. 0519 (2013).

"[I]n no way can quantitative proof be held as the *sine qua non* of a repetitive trauma case." *Christopher Parker v. IDOT*, 15 I.W.C.C. 0302 (2015). The Appellate Court's decision in *Edward Hines Precision Components v. Indus. Comm'n* further highlights that there is no standard threshold which a claimant must meet in order for his or her job to classify as sufficiently "repetitive" to establish causal connection. *Edward Hines*, 365 Ill.App.3d 186, 825 N.E.2d 773, 292 Ill.Dec. 185 (Ill.App.2d Dist. 2005). In fact, the Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." *Id.* at N.E.2d 780. Similarly, the Commission recently noted in *Dorhesca Randell v. St. Alexius Medical Center*, 13 I.W.C.C. 0135 (2013), a repetitive trauma claim, a claimant must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or primary cause, and there is no requirement that a claimant must spend a certain amount of time each day on a specific task before a finding of repetitive trauma can be made. *Randell* citing *All Steel, Inc. v. Indus. Comm'n*, 582 N.E.2d 240 (1991) and *Edward Hines supra.*

The Appellate Court in *Darling v. Indus. Comm'n* even stipulated that quantitative evidence of the exact nature of repetitive work duties is not required to establish repetitive trauma injury in reversing a denial of benefits, stating that demanding such evidence was improper. *Darling v.*

Industrial Comm'n, 530 N.E.2d 1135, 1142 (1st Dist. 1988). The Appellate Court found that requiring specific quantitative evidence of amount, time, duration, exposure or "dosage" (which in Petitioner's case would be force) would expand the requirements for proving causal connection by demanding more specific proof requirements, and the Appellate Court refused to do so. *Id.* at 1143. The Court further noted, "To demand proof of 'the effort required' or the 'exertion needed' . . . would be meaningless" in a case where such evidence is neither dispositive nor the basis of the claim of repetitive trauma." *Id.* at 1142. Additionally, the Court noted that such information "***may***" carry great weight "only where the work duty complained of is a common movement made by the general public." *Id.* at 1142. The evidence shows that Petitioner's job duties involve the performance of tasks distinctly related to his employment for Respondent, many of which are not activities that are even performed by the general public, let alone ones to which the public would be equally exposed.

In *City of Springfield v. Illinois Workers' Comp. Comm'n*, the Appellate Court issued a favorable decision in a repetitive case to a claimant in which the claimant's work was "varied" but also "repetitive" or "intensive" in that he used his hands, albeit for different task, for at least five (5) hours out of an eight (8) hour work day. *City of Springfield v. Illinois Workers' Comp. Comm'n*, 901 N.E.2d 1066, (Ill.App. 4th Dist., 2009). As was noted by the Commission and reiterated in the Appellate Court decision in *City of Springfield v. Illinois Workers' Compensation Comm'n*, "while [claimant's] duties may not have been 'repetitive' in a sense that the same thing was done over and over again as on an assembly line, the Commission finds that his duties required an intensive use of his hands and arms and his injuries were certainly cumulative." *Id.*

The Commission has also recognized that a claimant's employment may not be the only factor in his or her development of a condition of ill-being. The Commission awarded benefits in a case where the claimant was involved in martial arts activity outside of his employment (*see Samuel Burns v. Pinckneyville Corr. Ctr.*, 14 I.W.C.C. 0482 (2014)), and in another case where the claimant was involved in weight lifting outside of his employment. *See Kent Brookman v. State of Illinois/Menard Corr. Ctr.*, 15 I.W.C.C. 0707 (2015). In the repetitive trauma case of *Fierke*, the Appellate Court specifically held that non-employment related factors that contribute to a compensable injury do not break the causal connection between the employment and a claimant's condition of ill-being. *Id.* at N.E.2d at 849. The Court stated, "The fact that other incidents, whether work related or not, may have aggravated a claimant's condition is irrelevant." *Id.*

Under Illinois law an 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 (Ill. 2003) [Emphasis added]. Even when other non-occupational factors contribute to the condition of ill-being, "[*A*] 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 (3rd Dist. 2000). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Indus. Comm'n*, 834 N.E.2d 583 (2d Dist. 2005). Employers are to take their employees as they find them. *A.C.& S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist. 1999), citing *General Electric Co. v. Industrial Comm'n*, 433 N.E.2d 671, 672 (1982). The Supreme Court in *Durand v. Indus. Comm'n* noted that the purpose of the Illinois Workers' Compensation Act is best served by allowing

compensation where an injury is gradual but linked to the employee's work. *Durand v. Indus. Comm'n*, 862 N.E.2d 918, 925 (Ill. 2006).

Based on the aforementioned law, the Arbitrator is not persuaded by Dr. Brown's opinion that Petitioner did not have work-related lateral epicondylitis or that his work activities did not aggravate the arthritis in his hands and thumb. The Arbitrator finds the opinions of Dr. Bradley more persuasive than those of Dr. Brown. Dr. Bradley testified that he took into account Petitioner's 26 year work history described in the Detailed Job Description prepared by Petitioner, as well as the history he obtained directly from Petitioner and from review of his medical records when making his causation opinion. Based upon the reports alone, Dr. Bradley's July 14, 2020 office note contains greater detail of Petitioner's current and past work activities than Dr. Brown's IME report. Moreover, Dr. Brown's opinions were largely based on prior medical records concerning carpal tunnel syndrome and a work analysis that was obtained in 2016 concerning the potential relationship between Petitioner's work and his bilateral carpal tunnel syndrome. Notwithstanding the fact that much of the information Dr. Brown reviewed dealt with Petitioner's prior carpal tunnel syndrome, both Dr. Paletta and the work analysis noted that Petitioner's work was repetitive and hand intensive.

With respect to the medical conditions germane to this claim, the Arbitrator notes that Petitioner has not been diagnosed with carpal tunnel syndrome or any other compression neuropathy. Nevertheless, the Arbitrator notes that Dr. Paletta opined Petitioner's prior carpal tunnel syndrome was work-related and Respondent agreed to pay, at least to some extent, Petitioner's medical bills for that condition, as well as TTD and PPD benefits in settlement of that claim. In this vein, Dr. Bradley believed that the work activities described by Petitioner including shoveling, pushing and pulling a hoist, prying, and picking up scrap metal were sufficient to contribute to his lateral epicondylitis and were sufficient to at least aggravate his underlying degenerative wrist and thumb arthritis.

According to the testimony of Petitioner, Dr. Bradley, and Mr. Hooven, as well as the medical records, it is clear that Petitioner's current job as a slinger helper requires a frequent and sustained shoveling, lifting, prying, and pushing and pulling. The Arbitrator notes that Petitioner has performed many of the same work activities or movements, notably shoveling, lifting, pushing, pulling, and prying for 26 years and credibly testified to a history of constant hand and arm intensive heavy repetitive work activities.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has met his burden of establishing that he sustained accidental injuries which arose out of and in the course of his employment with Respondent, and that his current conditions of ill-being with respect his left and right wrists, hands, left thumb, and elbows are causally related to the employment and work injury of August 5, 2019.

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

The Arbitrator further finds that Petitioner provided timely notice to Respondent of the accident. Petitioner testified, and the medical records indicate, that he began treating for his current conditions of ill-being on August 5, 2019 when he was seen by Dr. Bell and Dr. Brooks. According to Respondent's own exhibit, Petitioner had not been seen at Multicare Specialists for over a year, and at that time in 2018, he did not present with complaints of elbow and hand pain. While Petitioner had a history of elbow and hand pain, his condition did not reach a point requiring treatment or restrictions until he began treating with Dr. Bell and Dr. Brooks on August 5, 2019. After initiating treatment, Petitioner provided notice to his employer when he was seen by the company nurse at the dispensary on August 8, 2019. As such, the Arbitrator finds that Petitioner provided timely notice of the accident to Respondent.

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

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

Petitioner has established by a preponderance of the evidence that his condition is causally related to his employment. Upon establishing such connection, employers are to provide all care reasonably required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001).

Petitioner attempted to resolve his hand and thumb condition conservatively with therapy, activity modification, cortisone injections, and over-the-counter NSAIDs. However, despite this treatment, his condition progressively worsened and required surgery. With respect to his bilateral hand arthritis and thumb arthritis, Dr. Kutnik, Dr. Brown, and Dr. Bradley all agreed on the diagnosis and believed that surgery was the proper treatment plan. Moreover, all three surgeons believed Petitioner has lateral epicondylitis and only Dr. Bradley saw Petitioner following the MRI that both he and Dr. Brown recommended.

With respect to Petitioner's bilateral hand condition, Respondent shall therefore pay for the treatment provided to date, including the surgeries performed by Dr. Kutnik. With respect to Petitioner's bilateral elbow condition, Respondent shall therefore pay for and authorize treatment provided to date including, but not limited to, the surgery recommended by Dr. Bradley.

Based upon the foregoing finding on the issue of causation, Petitioner is entitled to medical care. Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, contained in Petitioner's Group Exhibit 1, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall reimburse Petitioner for out-of-pocket expenses contained in Petitioner's Group Exhibit 1. Petitioner testified he is an insured under this wife's health insurance plan who paid a portion of his medical expenses, for which Respondent is not entitled to a credit under Section 8(j) of the Act.

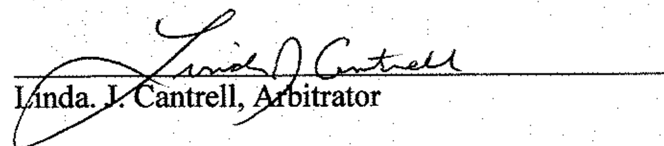
Further, Respondent shall authorize and pay for the treatment recommended by Dr. Bradley, including, but not limited to, a left and right lateral epicondylectomy and extensor tendon repair.

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

Petitioner has continuously been placed off work or on light duty restrictions which Respondent did not accommodate since August 12, 2019. He is currently off work per the restrictions of Dr. Bradley.

The Arbitrator finds that Petitioner is entitled to temporary total disability benefits of $826.19/week from August 12, 2019 through the date of arbitration, August 14, 2020, representing 52-5/7 weeks. Respondent shall be given a credit of $6,875.86 for nonoccupational disability benefits previously paid.

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



Linda. J. Cantrell, Arbitrator

10/21/20
DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC033470
Case Name	CUSUMANO, CHARLES ANTHONY v. STATE OF IL - DOT
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0515
Number of Pages of Decision	21
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Martin Haxel
Respondent Attorney	Chelsea Grubb

DATE FILED: 10/12/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHARLES ANTHONY CUSUMANO,
Petitioner,

vs. NO: 17WC 033470

STATE OF ILLINOIS/DEPARTMENT OF TRANSPORTATION,
Respondent.

DECISION AND OPINION ON REVIEW

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

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

October 12, 2021

/s/Maria E Portela

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/s/Christopher A Harris

/s/Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC033470
Case Name	CUSUMANO, CHARLES ANTHONY v. STATE OF IL - DOT
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	Dennis O'Brien, Arbitrator

Petitioner Attorney	Martin Haxel
Respondent Attorney	Chelsea Grubb, AGWorkersComp Chicago, AGWorkersComp Springfield, Jill Otte

DATE FILED: 5/10/2021

INTEREST RATE FOR THE WEEK OF MAY 4, 2021 0.03%

/s/*Dennis OBrien, Arbitrator*

Signature

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

May 10, 2021

/s/ *Brendon O'Rourke*

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

CHARLES ANTHONY CUSUMANO
Employee/Petitioner

Case # **17** WC **33470**

v.

Consolidated cases: ______

STATE OF ILLINOIS/DEPARTMENT OF TRANSPORTATION
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Springfield**, on **March 29, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **October 25, 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 $**63,544.00**; the average weekly wage was $**1,222.00**.

On the date of accident, Petitioner was **42** 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 $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

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

ORDER

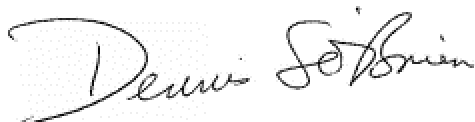
Petitioner's current conditions of ill-being, including left carpal tunnel, left cubital tunnel, left lateral epicondylitis, left medial epicondylitis, left posterior interosseous nerve injury, and left distal biceps tendon tear, are causally related to the accident of October 25, 2016.

Respondent shall pay Petitioner temporary total disability benefits of $814.67/week for 53 5/7 weeks, commencing November 30, 2017 through December 12, 2018, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $733.20/week for 107.85 weeks, because the injuries sustained caused the 12 1/2% loss of the left hand, as provided in Section 8(e) of the Act, and the 32 1/2% loss of the left arm, 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.



MAY 10, 2021

Signature of Arbitrator

ICArbDec p. 2

FINDINGS OF FACT:

TESTIMONY AT ARBITRATION

Petitioner Charles Anthony Cusumano

Petitioner testified that he was employed by the Illinois Department of Transportation as a Technical Manager II, Division of Property Control. He started that job in April of 2005. His job involved his keeping track of modular furniture, planning the layouts of the furniture, some assembly work, and moving the furniture. They would move furniture around, put it where it needed to be and inventoried it. He did this work on a daily basis. He said that on October 26, 2016 he was helping the building and grounds crew as they needed assistance installing a 62-inch panel to a 36 or 48-inch panel. He said he used a manual screwdriver to do this. He was attempting to remove a screw and he initially tried to do this using a drill, but it would not come out. He had the other employees hold the panel while he attempted to put more torque on the screwdriver than the power tool was capable of applying. It was while doing this that his injury occurred, his left arm swelled immediately, and he sat the screwdriver down He said his supervisor, Jim Gott, and a co-worker, James Logue, were present when this occurred.

After this occurred he stayed in the office for the remainder of the work day, doing nothing. Petitioner said he was left handed. He said he made a phone call and a week later the paperwork to report the injury arrived.

Petitioner said he had not previously had prior injuries to those locations in his left arm, elbow or hand. He said he treated with Dr. Wottowa for a period of time following this event and was released from that doctor's care in the spring of 2019. He said that since being released by Dr. Wottowa he had not suffered additional injuries to his left arm, elbow or hand other than an incident where his hand was smashed in a screen door causing a trigger finger. His only treatment for that injury was a visit to Prompt Care, with no follow up care.

Following his October 26, 2016 injury he saw Dr. Kellenberger, his primary care physician. He did not know the date as he had seen a lot of doctors and physical therapists. He said to identify the correct dates the medical records should be used. He saw Dr. Kellenberger on probably 2 occasions. He also saw Dr. Sharma and Angela Royer at the Springfield Clinic walk-in orthopedic clinic. They sent him to physical therapy and ordered an MRI. The physical therapy occurred from December of 2016 through February of 2017. Dr. Sharma then referred him to Dr. Wottowa, who treated him for a couple of years, treating him with an injection, which

did not work, with EMG testing by Dr. Gelber on multiple occasions, and then with multiple surgeries on his left arm and wrist.

Petitioner's first surgery was on November 29, 2017. Prior to that date Petitioner said he had been working with lifting restrictions, but after the surgery he was kept off work entirely for approximately 13 months. Petitioner said he was not paid workers' compensation benefits during that period of time, but did receive another type of payment from the State Retirement System.

The first surgery he had was for a carpal tunnel decompression, cubital tunnel decompression and epicondylitis in his elbow. He said those surgeries helped some of his symptoms, but those procedures did not completely alleviate all of his symptoms, as he continued to have pain in the left forearm which came from the biceps. Dr. Wottowa performed a second surgery on March 22, 2018 for posterior interosseous nerve entrapment. That surgery helped some of his symptoms, though he continued to have left arm pain from the bicep.

Petitioner said Dr. Wottowa referred him to Dr. Greatting, who ordered a repeat MRI of his left arm and another EMG test. Dr. Greatting then recommended bicep surgery. He said he returned to see Dr. Wottowa, and that physician performed surgery for the bicep tendon problem on September 18, 2018.

Petitioner did not believe he ever was prescribed physical therapy after any of the three surgeries. He had previously gotten a list of exercises to perform from a physical therapist, and a doctor approved his doing those.

Petitioner said the bicep tendon surgery helped some, but not all, of his left arm symptoms. He continued to be treated by Dr. Wottowa, and he was eventually released to return to work on Christmas Eve of 2018 with a 20 pound lifting restriction.

Petitioner said he was seen by Dr. Greatting again in April of 2019 and then saw Dr. Wottowa for a final time on April 17, 2019, at which point he was released from care with a permanent 20 pound restriction.

Upon returning to work with permanent restrictions Petitioner said he job duties were changed, he was allowed to return to his old job, but he did not have to lift the same things he had lifted before, he would go get a co-worker for help, which they were glad to do.

Petitioner noted that he had been involved in a motor vehicle accident on April 1, 2013, and that his neck was injured in that accident. He underwent neck surgery by Dr. Russell for that injury on May 22, 2015. He said that injury helped with his neck problems and that he last saw Dr. Russell about a year after his surgery, at which point his neck was much better. He said that he did have occasional problems with his hands or arm, with occasional numbness in his hand that was not constant. Petitioner said that he did not return to see Dr. Russell after the one year follow up.

Petitioner said his work injury did not injure his right arm or hand in any way but it caused the occasional numbness and tingling in his left arm and hand to get much worse and become constant.

Petitioner noted that the only doctor who had treated him for carpal tunnel and cubital tunnel syndromes was Dr. Wottowa.

Petitioner testified that prior to this accident he worked out at a gym and did weightlifting there, but he only did so after the accident for physical therapy. He did the exercises he got from the doctors a few times at the gym. This did not involve lifting heavy weights.

As of the day of arbitration Petitioner said he left hand and arm condition caused him to struggle to do daily things like raising a fork, or writing. He said writing caused his hand to wear out, that after writing for a while all of a sudden the writing quality would decrease. Using a fork to twirl pasta on a spoon was difficult, as he did not have the coordination to do that. He said he had not regained all of his strength or his grip and his left hand would occasionally ache, and he was told this is about as good as it was going to get, so he was living with it.

Petitioner said his condition did not really bother him at work as he was able to ask for assistance.

On cross-examination Petitioner said he was not seeing a doctor for his left arm condition as of the date of arbitration. He said he was not wearing any type of brace or protective device. He said he does have a hobby of going to car shows and tinkering with minor mechanical work on cars. He has a gym membership and does cardio workouts to maintain flexibility so he can still be active and play with the kids. He said he would do cardio and stretching at the gym as well as some minor free weights.

He said he saw a chiropractor and had been doing so since before the date of this accident. He said he would have to rely on the medical records to determine when he first complained of left arm problems or weakness of his left hand, including whether he had noticed any weakness in his left hand prior to October of 2016.

Petitioner explained that when he had testified to having had an injury to his left arm, but not at that location, he meant that the work injury was in a certain part of his arm and the door injury incident which injured his hand was not in the same location.

When asked what symptoms he had before his first surgery Petitioner said he had swelling, soreness, and his fingers and hand did not work correctly. He said that after that first surgery the swelling in his forearm had been fixed, the movement was better, the ring and little fingers had been helped, and the constant tingling was better.

Petitioner said the exercises he did at home and at the gym were light curls, which he would stop when he felt tension on the biceps, as well as very light resistance. He said those exercises helped his symptoms.

Petitioner said that as of the date of arbitration he could not really hold a fork or a dart, and he would occasionally just drop something he was holding. He said he used his right hand more to compensate for not being able to use the left arm and he thought there was some atrophy in his left arm.

Petitioner felt he was able to perform his job satisfactorily since returning to work, he had received performance evaluations since his return, and they had all been positive, with no complaints from supervisors about his job performance. He said the help he got from co-workers would be in things such as moving heavy panels around that exceeded his weight restrictions.

Petitioner said that as of the date of arbitration he was not under the care of a physician.

MEDICAL EVIDENCE

Medical records for treatment preceding this accident were introduced. On October 12, 2001 Petitioner told Dr. Kozak that his left hand was numb and he had had that problem for years. The doctor noted that Petitioner had a tendency for chronic neck pain and that he would wake up with a little tingling in his left fingers but that it was gone during the day. He stated that on the date he saw Petitioner the symptoms had persisted and that they were in the left 3rd, 4th, and 5th fingers, going up into the forearm and the left triceps. RX 6

Petitioner was seen for a neurosurgical consultation by Dr.Claude Fortin on December 4, 2012. He gave a history of a motor vehicle accident in 1992 and neck pain with radiation into the left arm following that accident. RX 6

Dr. Kozak saw Petitioner again on April 4, 2013 after he had been in another motor vehicle accident in which he struck the left side of his head. When next seen by Dr. Kozak on April 18, 2016 he was making complaints of frequent headaches noting the headaches were much worse since the auto accident. RX 6

Petitioner was seen for an epidural steroid injection by Dr. Narla on November 4,2013, but that injection was cancelled as Petitioner was too anxious to have the injection. RX 6

Petitioner was seen by Dr. Brian Russell on December 13, 2013, again for neck complaints. Dr. Russell noted left proximal arm pain and felt there was disc disease at C5/6. RX 6

When seen by Dr. Russell on December 23, 2014 it was noted that CT scan images showed spondylolitic changes at C5/6, and an MRI was ordered. That MRI was conducted on January 9, 2015,

and Dr.Russell on January 28, 2015 noted that the MRI showed worsening changes at C5/6 and stated he was of the opinion that Petitioner had foraminal stenosis at C5/6. RX 6

Dr. Russell performed a cervical arthroplasty at C5/6 on May 21, 2015 . Post-operatively he noted on June 24, 2015 that Petitioner still occasionally had left arm numbness and tingling. He noted that Petitioner's right hand was constantly numb. RX 6

Dr. Russell on October 14, 2015 noted that Petitioner's numbness and tingling was much improved and that he had great strength. He stated Petitioner had no restrictions as of that date. RX 6

On May 18, 2016 Dr. Russell saw Petitioner and took a history of numbness and tingling in his hands especially at night. The doctor stated that this seemed more suggestive of carpal tunnel disease. RX 6

Petitioner was seen by Dr. Cecile Becker on June 20, 2016 due to occipital nerve pain which would come and go. He advised her at that time that he had numbness and tingling in both of his arms. Her physical examination on that date showed strength to be full bilaterally and sensory examination showed no problems with pinprick and soft touch bilaterally. She felt he had occipital neuralgia of the left side. RX 6

Petitioner was seen by his Dr. Kellenberger, on August 15, 2016 with neck pain in the lower neck to the right which had started one or two days earlier. He noted he had fallen down some stairs three weeks earlier and then aggravated it again while under a car the day before being seen. Petitioner gave a history of occasional numbness, tingling, or weakness in the extremities with no change due to the recent injury. Dr. Kellenberger did not record any objective abnormalities during his physical examination. RX 6

The first medical treatment following this October 25, 2016 accident was on October 31, 2016 when Petitioner was seen by Dr. Kellenberger. He gave a consistent history of twisting a screwdriver and feeling a pop in his left elbow with immediate pain. Dr. Kellenberger's physical examination revealed pain in the lateral left shoulder and the doctor's assessment was left elbow pain, possible epicondylitis. He immediately referred Petitioner to the Springfield Clinic orthopedic walk-in clinic. Patient was seen that same day by Physician's Assistant (PA) Angelia Royer and she, too, suspected lateral epicondylitis. PX 2

On November 14, 2016 Petitioner was seen by Dr. Sharma who found limited range of motion of the elbow with pain, tenderness to palpation, and weakness. He noted tenderness along the lateral epicondyle. His assessment was possible distal bicep tendon rupture and he ordered an MRI. The MRI of the left elbow was interpreted as showing a partial thickness tear of the common extensor tendon and a

mild sprain of the ulnar collateral ligament. Doctor Sharma saw Petitioner again on December 14, 2016, and while he found effusion present around the elbow, he did not note any tenderness. His assessment at that time became left elbow ulnar collateral ligament sprain and lateral epicondylitis. The health status form for that date states Petitioner was not to do any pushing or pulling greater than 20 lbs. PX 2

Petitioner received physical therapy at Springfield Clinic from December 20, 2016 through February 4, 2017. This included dry needling. Following the completion of that physical therapy it was noted that he continued to complain of left elbow pain with all activities involving the left elbow and that he had not had any significant change from the physical therapy. PX 2

Petitioner was seen by PA Royer on January 18, 2017 and advised her that lifting, pushing and pulling were bothersome. When seen by her on March 1, 2017 he described his left elbow pan as being 4/10 and said his elbow was weak, with no endurance. He also felt his grip was weaker. Her physical examination on that date revealed some soft tissue swelling along the medial epicondyle, reduced grip strength on the left and reduced strength with forearm pronation. She felt he had left lateral epicondylitis with a partial tear of the common extensor tendon and a collateral ligament strain of the left elbow. Since he had not progressed, she was going to refer him to an upper extremity specialist. PX 2

Petitioner saw Dr. Wottowa on April 14, 2017. Dr. Wottowa found Petitioner to have swelling in the area of the left lateral epicondyle with tenderness over the ulnar nerve at the medial epicondyle. He found elbow flexion and Tinel's testing over the ulnar nerve caused numbness and tingling in the 4th and 5th fingers of the left hand, and he said Petitioner had some weakness to adduction of the fifth finger. A positive Faber test on the left also indicated weakness of the ulnar nerve. Dr. Wottowa felt Petitioner had medial and lateral epicondylitis with some ulnar nerve findings. PX 4 p.3

Petitioner received electrodiagnostic testing from Dr. David Gelber on May 5, 2017. That testing was interpreted to show mild left carpal tunnel syndrome and borderline left cubital tunnel syndrome. It did not reveal posterior interosseous nerve abnormalities. PX 4 p.6

When next seen by Dr. Wottowa on June 28, 2017, that physician noted that Petitioner was not tender over the lateral epicondyle on that date, but continued to be tender at the posterior interosseous nerve, despite the negative electrodiagnostic test. He also continued to be tender over the median epicondyle. Dr. Wottowa was of the impression that Petitioner had medial epicondylitis, ulnar nerve irritation and some posterior interosseous nerve irritation, a problem which would not be amenable to an injection. He did inject the medial epicondyle on that date. He had Petitioner on a 10 lb. weight restriction. PX 4 p.13

On August 21, 2017 Respondent had Petitioner examined by Dr. David Anderson pursuant to Section 12. During his physical examination Dr. Anderson found diffuse circumferential tenderness over approximately the distal 25% of the humerus to the distal ¾ of the forearm, with the most tenderness in the antecubital fossa and the biceps muscle. He found Petitioner to have full range of motion of the left elbow and decreased grip strength on the left. He also noted decreased sensation to light touch over the small and ring fingers, the dorsal radial forearm and the dorsal forearm. He found the left-handed Petitioner to have 2 cm less circumference in the left biceps compared to the right and 0.5 cm less circumference in the left forearm compared to the right. His interpretation of the December 8, 2016 left elbow MRI was that it showed some increased signal in the common extensor tendon in the area of the lateral epicondyle with possible partial tearing as well as increased signal near the humeral insertion of the ulnar collateral ligament with no evidence of a tear. His diagnosis was left elbow and forearm pain with numbness and tingling. RX 5

Dr. Anderson said he could not attribute most of Petitioner's objective findings to the reported accident, but he said "it is reasonable to believe that the reported 10/24/2016 work injury caused lateral epicondylitis and a biceps strain." He noted that as of the time of his examination Petitioner was having mild lateral elbow symptoms, but that most of his symptoms were diffuse and not specific. He felt the medical treatment Petitioner had received was reasonable and necessary and that the 10 lb. weight limit given Petitioner was reasonable based upon the ongoing diffuse left upper extremity symptoms. RX 5 p.7,8

Petitioner saw Dr. Wottowa on August 30, 2017 and was found to have decreased pinch strength and positive Phalen's and Tinel's tests over the median and ulnar nerves of the left arm. It was noted that the medial epicondyle injection had provided Petitioner with a small amount of relief. He thought Petitioner had tenderness over the lateral epicondylar area, tenderness over the posterior interosseous nerve, an irritated medial epicondylitis, some cubital tunnel, and carpal tunnel. Petitioner advised him he could live with the problems on the radial side, but the problems on the ulnar side and into his hand were not something he wanted to live with. Dr.Wottowa said that while he did not know if doing an operation would solve all of Petitioner's problems, he thought it reasonable and prudent to consider doing an ulnar nerve decompression and a median nerve decompression at the same time. He made it clear he did not think surgery was a great option. At their next visit on November 8, 2017 Petitioner advised him he wanted to have the surgery. The left submuscular transportation of the ulnar nerve and left carpal tunnel release were performed on November 30, 2017. PX 4 p.16,17,19,20,25,26

Dr. Wottowa saw Petitioner post-operatively on December 13, 2017. Petitioner advised him that many of his pre-operative symptoms had gotten better, he had much less numbness and tingling in the 4th and 5th fingers and the achy pain in his forearm was much better. He was advised to lift nothing weighing more than one pound. He was next seen on January 10, 2018 and while described as doing quite well, it was noted that one thing which had not gotten better was the pain over the dorsal radial aspect of his left forearm over the posterior interroseus nerve. That problem was surgically addressed on March 22, 2018. PX 4 p.34,39

After the posterior interosseous nerve surgery Petitioner was seen by PA Nathaniel Gregoire and told him that his symptoms were unchanged, he still had pain over the dorsal portion of his forearm. On April 18, 2018 he saw Dr. Wottowa and advised him, too, that there was no change in his pain. Dr. Wottowa noted that it might be eight weeks before they would be able to get Petitioner back to work. PX 4 p.43,45

On May 16, 2018 and June 27, 2018 Dr. Wottowa noted that Petitioner was still reporting no improvement in the dull, achy pain over the middle of his forearm. Dr. Wottowa stated he did not know what was causing Petitioner's pain, but noted the complaints were consistently in the same place on the volar aspect of the proximal forearm. Because of this he again referred Petitioner to Dr. Greatting for another second opinion. PX 4 p.48,51

After examining Petitioner again on August 1, 2018 Dr. Greatting stated his examination revealed few objective abnormalities, just a mildly positive Tine's test over the transposed ulnar nerve, but he noted that clinically Petitioner still appeared to have ongoing symptoms relating to the posterior interosseous nerve. He ordered another MRI and another EMG/NCV. The August 17, 2018 MRI of the left elbow showed common flexor tendonopathy and tendonopathy with a partial tear of the distal biceps tendon. Dr. Gelber's repeat EMG/NCV showed mild residual cubital tunnel but no evidence of recurrent carpal tunnel or posterior interosseous nerve injury. PX 5 p.1,2,4,7

After reviewing those test results Dr. Greatting noted that Petitioner reported his symptoms had improved due to his surgeries but that he had some feeling of incoordination and weakness in his hand and significant pain in the proximal forearm and elbow with lifting and resisted forearm supination. Dr. Greatting said he advised Petitioner that many of his complaints were related to the distal biceps tendon. PX 5 p.9

Dr. Wottowa saw Petitioner on September 5, 2018 and interpreted the repeat MRI as showing quite a bit of high-grade, partial-thickness tearing of the biceps. Petitioner told him it bothered him too much to just live with it, so Dr. Wottowa said that he did not think it unreasonable, based on the MRI, to do one

last surgery, a bicipital reimplantation. He did note that it took about five months to recover from such a surgery. That surgery took place on September 18, 2018. PX 4 p.56,58

Dr. Wottowa saw Petitioner on October 3, 2018 and October 31, 2018 and found Petitioner to still have nerve pain in the area of the posterior interosseous nerve, and noted it would take a long time to see if the most recent surgery would help him. When seen on December 12, 2018 Dr. Wottowa noted that Petitioner's elbow was finally feeling better, only had minimal tenderness, and he changed Petitioner's work restriction from 2 lbs. to 20lbs. PX 4 p.64,66,68

PA David Purves saw Petitioner on January 22, 2019 and took a history of Petitioner having an aggravation of his left elbow injury 1 ½ to 2 weeks earlier when he lost his balance and had to catch himself against his truck with his left arm. He had medial elbow pain but PA Purves thought it was probably just an aggravation. PX 4 p.71; RX 7

Dr. Wottowa reported that Petitioner was frustrated with his left forearm when seen on February 13, 2019, noting that it bothered him when he did curls. The physical examination that day was objectively normal. Dr. Wottowa noted that the only thing which had not improved as a result of the surgeries was the diffuse pain around Petitioner's mobile wad, saying, "I have never really been able to put a finger on this and tell him why he has this." He did not know if Petitioner would have further improvement and sent him back to Dr. Greatting for further suggestions. PX p.73

Dr. Greatting saw Petitioner for April 10, 2019. All objective findings were normal, and the only subjective finding was tenderness over the incision from his post interosseous nerve surgery Dr. Greatting stated that it was potentially possible that Petitioner had some recurrent compression of the posterior interosseous nerve, and that a re-exploration of that area would not necessarily be helpful. He told Petitioner that the most reasonable thing to do would be to give Petitioner permanent restrictions and consider him at maximum medical improvement. PX 5 p.11

When Dr. Wottowa saw Petitioner on April 17, 2019 he agreed with Dr. Greatting and made Petitioner's 20 lb. restriction permanent. PX 4 p.76; RX 7

Dr. Kellenberger saw Petitioner on October 11, 2019 and noted that Petitioner's "arm is not back to its original form, but remains highly viable and functional." He noted that Petitioner continued to voice left forearm pain and had residual swelling in the dorsal left forearm. His physical examination on that date showed Petitioner's left arm to be weaker. RX 7

Dr. Wottowa saw Petitioner on March 10, 2020 and June 8, 2020 for left triggering and locking of the left long finger and made on mention of the injuries involved in this case. RX 7

Nurse Practitioner Sarah Wilks of Prompt Care saw Petitioner on September 8, 2020 for abrasions suffered when Petitioner had his left hand struck by a front door and a brick wall and no mention of the injuries from this accident was made in those records. RX 7

DEPOSITION TESTIMONY OF DR. CHRISTOPHER WOTTOWA

Dr. Wottowa's testimony in regard to his examination, diagnoses and treatment of Petitioner was consistent with the medical summary above.

Dr. Wottowa testified that he was a board certified orthopedic surgeon cool emphasized his practice only in the areas of shoulder, elbow, hand and wrist conditions. He stated that while performing carpal tunnel surgery on Petitioner on November 3, 2017 he observed signs of chronic median nerve compression , thickening of the transverse carpal ligament and hyperemic blush of the new median nerve. In the left elbow surgery on that same date he said he saw quite a bit of compression and Osborne's ligament and the arcade of Struthers were markedly thickened, signs of chronic constriction throughout. PX 6 p.4,5,10,11

Dr. Wottowa noted that this injury could not have caused the thickening of the ligament or the structures he observed, they had built up overtime, but the actual injury hurting the elbow aggravated the conditions and made them symptomatic. PX 6 p.12,13

Dr. Wottowa said that Petitioner's post-surgical complaints of diffuse pain in different areas of the elbow did not fit into a "nice, neat box," it was not clear cut. He felt it was a posterior interosseous nerve entrapment in the forearm. He said Petitioner voiced pain in that area the entire time he treated him. He testified that 70% of those diagnosis are made through electrodiagnostic testing, while 30% were diagnosed clinically, as was the case here. Dr. Wottowa said the etiology of the posterior interosseous nerve injury could not be explained, some people get it from an injury while others get it from overuse, but he noted Petitioner did not have symptoms until the injury, so in his head they went together. PX 6 p.12-14,20,21

After referring Petitioner to Dr. Greatting for a second opinion repeat MRI scans and EMG testing were performed. The new MRI showed chronic changes to the distal biceps, which was consistent with Petitioner's complaints, and Petitioner elected to have the repair, which occurred on September 18, 2018. PX 6 p.15-17

He said that the biceps tendon did well after the surgery but Petitioner continued to have pain diffusely over the elbow . He therefore sent him back to Dr. Greatting again, and Dr. Greatting thought that nothing on Petitioner's physical examination pointed to a surgical problem. Dr. Wottowa said he saw Petitioner for left arm problems for the last time on April 17, 2019, at which point he released him at maximum medical improvement with a permanent 20 lb. lifting restriction. PX 6 p.21,22,

Dr. Wottowa thought Petitioner had been restricted from work from January 10, 2018 as well as for the weeks and months after every surgery. PX 6 p.24-26

Dr. Wottowa said that while Petitioner had improved after each surgery he was not a hundred percent. PX 6 p.26

Dr. Wottow was of the opinion that this injury was an aggravating factor for Petitioner's carpal tunnel syndrome, cubital tunnel syndrome, posterior interosseous nerve injury and his partial distal biceps tendon tear. He felt the surgeries for those conditions were necessitated by those conditions and reasonable to perform. RX 6 p.27-30

On cross-examination Dr. Wottowa said if Petitioner had the symptoms of carpal tunnel prior to this accident but they worsened, then the injury was an aggravating factor, but that if they were exactly the same, it would not be an aggravating factor. He said he had not seen Petitioner's previous records, but if Dr. Russell's medical records reflect chronic pain and numbness in the left arm with numbness in the third, fourth and fifrh finger from 2007 through May of 2016, several months prior to this accident, his opinion would be different, but if his symptoms increased, he would say they were aggravated. PX 6 p.31,32

Dr. Wottowa said the interosseous nerve was a "particularly pesky nerve to diagnose. It is hard to treat, and it is also susceptible to minor insults as well." When asked if the interosseous nerve arose from the C5 nerve Dr. Wottowa said it did, and that while an interosseous nerve pain could result from an C5/6 arthroplasty, Petitioner did not have the interosseous nerve problem prior to this injury, so the injury could be an aggravating factor as well, and Petitioner's description of his symptoms being worse to the doctor were coincidental to the injury. PX 6 p.33-35

In regard to work restrictions Dr. Wottowa noted that Dr. Sharma gave Petitioner a "work as tolerated" restriction on December 14, 2016, that PA Royer gave him a limited left arm pushing, pulling and no lifting in excess of 10 lbs. limitation on January 18, 2017 and that Petitioner's restrictions were based on his discomfort , including after his four surgeries. PX 6 p.38

On re-direct examination Dr. Wottowa testified that at no time during his treatment of Petitioner did he suspect him of symptom magnification. PX 6 p.42

ARBITRATOR'S CREDIBILITY ASSESSMENT

Petitioner Charles Anthony Cusumano

The Arbitrator observed Petitioner during his testimony both on direct examination and on cross-examination. He did not appear to evade questions posed to him nor did he appear to exaggerate either the facts of the accident, the severity of his symptoms, or difficulties he had upon his return to work. The Arbitrator finds Petitioner to have been a credible witness.

Dr. Christopher Wottowa

Dr. Wottowa during his testimony appeared to be direct and forthcoming, admitting his own limitations as shown by his repeated referral of Petitioner to Dr. Greatting for second opinions when treatments did not result in full elimination of symptoms. On cross-examination Dr. Wottowa was willing to note that his opinions could change if additional facts he was not aware of were proven. The Arbitrator finds Dr. Wottowa to have been a credible witness.

CONCLUSIONS OF LAW:

In support of the Arbitrator's decision relating to whether Petitioner's current condition of ill-being, left carpal tunnel, left cubital tunnel, left lateral epicondylitis, left medial epicondylitis, left posterior interosseous nerve injury, and left distal biceps tendon tear, are causally related to the accident of October 25, 2016, 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 Petitioner suffered an accident at work on October 25, 2016 involving his left elbow/arm, and all of the testimony and Respondent's Exhibits 1 through 4 indicate that a work injury occurred at that time as described.

Dr. Wottowa, Petitioner's treating surgeon, has performed injections and three separate surgeries to address five separate problems: epicondylitis, carpal tunnel syndrome, cubital tunnel syndrome, posterior interosseous nerve compression and a biceps tendon tear. The doctor testified that all of these medical conditions were aggravated by the work injury making the surgeries necessary. He has explained that the elbow injury most likely caused the nerve entrapments to become symptomatic and, given the fact that Petitioner did not have these problems prior to the work injury, that they are all causally connected to the work injury.

Dr. Anderson, Respondent's IME physician, opined that the work injury caused lateral epicondylitis and a biceps strain, but nothing else. Consequently, both doctors agree on causation for the epicondylitis and an injury to the biceps tendon which was subsequently found to be torn. Dr. Anderson did not have knowledge of tests or treatment subsequent to August 2, 2017.

RX 6 consists of medical records from Drs. Kellenberger, Becker, and Russell for periods of time prior to the injury. These records indicate that Petitioner had neck surgery in the spring of 2015. On May 18, 2016, he saw Dr. Russell for a follow-up visit and complained of some numbness in both hands (as opposed to his left hand), and he was released from care at that time.

In June 2016, Petitioner was examined by Dr. Becker for occipital neuralgia. On August 15, 2016, Petitioner saw his primary care doctor, Dr. Kellenberger, for an injury at home. These pre-accident records show Petitioner was treated for cervical disc disease, cervical radiculopathy, cervicalgia and some other medical conditions. Other than a May 18, 2016 Dr. Russell note referencing Petitioner giving a history of numbness and tingling in his hands, especially at night, and the doctor's statement that this seemed more suggestive of carpal tunnel disease, there are no other mentions of carpal tunnel syndrome, cubital tunnel syndrome, epicondylitis, posterior interosseous nerve entrapment or any other diagnosis caused by the work injury in those records. The Dr. Russell's note is in regard to bilateral hands, not just the left hand, and the complaints being voice to him at that time are different from those voiced by the Petitioner while being treated by Dr. Wottowa. Further, Dr. Russell did not make a definitive diagnosis of carpal tunnel syndrome for the left hand or have any electrodiagnostic testing confirm that diagnosis.

The evidence shows that Petitioner's left elbow, arm and hand were in state of good health before the work injury and injured and symptomatic afterwards. The evidence presented at trial and the chronology of Petitioner's medical treatment show that he developed several problems following this accident which required surgeries. The opinions of Dr. Wottowa are more reliable and are amply supported by the other evidence presented at trial. Petitioner has proven that a causal connection exists between the work accident and his current conditions of ill-being, left carpal tunnel syndrome, left cubital tunnel syndrome, left posterior interosseous nerve injury, left lateral epicondylitis, left medial epicondylitis and left distal bicep tendonopathy

through both the opinion testimony of Dr. Wottowa and through the chain-of-events. *Shafer vs. Illinois Workers' Compensation Commission,* 2011 IL App (4th) 100505WC, 976 N.E.2d 1 (2011)

The Arbitrator finds that Petitioner's current conditions of ill-being, including left carpal tunnel, left cubital tunnel, left lateral epicondylitis, left medial epicondylitis, left posterior interosseous nerve injury, and left distal biceps tendon tear, are causally related to the accident of October 25, 2016. This finding is based upon the medical records of Dr. Kellenberger, Dr. Sharma, Dr. Greatting and Dr. Wottowa as well as the deposition testimony of Dr. Wottowa. In addition, this finding is based upon the chain-of-events, as Petitioner has proved a prior condition of good health in regard to his left hand and arm, a definite accident and immediate conditions of ill-being following that accident.

In support of the Arbitrator's decision relating to what temporary benefits Petitioner is entitled to as a result of the accident of October 25, 2016, 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 causal connection, above, are incorporated herein.

Petitioner testified that he was off work from November 30, 2017 through December 12, 2018. Respondent introduced no evidence to rebut the length of the period of disability but did dispute liability for all temporary total disability based upon lack of causal connection between the accident and Petitioner's conditions of ill-being.

Dr. Wottowa testified that he restricted Petitioner following each of his surgeries through December 12, 2018, when he gave him permanent restrictions of no lifting over 20 lbs.. The first surgery was November 30, 2017, the date alleged as the beginning of his temporary total disability by Petitioner.

The Arbitrator finds that Petitioner was temporarily totally disabled as a result of the accident from November 30, 2017 through December 12, 2018, a period of 53 5/7 weeks. This finding is based upon Petitioner's testimony, Dr. Wottowa's medical records, Dr. Wottowa's testimony, and the lack of evidence to the contrary.

The Arbitrator further finds that based upon the opinions of Dr. Greatting and Dr. Wottowa, Petitioner reached maximum medical improvement on December 12, 2018.

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 causal connection and temporary total disability, above, are incorporated herein.

As the accident occurred after September 1, 2011, the nature and extent of the injury must be determined through the five-factor test set out in §8.1b(b) of the Act.

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

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a technical manager for the Illinois Department of Transportation, a job which requires physical laboring to assemble office work areas and furniture 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 that he returned to work subject to a permanent 20 lb. lifting restriction which Respondent has been able to accommodate. Petitioner testified that when work he is to perform involves weight in excess of his restriction he requests assistance from co-workers and they help him. Because of the physical nature of his work and his permanent restrictions, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 42 years old at the time of the accident. Because of the number of expected work life years Petitioner has remaining, 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 presented concerning Petitioner's future earning capacity. Because of the lack of evidence in this regard, 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 the medical records of both Dr. Wottowa and Dr. Greatting reflect consistent and continuing complaints of pain and weakness involving Petitioner's left, dominant arm and hand causing him to have difficulties with dexterity and grip and arm strength.. Because of this loss of strength and his permanent restrictions, 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 1/2% loss of use of the left hand, 25.625 weeks, pursuant to §8 (c) of the Act.

Based on the above factors, and the record taken as a whole, the Arbitrator further finds that Petitioner sustained permanent partial disability to the extent of 32 1/2% loss of use of left arm, 82.225 weeks, pursuant to §8 (c) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	10WC024712
Case Name	ZIMMERIE, MARTHA v. STATE OF ILLINOIS-DEPT OF REHAB SRVC
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0516
Number of Pages of Decision	15
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Jeffrey Alter
Respondent Attorney	Drew Dierkes

DATE FILED: 10/14/2021

/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

Martha Zimmerle,
Petitioner,

vs. NO: 10 WC 24712

State of Illinois, Dept. of Rehabilitation Services,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 21, 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.

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.

October 14, 2021

o10/13/21
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
NOTICE OF ARBITRATOR DECISION

ZIMMERIE, MARTHA Case# **10WC024712**
Employee/Petitioner

ST OF IL- DEPT OF REHABILITATION SERVICES
Employer/Respondent

On 4/21/2020, 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 0.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

APR 21 2020

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

STATE OF ILLINOIS)
)SS.
COUNTY OF KANKAKEE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MARTHA ZIMMERLE
Employee/Petitioner
v.
STATE OF ILLINOIS – DEPT. OF REHABILITATION SERVICES
Employer/Respondent

Case # **10 WC 24712**

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 **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Kankakee**, on **February 20, 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. [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 **May 15, 2010** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, the average weekly wage was $**583.96**.

On the date of accident, Petitioner was **34** years of age, **single** with **two** 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.

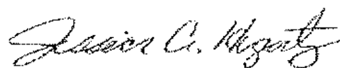
Respondent shall be given a credit of $**32,784.34** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**32,784.34**.

Order

- Respondent shall pay reasonable and necessary medical services of $129,262.66, as provided in Sections 8(a) and 8.2 of the Act.
- Respondent shall pay Petitioner permanent partial disability benefits of $350.38/week for 175 weeks, because the injuries sustained caused the 35% loss of the person as a whole which equates to $61,316.50, as provided in Section 8(d)2 of the Act
- Respondent shall pay Petitioner temporary total disability benefits from May 16, 2010 through March 17, 2014, a period of 200-2/7 weeks, for a total of $77,973.23.
- Respondent is entitled to a credit for TTD benefits paid in the amount of $32,784.34.

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

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



Signature of Arbitrator

4-16-20
Date

APR 2 1 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION

MARTHA ZIMMERLE	)	
	)	
Employee/Petitioner,	)	
v.	)	
	)	No. 10WC 24712
STATE OF ILLINOIS/DEPT. OF REHABILITATION SERVICES	)	Kankakee, IL
	)	
Employer/Respondent.	)	

ADDENDUM TO THE DECISION OF THE ARBITRATOR

On February 20, 2020 this matter proceeded to hearing before the Arbitrator in Kankakee, Illinois (Arb. 1).

Petitioner began working as a personal assistant in 2008 through the Illinois Department of Rehabilitation Services ("Respondent"). Petitioner was assigned to a client, Bobby, a paraplegic. Her duties including cooking, cleaning, grocery shopping, laundry, and helping with bathroom needs. Additionally, she was required to move Bobby from his bed to his wheelchair and to the shower/shower chair when necessary. Petitioner estimated Bobby weighed about 190 pounds. Petitioner worked for Bobby 8 hours per day, 7 days per week for 2 to 3 week periods of time. She would help Bobby into bed at night and then go home, returning the following morning.

Bobby's daughter, Samantha, would occasionally assist in his care.

Petitioner testified that she provided personal care assistance for Bobby from 2008 through May 15, 2010.

On May 1, 2010 Petitioner presented to Michael Schreiber, DO, at Riverside Medical Practice in Momence, IL., for female issues and some back pain. Petitioner did not know what caused her back pain, but was able to work through it. Petitioner returned to the doctor on May 14, 2010 again for female issues and back pain. The doctor recommended Petitioner refrain from lifting more than five pounds (PX#2).

Petitioner returned to work for Bobby May 12, 2010 through May 14, 2010.

Petitioner returned to Dr. Schreiber on May 14, 2010 for continued rectal pain and increased lower back pain shooting pain down across her buttocks and down the right side of her leg. Petitioner's 5 pound lifting restriction was continued (Id.).

On May 15, 2010, Petitioner, according to her testimony, reported for work with the expectation that Bobby's daughter would assist with certain duties that exceeded Petitioner's restrictions however, Bobby's daughter was not present. Bobby had an accident in bed and Petitioner attempted to move him when she felt a pull in her lower right side back and down her leg. Petitioner testified the back pain from moving Bobby was different from the back pain she had sought treatment for in the preceding days. Petitioner helped Bobby with showering and getting dressed. At one point, Petitioner laid down in Bobby's spare room. When she attempted to get out of bed, she experienced severe back pain.

Petitioner was transported later that day by ambulance to the ER at Riverside Medical Center in Kankakee. The medical records noted a history of low back pain after lifting wood today (PX#1). Petitioner testified she does not know why the emergency room records reference lifting wood. Petitioner was released with instructions to follow up with her primary doctor (Id.).

Petitioner testified she was unable to return to work the next day, May 16, 2010, as she could not get out of bed due to back pain. The records reflect that an ambulance was again called on May 16, 2010 and Petitioner returned to the ER at riverside Medical Center (Id.). Petitioner reported a history of right, low back pain for the past week and that had increased 3 days prior after moving a patient (Id.). Petitioner was restricted from returning to work and was advised to follow-up with her doctor. Petitioner's Exhibit #14 confirms that she worked 8 hours per day May 11 through May 15, 2010, and did not return to work thereafter.

On May 21, 2010 Petitioner presented to Dr. Schreiber who noted a history of back pain since Saturday after lifting (PX#2). Petitioner complained of low back pain radiating down both legs with difficulty walking. Dr. Schreiber restricted Petitioner from returning to work and ordered a lumbar MRI (Id.).

On May 25, 2010 Petitioner underwent a lumbar MRI that noted a small central disc protrusion at L5-S1 with no spinal or neural foraminal stenosis identified. No osseous pathology was noted (Id.). Petitioner returned to Dr. Schreiber on May 27, 2010 for the test results and was referred to Dr. Maly for pain management (Id.).

On May 28, 2010 Petitioner presented to Dr. Jasmine Maly with a history of persistent low back pain radiating down the back of both extremities following an accident on May 15, 2010. Petitioner described the pain as burning, sometimes shooting, and numbing in nature. The pain interrupted her daily activities and her sleep. Dr. Maly reviewed the MRI, noting a small central herniated disc at L5-S1 and opined that the Petitioner's pain problems were secondary to lumbar radiculopathy. The doctor recommended a series of lumbar epidural injections and continued off work restrictions Petitioner underwent the first injection at that time (PX#3).

On June 22, 2010 the Petitioner underwent a second epidural injection at L5-S1 with Dr. Maly. (Id.). Petitioner follow-up with Dr. Schreiber on July 7, 2010, for her lower back pain. At that time, Petitioner was released to return to work with 5 pound lifting restrictions and advised to avoid bending or prolonged sitting or standing for 4 weeks. Petitioner testified she was unable to perform her job duties for Respondent with those restrictions so she remained off of work. Dr. Schreiber also recommended a course of physical therapy (PX#2).

Petitioner testified, and the records reflect, that physical therapy commenced on July 13, 2010 at Riverside Rehab and continued through August 9, 2010 (PX#4). She testified the therapy was not helping. Petitioner returned to Dr. Schreiber on August 11, 2010 for follow-up of her lower back pain. At that time, she was referred back to Dr. Maly and to Riverside Rehab for a functional capacity evaluation ("FCE") (Id.).

On August 13, 2010 Petitioner presented to Dr. Maly with continued low back radiating pain down the back of both thighs. Dr. Maly recommended a 3rd epidural steroid injection, which was performed on August 20, 2010 at L4-5 on the right side (Id.). Petitioner testified that injections were not providing her with any relief of her pain. On September 28, 2010, Dr. Maly prescribed Lyrica, which helped some. Dr. Maly also recommended a lumbar facet block.

On September 30, 2010 Petitioner presented to Dr. Yuvraj Kamboj, as her new primary care physician at Riverside, as Dr. Schreiber had retired (PX#2). Dr. Kamboj noted approval had not yet been received for Petitioner to undergo the FCE. Petitioner reportedly had been feeling

depressed since the injury, having lost all interest in hobbies, as well as feelings of guilt, with poor concentration. Seroquel was prescribed and Petitioner was referred to a therapist for depression. Petitioner testified that she was depressed because she was not working and was unable to do any activities at home or with her family since the injury in May 2010.

On October 1, 2010 Petitioner underwent the lumbar facet blocks from L3-S1 with Dr. Maly. (PX#3). Petitioner returned to Dr. Maly on November 16, 2010 at which time the doctor recommended facet medial branch blocks at L3-S1. The recommended blocks were performed on November 19, 2010. Petitioner testified the blocks helped only for a couple of days.

On November 23, 2010 Petitioner underwent an FCE at Riverside. The results of the evaluation revealed that Petitioner gave near, but not entirely, full effort. The FCE results were below the level necessary to return to work as a caretaker, which required her to lift at the medium, up to heavy duty. It was recommended that Petitioner undergo further testing due to increased lower back and right butt pain (PX#4).

Petitioner testified she gave her full effort during the evaluation and that after the testing, her back had increased pain.

On December 1, 2010 Petitioner followed up with Dr. Kamboj who noted complaints of severe back pain radiating to the right, increased with movement. Dr. Kamboj recommended additional physical therapy and restrictions of no lifting greater than 36 pounds (PX#2). Petitioner testified that work was not available for her within her restrictions. Petitioner continued to receive weekly temporary total disability benefits at that time.

On December 7, 2010 Dr. Maly diagnosed Petitioner with lumbar radiculopathy and referred her to a neurosurgeon after she underwent a revised lumbar MRI and nerve conduction study (PX#3). Petitioner underwent the lumbar MRI on December 23, 2010 which noted a small disc protrusion at L5-S1 (PX#2, 3). Petitioner also underwent the EMG-NCV on December 23, 2010, which was within normal limits (PX#3).

Petitioner returned to Dr. Maly on January 7, 2011 at which time the doctor noted Petitioner's leg and low back pain were getting better although she still had some numbness, tingling and achy pain in her legs. Dr. Maly recommended holding off on any further injections, but increased the Lyrica, which had been helping Petitioner, and added Flexeril (Id.).

On January 13, 2011 Petitioner followed-up with Dr. Kamboj, who recommended further physical therapy (PX#2).

Petitioner participated in physical therapy from February 18, 2011 through February 28, 2011.

On March 14, 2011 Petitioner presented to Neurosurgery Consultants where Dr. Juan Jimenez noted an accident history consistent with Petitioner's testimony (PX#5). Dr. Jimenez performed an examination and reviewed the December 23, 2010 MRI, noting evidence of disc degeneration and a small disc protrusion at the L5-S1 segment with no significant spinal stenosis. Dr. Jimenez indicated he was "uncertain of the etiology of the persistent pain" Petitioner was experiencing and that Petitioner was not a surgical candidate. Dr. Jimenez referred Petitioner back to Dr. Maly for consideration of 1) radiofrequency ablation, 2) spinal cord stimulator trial, or 3) lumbar discogram to confirm that L5-S1 was the primary pain generator if the above measures failed to provide pain relief. Dr. Jimenez also noted that since the Petitioner was only 35 years old, that "a lumbar fusion should be the treatment of last resort" (Id.).

On March 22, 2011 Dr. Maly noted Petitioner's complaints of moderate low back pain. Per Dr. Jimenez, Dr. Maly recommended proceeding with the radiofrequency ablation of the facet

medial nerve branches of L3, L4, L5 and S1. Dr. Maly also prescribed Lidoderm patches for the low back (PX#3).

On March 29, 2011 Petitioner underwent radiofrequency ablation with Dr. Maly at the Pain Care Center (Id.). Petitioner returned to Dr. Maly on April 12, 2011 reporting her low back pain had nearly resolved although she still had occasional shooting pain down the right lower extremity. At that time, Dr. Maly recommended physical therapy and to follow-up with Dr. Kamboj (Id.).

Petitioner started the therapy at Riverside Medical Center on April 13, 2011. The initial evaluation noted that Petitioner was doing much better but still had occasional sharp pain in her back shooting down her right leg, especially when sitting. Petitioner continued in therapy through May 3, 2011. The therapy notes reflect that Petitioner had increased left lower back pain during the initial therapy visit, with swelling after she woke up, which continued throughout her therapy sessions. The discharge note also indicated that Petitioner continued to have left lower back pain and swelling and that her right side was hurting her again (PX#4).

After completing therapy, Petitioner returned to Dr. Maly on May 5, 2011 at which time she reported her right-sided back pain had resolved but she continued to have pain on the left side. At that time, Dr. Maly recommended diagnostic facet medial nerve branch blocks (PX#3). Petitioner underwent lumbar facet median nerve branch blocks at L3, L4, L5 and S1 on the left side with Dr. Maly on May 13, 2011 (Id.).

On June 2, 2011 Petitioner reported to Dr. Maly that her left-sided pain had resolved although her right-sided radiating pain down the right leg was coming back. During that visit, Dr. Maly recommended a lumbar epidural steroid injection at L5 and S1 on the right side. Petitioner underwent the injection on June 7, 2011 (Id.). Petitioner testified the injection did not help her pain, which was confirmed by the office note of June 14, 2011 of Dr. Maly. The office note also indicated that Petitioner was taking 3 Lyrica and Flexeril 3 times per day. At that time, Dr. Maly recommended the trial spinal cord stimulator per the recommendations of Dr. Jimenez (Id.).

Petitioner testified that while she was waiting for approval of the spinal cord stimulator, she underwent a diagnostic lumbar sympathetic block with Dr. Maly on July 19, 2011 (Id.). Also, in anticipation of the trial spinal cord stimulator placement, Dr. Maly referred Petitioner to Dr. Mehta for psychiatric clearance, as Petitioner had reportedly been depressed and was taking Seroquel (Id.). Petitioner underwent the evaluation with Dr. Mehta on July 11, 2011. (PX#6).

On August 2, 2011 Dr. Maly noted that Petitioner's pain was worse with movement, radiating pain to the back and side of her right thigh and leg (PX#3). At that time,. Dr. Maly continued to recommend the trial spinal cord stimulator as Petitioner had failed to respond to other treatments (Id.).

At the request of Respondent, Petitioner underwent a Section 12 examination with Dr. Frank Phillips on November 8, 2011. Dr. Phillips performed an examination and reviewed the medical records. Dr. Phillips indicated that Petitioner sustained a lumbar strain and that a course of therapy and activity modification would be reasonable and appropriate, but that there was no indication for the multitude of injections as being related to the work injury. Dr. Phillips opined that Petitioner was at maximum medical improvement with regard to her lumbar sprain resulting from the work injury of May 15, 2010, and was capable of resuming full duty work. He found no indication for a spinal cord stimulator (RX#3).

Petitioner testified that after the IME examination, her weekly temporary total disability benefits were discontinued, and she testified that she did not feel that she was capable of returning to full duty work due to her continued pain. She then returned to see Dr. Maly on December 1, 2011. The record reflects that she continued to have back pain radiating to her right

leg. Dr. Maly recommended two epidural steroid injections that Petitioner underwent on December 6, 2011 and December 20, 2011 (Id.).

On February 9, 2012 Dr. Kamboj examined Petitioner who reported only temporary relief from the injections and therapy. At that time, Dr. Kamboj referred Petitioner to Dr. Malek for further evaluation (PX#2).

On April 2, 2012 Petitioner presented for initial consult to neurosurgeon Dr. Michel Malek who noted an accident history consistent with the testimony of Petitioner. Upon examination, Dr. Malek noted negative Waddell's signs and a positive straight leg raise test on the right side at 30 degrees. Dr. Malek recommended a lumbar discography at L5-S1, repeat EMG/NCV and MRI of the lumbar spine, and that Petitioner remain off of work (PX#7).

On April 3, 2012 Petitioner underwent the EMG/nerve conduction study revealing mild right L5-S1 radiculopathy (Id.).

On April 16, 2012 Petitioner underwent a discogram at Provena St. Mary's Hospital. The results of the discogram revealed concordant pain at L5-S1 (Id.).

On April 27, 2012 lumbar MRI showed desiccation at the L5-S1 level with left paracentral disc protrusion effacing the left sided root.

Petitioner returned to Dr. Malek on May 7, 2012 at which time the doctor noted the patient's symptomatology pointed to the L5-S1 level as the pathological level. Dr. Malek then recommended a L5-S1 fusion and that Petitioner remain off of work (PX#7).

Petitioner testified the surgery was not authorized and she continued to follow-up with Dr. Malek through October 12, 2012 (Id.). Petitioner also testified that her back pain was so bad that she went to the emergency room at Provena St. Mary's Hospital on November 19, 2012 (PX#12). After that, on a monthly basis through March 2013, Petitioner continued to follow-up with Dr. Malek, who continued to recommend surgery and that she remain off of work.

Dr. Malek authored a report noting her opinion that Petitioner's current condition and need for the recommended lumbar fusion at L5-S1 was causally related to the work injury on May 15, 2010. Regarding Dr. Phillips report, Dr. Malek noted that Dr. Phillips failed to review the most recent EMG, which were objective findings that correlated with Petitioner's subjective complaints. Dr. Malek also disagreed with Dr. Phillips diagnoses and need for treatment based upon the results of the discogram, which confirmed Petitioner's concordant pain at L5-S1. Dr. Malek noted the delay in treatment may adversely affect the outcome of the recommended treatment (PX#7).

On April 9, 2013 Dr. Malek performed an L5-S1 transforaminal interbody fusion with instrumentation at Our Lady of the Resurrection Hospital in Chicago, IL. (Id.).

Petitioner followed up with Dr. Malek post-operatively. Dr. Malek continued to restrict the Petitioner from returning to work. Petitioner underwent a course of physical therapy starting on June 3, 2013 followed by a work conditioning program at Provena starting on September 17, 2013 (PX#11). After completing the work conditioning program, Petitioner underwent an FCE on December 2, 2013 at ATI (PX#13). The report revealed a valid result with the Petitioner capable of performing at the light-medium physical demand level, which was below the level necessary to return to work as a caregiver (Id.).

In April 2014, Dr. Malek released Petitioner from care and gave her permanent light duty restrictions.

Petitioner did not return to work for Respondent due to her permanent light duty restrictions.

On May 5, 2014, Petitioner began working at Circle K as a cashier which was within her restrictions. Petitioner initially made $9.00/hour and worked 25-30 hours per week. Petitioner was made a manager in 2018, is currently paid $12.25/hour, and works 50 hours per week. Petitioner's current job duties include paperwork, orders, talking to vendors, putting away stock, and working the register if needed.

Petitioner testified she has "some pain, but not much." Petitioner can function and do her job. Petitioner considered the surgery a success and does not think she would be in her current condition without the surgery. Petitioner has no pain radiating down her leg.

Testimony of Dr. Frank Phillips

Dr. Frank Phillips is an orthopedic surgeon licensed to practice in Illinois "around about '90 or '91" (RX 3).

Dr. Phillips saw Petitioner for an IME on November 8, 2011 (*Id.* at 6). Dr. Phillips reviewed records from Dr. Schreiber, Dr. Maly, Dr. Kamboj, Dr. Jimenez, reports of MRI studies, report from an FCE, and a report from an EMG (*Id.* at 7). Petitioner complained of "back pain, pain in the right buttock and posterior thigh to the level of the knee... she also had numbness in the right thigh." *Id.* at 8. Petitioner was very pain focused with two to three positive Waddell's signs. *Id.* Dr. Phillips diagnosed her with a "lumbar sprain/strain injury." *Id.* at 9.

Dr. Phillips opined that it "doesn't make sense" for a positive finding on the 2012 EMG to be causally related to the work injury, "based on the fact that she had an early EMG that was negative, plus she had an MRI showing no nerve compression, so it wouldn't make sense that two years later, suddenly she developed a problem related to the accident now reflected on the EMG." *Id.* at 12-13. Based on the MRI report of December 23, 2010, there was nothing to indicate radiculopathy (*Id.* at 16).

Dr. Phillips opined it is certainly possible for an EMG to show a false negative, however in his experience "EMGs by far more likely show false positives overwhelmingly" (*Id.* at 24). During the physical exam of Petitioner, the straight leg test caused back pain only, whereas if there was radiculopathy it would cause pain radiating down in the leg typically to the foot (*Id.* at 28). The results of a discogram are more reliable with a negative control level (*Id.* at 35).

CONCLUSIONS OF LAW

The Arbitrator adopts and incorporates the above findings in support of the following conclusions of law.

Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

Based upon a preponderance of the credible evidence, the Arbitrator finds that Petitioner did sustain an accidental injury arising out of and in the course of her employment with Respondent.

Petitioner testified that while she was working on May 15, 2010, she was lifting her client, Bobby, who weighed about 190 pounds, to clean up after he had accident in his bed. Petitioner testified that as she was lifting Bobby to put him on the shower chair, she felt a pull in her right

side of her lower back and excruciating pain in her back and down her right leg. She testified that the pain was much worse and was different than the pain that she was experiencing prior to that date. The history of her injury was consistent with the emergency room medical records that reflect she sustained a lifting injury after moving a patient. The history was also consistent with the Form 45 completed by Petitioner documenting the lifting injury.

Although Respondent failed to present evidence to dispute the accident occurring on May 15, 2010, it is assumed the accident dispute is based upon the medical records prior to that date. The Arbitrator recognizes that Petitioner saw her doctor on May 11, 2010, for rectal pain and hemorrhoids, with shooting pain from the rectal area around the vaginal area and down the right leg to her foot. Petitioner testified that the pain was minor and that the primary purpose of the visit was for female issues. The Arbitrator further recognizes that Petitioner returned to see Dr. Schreiber as directed on May 14, 2010 for a follow-up appointment and the record reflects that she had continued minor rectal pain but had increased lower back pain with a shooting pain across her buttocks and down the right side of the leg. As a result, Petitioner was given a restriction of no lifting over 5 pounds. Petitioner testified that the back pain was minor and did not interfere with her ability to work, as she thought she would still be able to care for Bobby, so she returned to work on May 15, 2010.

The Arbitrator notes that the Respondent failed to present any evidence to rebut the course of events that occurred on May 15, 2010, and the lifting injury that occurred while Petitioner was at work, that ultimately caused her to go to the emergency room on May 15, 2010 and May 16, 2010. The records reflect that she was not in the type of pain on May 14, 2010, as the pain that was documented thereafter, and the records all confirm that there was a lifting injury that occurred on May 15, 2010, causing Petitioner to seek emergent medical care.

What is clear to the Arbitrator is that Petitioner injured her lower back while lifting a patient on May 15, 2010, and the fact that she may have had some back pain the day previously does not negate the undisputed and documented lifting injury that occurred on that date. The injury is well documented in all of the medical records and the accident report. Respondent failed to present any evidence contradicting the injury occurring at that time, either testimonial or documentary. The Arbitrator also finds Petitioner's testimony regarding the course of events to be credible and undisputed, noting that the contemporaneous accident report and medical records of Riverside Medical Center, Dr. Schreiber, the MRI report of May 25, 2010, and Dr. Maly corroborate Petitioner's trial testimony.

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

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

Lumbar MRI (taken 3 days prior and 10 days after Petitioner's accident) noted a small central herniated disc at L5-S1. Dr. Maly opined that Petitioner's pain problems were secondary to lumbar radiculopathy. Dr. Maly recommended a course of conservative medical care to treat the radiculopathy including injections, blocks, medications and physical therapy. After failing the course of conservative care, Dr. Maly referred Petitioner to see Dr. Jimenez who concurred with the diagnosis and recommended three options: 1) radiofrequency ablation, 2) spinal cord stimulation trial, and 3) a lumbar discogram to confirm that L5-S1 was the primary pain generator if the other 2 options failed. Dr. Jimenez, who examined Petitioner on March 14, 2011, indicated that surgery was not indicated at that time and that a lumbar fusion should be the treatment of last resort since Petitioner was only 35 years old.

The Arbitrator assigns more weight to Dr. Malek's testimony regarding causation than to Dr. Phillips' causation opinion. Dr. Phillips was not provided with the positive EMG findings or the positive discogram results, which correlate with the initial MRI of May 25, 2010 of pathology at L5-S1. The Arbitrator notes that Dr. Phillips does not dispute that Petitioner did indeed sustain a back injury as a result of the work injury of May 15, 2010.

Neurosurgeon, Dr. Michel Malek testified that Petitioner presented for initial consult on April 2, 2012 pursuant to Dr. Kamboj's referral. Petitioner reported "pain in the low back radiating into her right lower extremity with tingling and numbness to about the knee". On physical exam, Waddell's signs were negative, evidence of myelopathy in the upper extremities, positive Hoffman's sign, straight leg raising positive on the right side at about 30 degrees and negative on the left side, Patrick's maneuver was negative, and her sensory and motor exam were otherwise unremarkable. Dr. Malek reviewed an MRI scan from December 23, 2010, records from Dr. Jimenez, an FCE from November 23, 2010, and an IME with Dr. Frank Phillips from November 8, 2011.

Dr. Malek opined that on the date of Petitioner's injury she had a "preexisting underlying degenerative lumbar spine condition at the L5-S1 level that was... asymptomatic..." but as a result of the accident "became symptomatic by aggravation, precipitation, and/or acceleration beyond the natural progression of the disease... and in need of the treatment delivered and recommended".

Dr. Malek disagreed with Dr. Phillips' diagnosis of lumbar sprain, strain, and contusion. Dr. Malek recommended a diskogram at L5-S1, repeating the EMG/NCV, and repeat of the MRI of the lumbar spine. The studies were all performed in April of 2012. Upon review, Dr. Malek noted the EMG/nerve conduction study revealed mild right L5-S1 radiculopathy, the discogram revealed concordant pain at L5-S1, and the lumbar MRI showed desiccation at the L5-S1 level with left paracentral disc protrusion effacing the left sided root. Dr. Malek testified that the discogram confirmed the results of the MRIs, which revealed a posterior disc protrusion at L5-S1, with an annular tear, and the EMG of April 2012 revealed L5-S1 radiculopathy. Dr. Malek testified these diagnostic tests were consistent with the mechanism of Petitioner's lifting injury of May 15, 2010, resulting in her current condition of ill-being and the need for the lumbar fusion. Dr. Malek further testified that she reviewed the actual MRI films and that in her opinion, the injury of May 15, 2010 caused Petitioner's pre-existing condition to become symptomatic and accelerated her need for medical treatment, including the recommended fusion.

Based upon the above, and the record taken as a whole, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the work injury on May 15, 2010. This decision is based upon Petitioner's credible testimony, he consistent histories Petitioner provided to treating physicians, the course of medical treatment, as well as the credible opinions of treating physicians Dr. Malek, Dr. Maly and Dr. Jimenez. The Arbitrator the testimony of Dr. Malek to be more persuasive than those offered by Respondent's Section 12 examining physician, Dr. Phillips.

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

Based upon the Arbitrator's findings that Petitioner did sustain an accidental injury arising out of and in the course of her employment with Respondent, and that her condition of ill-being is causally related to the injury, and after review of Petitioner's medical treatment and expenses, the Arbitrator finds the treatment provided was reasonable and necessary. Respondent is liable

for Petitioner's medical expenses in the amount of $129,262.66, per the applicable fee schedule, as follows:

Facility Name	Total Charge	Balance
Central IL Radiology Assistants *In collections with TH Professionals*	$543.00	$543.00
EPMG of Illinois *In collections with Convergent Healthcare Recoveries*	$5,605.00	$68.40
Riverside Health System *Creditors Collection Bureau, Inc.*	$616.00	$396.35
Provena Medical Group *In collections with MiraMed Revenue Group*	$96.00	$96.00
Dr. Michel Malek	$62,294.00	$62,294.00
Dr. Bassam Osman, M.D.	$4,007.00	$4,007.00
Resurrection Heath Care	$93,508.00	$7.30
Blue Cross Blue Shield of IL	$1,320.00	$360.60
American Surgical Assistants	$44,299.20	$44,299.20
ATI Physical Therapy	$2,679.30	$2,679.30
IL Department of Healthcare & Family Services	$14,511.51	$14,511.51
Total:	**$229,479.01**	**$129,262.66**

What temporary benefits are in dispute?

Petitioner claims that she was temporarily totally disabled from May 16, 2010 through March 17, 2014, for a period of 200-2/7 weeks. Respondent paid benefits from May 16, 2010 through November 15, 2011, and terminated benefits thereafter based upon Dr. Phillips' report. Having determined that Petitioner's current condition of ill-being is causally related to the injury of May 15, 2010, the Arbitrator finds the Petitioner was temporarily totally disabled from May 16, 2010 through March 17, 2014 as a result of her low back injury, at which time she reached maximum medical improvement.

Based upon the above, the Arbitrator finds that Petitioner is entitled to benefits from May 16, 2010 through March 17, 2014, a period of 200-2/7 weeks, for a total of $77,973.23. Respondent is entitled to a credit for TTD benefits paid in the amount of $32,784.34.

What is the nature and extent of the injury?

The accident occurred on May 15, 2010 prior to the amendments to the Workers' Compensation Act for determining the nature and extent of injuries for accidents occurring on and after September 1, 2011.

The Arbitrator concludes that as a result of the May 1, 2010 work injury, Petitioner sustained a disc protrusion at L4-5 with an annular tear resulting in lumbar radiculopathy. Considering the record as a whole and Petitioner's testimony, the Arbitrator concludes she suffered 35% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

In support, the Arbitrator notes that Petitioner underwent conservative medical treatment, including medications, physical therapy, injections, blocks, and radiofrequency ablation. Ultimately, the conservative treatment failed and Petitioner underwent a lumbar fusion at L5-S1 by Dr. Malek. After undergoing a course post-operative physical therapy, Petitioner underwent a functional capacity evaluation at ATI that revealed that she was capable of performing work at the light to medium physical demand level, which was followed by Dr. Malek, who released her to return to work with permanent light duty restrictions. Petitioner still has the hardware from the fusion in her back.

Petitioner was unable to return to work for Respondent or her former occupation as a caretaker due to her permanent light duty restrictions. Petitioner sought and found alternative employment at the Circle K on May 5, 2014, as a cashier earning $9.00 per hour, and was currently the manager for Circle K, earning $12.25 per hour, working 50 hours per week.

Considering the record as a whole and Petitioner's loss of trade as a caregiver, the Arbitrator awards the Petitioner 35% loss of use of the person as a whole pursuant to section 8(d)2 of the Act, or 175 weeks at $350.38 per week, which equates to $61,316.50.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC036884
Case Name	STOVER, MELISSA S v. ST OF ILLINOIS-MURRAY
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b) REMANDED ARBITRATION
Decision Type	Commission Decision
Commission Decision Number	21IWCC0517
Number of Pages of Decision	17
Decision Issued By	Maria Portela, Commissioner, Christopher Harris, Commissioner

Petitioner Attorney	James Ruppert
Respondent Attorney	Kenton Owens

DATE FILED: 10/14/2021

/s/*Maria Portela, Commissioner*
Signature

DISSENT

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MELISSA S. STOVER,

Petitioner,

vs. NO: 18 WC 36884

STATE OF ILLINOIS/
MURRAY DEVELOPMENTAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b) of the Act by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective treatment, and temporary total disability (TTD) benefits, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission makes one clarification, however – it should be noted that Petitioner underwent a C4-5 interlaminar epidural steroid injection (ILESI) with Dr. Helen Blake on June 25, 2019, and not June 5, 2019, as indicated in the Arbitrator's Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 28, 2020 is hereby amended as indicated above and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

IT IS 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.

October 14, 2021

CAH/pm
D: 10/7/2021
052

Maria E. Portela
Maria E. Portela

Marc Parker
Marc Parker

DISSENT

I respectfully dissent from the Majority decision and instead find that Petitioner's current condition of ill-being as to her cervical spine is not causally related to the August 4, 2018 work accident. Respondent's Section 12 examiner, Dr. Robert Bernardi, believed that the work accident may have caused a myofascial sprain/strain, but that any symptoms would have subsided within a matter of days. I find Dr. Bernardi's opinions more persuasive and consistent with the evidence in the record – especially when compared to the seemingly radical alternative proposed by Petitioner's physician, Dr. Matthew Gornet. I further find compelling that while Petitioner reported facial/jaw and neck pain at the emergency room on August 4, 2018 and later to her primary physician on August 6, 2018, the arbitration record was void of further complaints, symptoms, or treatment related to the cervical spine until November 2018.

Petitioner consulted with Dr. Gornet, a board-certified orthopedic surgeon, on April 8, 2019. Dr. Gornet testified that Petitioner's examination was non-focal, she was stable on flexion/extension, and x-rays revealed no evidence of disc degeneration. Dr. Gornet also ordered an MRI of the cervical spine which Petitioner completed on June 13, 2019. The results indicated a small, right-sided protrusion at C3-4 and a small disc bulge at C4-5 in the midline with protrusions extending towards the foramina. On the left at C4-5, there was minimal encroachment of the foramen without root impingement – larger on the right side. Centrally, there was no cord compression or significant stenosis. There was a small questionable protrusion at C6-7 in the far left foramen. Dr. Gornet found that Petitioner was neurologically normal but with small herniations present. He recommended treating all four cervical levels from C3 to C7 with disc replacement surgery.

Although Dr. Gornet testified that Petitioner, who was 35 years old on the accident date, had a fairly young, healthy neck, and that "No one wants to operate on someone like this . . . ", he felt that this was Petitioner's only option after she failed conservative treatment by way of two cervical injections. (PX1, pgs. 18-19).

Dr. Bernardi examined Petitioner on December 3, 2019 and stated that the cervical spine was normal. Similar to Dr. Gornet, Dr. Bernardi found no evidence of radiculopathy. Dr. Bernardi stated that the only objective abnormality on her neurological examination was asymmetry between her triceps reflexes. He believed this could be due to irritation of the left C7 nerve root, but that Petitioner's complaints were entirely inconsistent with left C7 radiculopathy. Petitioner did not have weakness in her left C7 innervated muscles, and this abnormality did not correlate with Petitioner's cervical CT scans or MRI.

Dr. Bernardi's impression of the cervical MRI was that the axial images gave the impression of slight uncovertebral joint disease in the upper cervical spine. He believed it was artifactual and due to a slight rotation of Petitioner's head. There may have been mild, uncovertebral disease in the mid-cervical area. There was no central or foraminal stenosis at any level and there were no acute abnormalities. Dr. Bernardi testified that the MRI did not reveal anything post-traumatic. He opined the MRI was essentially normal.

Dr. Bernardi acknowledged Petitioner's reported complaints of neck pain at the onset. The August 4, 2018 emergency room record stated that examination of Petitioner's neck demonstrated normal range of motion and tenderness over the left side of the neck and midline. A CT scan of the cervical spine was completed at the hospital, and revealed C1 through T1 were intact, vertebral body heights were normal, and paraspinal soft tissues were unremarkable. Petitioner was diagnosed with a neck strain. Petitioner's follow-up visit with her primary care physician, Dr. William Huffstutler, on August 6, 2018, indicated that Petitioner had no real dizziness or headaches. Petitioner did have left posterior cervical pain and left trapezius pain. Examination of the cervical spine specifically demonstrated spasm and tenderness in the posterior cervical spine and left trapezius area.

There was no further evidence related to the cervical spine until November 30, 2018 when Petitioner presented to the emergency department of Crossroads Community Hospital. Petitioner completed a CT scan of the cervical spine on November 30, 2018 which revealed no fracture or subluxation malalignment. There were mild degenerative spondylosis changes with minimal disc bulging at C3-4, C4-5, C5-6 and C6-7. There was no protrusion, canal or neural foraminal stenosis.

Dr. Bernardi diagnosed Petitioner with mild degenerative disc disease (spondylosis), neck pain and non-radicular bilateral arm numbness of uncertain etiology. Dr. Bernardi stated that he did not have an adequate explanation for Petitioner's neck and arm complaints and was unable to causally relate her condition to the August 4, 2018 work accident. He found only minor and degenerative changes on Petitioner's CT scans and MRI. During cross-examination, Dr. Bernardi

testified that he did not see any annular fissures or tears on Petitioner's MRI. Dr. Bernardi did not agree that the MRI showed herniations present in Petitioner's cervical spine. Dr. Bernardi opined that Petitioner did not need additional diagnostic testing or treatment and she was not a candidate for surgery.

Dr. Bernardi testified that he did not believe Petitioner sustained the kind of accident that would cause chronic neck pain. He further testified that it was unlikely that Petitioner had injured four levels in her cervical spine from this one incident. Dr. Bernardi noted that for about four months there was no mention of neck complaints in the medical records. He also opined that it was difficult to see someone, such as Petitioner, who needed a four-level disc replacement for incapacitating neck pain, have a gap in treatment for that duration. Dr. Bernardi's opinions with respect to causation for Petitioner's cervical spine condition, as well as the need for additional treatment, are consistent with the medical evidence which was either minimal or insignificant.

With the foregoing findings, both clinically and the diagnostic imaging, together with the medical testimony in evidence, I find Dr. Bernardi's opinions persuasive. Not only do I find Petitioner's current neck condition to be unrelated to the August 4, 2018 work accident, but I find that the recommended four-disc replacement surgery to be unreasonable and unnecessary under Section 8(a) of the Act. I therefore respectfully dissent from the Majority decision.

Christopher A. Harris
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0517
NOTICE OF 19(b) ARBITRATOR DECISION

STOVER, MELISSA S Case# **18WC036884**
Employee/Petitioner

ST OF IL/MURRAY DEVELOPMENTAL CENTER
Employer/Respondent

On 12/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

5274 HASSAKIS & HASSAKIS PC
JAMES M RUPPERT
206 S 9TH ST SUITE 201
MT VERNON, IL 62864

0558 ASSISTANT ATTORNEY GENERAL
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0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
801 S 7TH ST
SPRINGFIELD, IL 62794

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

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

DEC 28 2020

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

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Melissa S. Stover
Employee/Petitioner

v.

State of Illinois/Murray Developmental Center
Employer/Respondent

Case # **18-WC-36884**

Consolidated cases: **None**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Collinsville, Illinois**, on **September 29, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

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

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

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

F. [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, **August 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 $**34,379.80**; the average weekly wage was $**661.15**.

On the date of accident, Petitioner was **35** years of age, respectively, ***married*** with **3** dependent children.

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

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

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

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's group exhibit 10, as provided in §8(a) and §8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Respondent shall further hold Petitioner harmless for any and all subrogation claims asserted or to be asserted by Blue Cross Blue Shield of Illinois.

Respondent shall authorize and pay for the treatment recommended by Dr. Matthew Gornet, including, but not limited to, a four-level disc replacement surgery.

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

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

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

Signature of Arbitrator

12/14/20
Date

DEC 28 2020

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

MELISSA S. STOVER,)
)
Employee/Petitioner,)
)
v.) **Case. No. 18-WC-36884**
)
STATE OF ILLINOIS/MURRAY)
DEVELOPMENTAL CENTER,)
)
Employer/Respondent.

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on September 29, 2020 pursuant to Section 19(b) of the Act. The issues in dispute are causal connection, medical bills, and prospective medical care with respect to Petitioner cervical spine. The parties stipulate that Petitioner's TMJ injury is compensable under the Act. All other issues have been stipulated.

TESTIMONY

Petitioner was 35 years old, married, with three dependent children at the time of accident. The parties agree that on August 4, 2018, Petitioner was employed as a mental health technician at Murray Developmental Center when she was punched with a closed fist in the left side of her face by a combative resident. Petitioner described the impact of the punch as fast and hard and her head went back from the punch. Petitioner testified she felt immediate left-sided jaw and neck pain and she is currently scheduled to undergo jaw surgery. Petitioner stated that when she first saw Dr. Huffstutler her jaw was bothering her more than her neck. Petitioner also testified that when she initially started treating with Dr. Huffstutler she believed her jaw was causing her neck pain as Dr. Huffstutler told her TMJ can cause neck pain.

Petitioner testified she has constant neck pain/achiness, numbness in her left arm that comes and goes, and severe and frequent headaches. Petitioner admitted she has suffered headaches since 2013 and was taking Excedrin before her accident. She testified that she took Excedrin before the accident and it would decrease her headache symptoms. She stated that since the accident Excedrin does not alleviate her headaches and she now takes over-the-counter Tylenol. Petitioner testified that prior to her accident her headaches were in the back of her skull but now they are in the frontal lobe.

Petitioner testified that she reported to the emergency room in March 2018 with neck and left shoulder symptoms. She thought her symptoms were caused by pneumonia or moving furniture which is stated in her prior medical records. She stated her symptoms resolved within a few days of the emergency room visit and she did not experience any neck symptoms again until her 8/4/18 accident. She testified she never had neck pain prior to March 2018 and never had numbness in her left arm prior to her accident in August 2018.

She is currently treating with Dr. Gornet who has recommended cervical disc replacement surgery. She continues to take medication as prescribed by Dr. Gornet and uses a neck pillow for sleeping. Petitioner testified she wants to undergo the surgery recommended by Dr. Gornet because she wants to get back to work and get her life back.

On cross-examination, Petitioner acknowledged that after being punched she reported neck pain to Dr. Huffstutler that she experienced while sitting in traffic. Petitioner testified she had numbness in both arms, but mainly her left arm. Petitioner stated she was off work due to her jaw and spine issues. She has received cervical injections that provided minimal, temporary relief.

MEDICAL HISTORY

Petitioner filled out a notice of injury form that was consistent with her testimony as to accident and injury. A Supervisor's Report of Injury was prepared on the date of Petitioner's accident that was also consistent with Petitioner's testimony. Several witness statements were completed by Petitioner's co-workers, all of which were consistent with Petitioner's testimony and incident reports. Petitioner's co-worker, Lisa McDonald, specifically stated that Petitioner's "head went back" after the resident punched her in the face. Respondent's on-site nurse examined Petitioner shortly after her injury and noted complaints of "headache, neck ache, and pain to cheek bone." The nurse instructed Petitioner to seek emergency care.

Petitioner presented to the emergency department at SSM Health St. Mary's Hospital on 8/4/18 with complaints of left-sided neck and facial pain and limited range of motion of her jaw. Petitioner had tenderness over the left side of her neck and midline and tenderness over her left zygomatic arch and TMJ during examination. It was noted Petitioner was unable to open her mouth and could barely move her jaw. CT scans of her face, brain, and cervical spine were unremarkable. She was diagnosed with facial contusions and a cervical strain and prescribed Norco, Flexeril, Naproxen, and Zanaflex.

Petitioner followed up with her family doctor, Dr. William Huffstutler, on 8/6/18 and complained she was unable to open her jaw. Petitioner reported 10 out of 10 pain in her left facial area as well as significant left posterior cervical pain and left trapezius pain. Dr. Huffstutler's physical examination showed spasm and tenderness in the posterior cervical spine and left trapezius area, as well as swelling and tenderness in the left maxillary area and left TMJ. Dr. Huffstutler instructed Petitioner to work on increasing her jaw and neck range of motion. Dr. Hufftstutler prescribed Norco, Baclofen, and Gabapentin with the latter being due to concern there was a neuropathic component to her symptoms. On 8/8/18, Petitioner underwent mandible x-rays ordered by Dr. Huffstutler that were unremarkable.

On 8/10/18, Petitioner called Dr. Huffstutler complaining of increasing jaw symptoms despite following his treatment recommendations. Dr. Huffstutler referred Petitioner for an ENT evaluation with Dr. Jacques Papazian. Petitioner was evaluated by Dr. Papazian on 8/17/18 for her jaw issues, but Dr. Papazian did not treat her neck issues. Petitioner returned to Dr. Huffstutler on 8/20/18 and he referred her to an oral surgeon for jaw/TMJ complaints and kept her on Norco, Baclofen, Flexeril, and Gabapentin. Dr. Huffstutler also prescribed a Medrol Dosepak.

Petitioner followed up with Dr. Huffstutler on three occasions in October 2018 and it was noted Petitioner was having difficulty finding an oral surgeon that would accept payment under the Act and that she had increasing headaches. Dr. Huffstutler replaced her Norco with Tramadol, increased the dosage of Gabapentin, prescribed Pamalor for her headaches, and prescribed a Prednisone taper.

On 11/7/18, Petitioner returned to the emergency department at SSM Health St. Mary's Hospital due to increased facial pain. A CT scan of her facial bones was obtained and was unremarkable. Petitioner was discharged and instructed to follow-up with Dr. Huffstutler. Dr. Huffstutler reexamined her on 11/12/18 for facial pain and secondary headaches. Dr. Huffstutler noted Petitioner was only able to eat soft foods and she secured an appointment with an oral surgeon. Dr. Huffstutler kept her on the medication regimen of Tramadol, Zanaflex, and Gabapentin.

On 11/29/18, Petitioner called Dr. Huffstutler's office due to increased symptoms and she was instructed to go to the emergency department. Petitioner presented to Crossroads Community Hospital complaining of intermittent neck pain after being punched at work that had become more constant in the last five days. A physical examination revealed limited range of motion and tenderness of the cervical spine. A CT scan of her cervical spine and head were ordered and were unremarkable. Petitioner was ordered to follow up with her family doctor and an orthopedic surgeon.

Petitioner returned to Dr. Huffstutler on 12/5/18 for jaw and neck pain. Dr. Huffstutler noted increased neck pain due to turning her head while driving and that "rarely" she would have pain going down her left arm. Dr. Huffstutler continued to recommend motion exercises and prescribed Gabapentin and Norco. Dr. Huffstutler also noted that her orthopedic surgeon appointment had not yet been scheduled.

Dr. Huffstutler examined Petitioner on 1/22/19 for cervical spine and jaw symptoms. Dr. Huffstutler noted persistent neck pain, with numbness down her arms. Dr. Huffstutler advised Petitioner to treat with an oral and orthopedic surgeon. On 2/21/19, Dr. Huffstutler referred Petitioner to Dr. Matthew Gornet for evaluation. Petitioner presented to Dr. Gornet on 4/8/19 at which time Petitioner exhibited neck pain, headaches, pain in her trapezius muscles, left upper arm pain, and numbness in her left arm. Petitioner provided a consistent history of accident. Dr. Gornet noted Petitioner had prior neck symptoms in March, 2018 after lifting furniture and she had headaches before her injury. Dr. Gornet further noted there was a question of whether her prior neck symptoms in March, 2018 were caused by lifting furniture or due to pneumonia. Dr.

Gornet documented that whatever caused her neck pain in March, 2018, these symptoms quickly resolved and Petitioner reported no neck symptoms leading up to her work accident in August 2018. Dr. Gornet recorded that Petitioner's headaches following her accident were different as they were more frequent and severe and involved her neck. Dr. Gornet's physical examination showed decreased left biceps strength. X-rays were unremarkable. Dr. Gornet wanted to have Petitioner undergo an MRI that day but the machine was inoperable. Dr. Gornet's working diagnosis was potential aggravation of an underlying condition.

Petitioner returned to Dr. Gornet on 6/13/19. A cervical MRI was performed that revealed central annual tears at C5-6 and C6-7 and disc herniations at C3-4, C4-5, C5-6, and subtly at C6-7. Dr. Gornet prescribed Celebrex and Cyclobenzaprine as an alternative to pain medication. Dr. Gornet recommended cervical injections. On 6/5/19, Dr. Helen Blake performed an interlaminar epidural steroid injection at C4-5. Dr. Blake performed the same procedure at C5-6 on 7/9/19. Petitioner returned to Dr. Gornet on 8/29/19 and reported some relief from the injections, but she continued to have daily headaches, axial neck pain, and symptoms into her left arm. Dr. Gornet opined all four levels would have to be treated and he continued her on Celebrex and Flexeril.

On 12/3/19, Petitioner was evaluated by Dr. Robert Bernardi pursuant to Section 12 of the Act. Dr. Bernardi documented a consistent history of present illness and recorded that Petitioner did not have any prior significant instances of neck pain or care for her cervical spine. He noted her current complaints were bilateral posterior neck pain. Dr. Bernadi also recorded Petitioner had bilateral circumferentially upper extremity numbness as well as numbness in all fingers in both hands, left worse than right. Dr. Bernardi reviewed all of Petitioner's medical records as well as multiple injury reports. Dr. Bernardi did not detect any signs of symptom magnification or malingering. He did not find tenderness about the cervical spine or limitations in her Petitioner's shoulder. Dr. Bernardi reviewed the cervical MRI and opined it showed minor degenerative changes. Dr. Bernardi diagnosed mild degenerative disc disease, neck pain, and non-radicular bilateral arm numbness of uncertain etiology.

Dr. Bernadi opined he could not relate Petitioner's current neck and upper extremity complaints to her 8/4/18 work accident. Dr. Bernardi opined the MRI did not reveal any findings that were acute, post-traumatic, or pathological. Dr. Bernardi acknowledged that her accident could have caused a strain. Dr. Bernardi also commented that the lack of neck complaints in Petitioner's medical records following the 8/6/18 appointment until she saw her oral surgeon on 12/18/18 was supportive that her injury was a strain. Dr. Berandi also highlighted perceived inconsistency in Petitioner's medical records concerning her upper extremity symptoms. Dr. Bernardi opined that all of her care to date, except for the second CT scan, was reasonable and necessary care. Dr. Bernadi concluded that Petitioner did not require further restrictions or treatment and she was at maximum medical improvement for her cervical spine condition as of 6/13/19.

Petitioner last saw Dr. Gornet prior to arbitration on 2/27/20. He continued to opine that her current symptoms were related to being punched at work on 8/4/18 and that Petitioner suffered disc injuries at C3-4, C4-5, C5-6, and C6-7. Dr. Gornet reviewed Dr. Bernardi's IME report and disagreed as to whether axial neck pain should be treated surgically. Dr. Gornet stated

that his treatment recommendations were supported by peer-reviewed publications and that with appropriate treatment, patients with axial neck pain do just as well as those that have radiculopathy. Dr. Gornet agreed with Dr. Bernardi that Petitioner's symptoms were generally not radicular in nature. Dr. Gornet was confident he could help Petitioner's symptoms improve substantially and get her back to work full duty.

Dr. Gornet testified by way of evidence deposition on 3/12/20. Dr. Gornet's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Dr. Gornet testified he is a board-certified orthopedic doctor devoted to spine surgery for the last 27 years performing between 5 to 10 surgeries per week. Dr. Gornet testified he has been specially trained to interpret radiographic imaging and does so every day in his practice. Dr. Gornet testified that he writes papers that are regularly published in medical journals with respect to spine care, speaks/lectures on the field of spine care and has been performing cervical disc replacements for the last 12 to 13 years. Dr. Gornet testified that he reviewed all of Petitioner's medical records following the 8/4/18 accident, medical records from SSM Health St. Mary's Hospital that pre-dated the accident, Dr. Bernardi's IME report, and the incident reports concerning Petitioner's injury.

Dr. Gornet testified that an annular tear is a tear of the disc and that Petitioner had not only annular tears at C5-7, but also herniations at C3-7. Dr. Gornet opined that his findings at C3-7 were related to the 8/4/18 accident. Dr. Gornet explained that annular tears are only caused by an acute event and that disc degeneration only makes a disc more susceptible to annular tears. Dr. Gornet testified that Petitioner really had no degeneration so there was nothing to associate with the disc tears/herniations except the 8/4/18 incident. Dr. Gornet further testified that Petitioner's symptoms in her neck and upper extremity and the proposed surgery at C3-7 were causally related to her work accident because the mechanism of injury was consistent with the type of mechanical energy that causes injuries that Petitioner sustained.

Dr. Gornet testified he recommends a four-level disc replacement surgery at C3-7. Dr. Gornet opined that the proposed surgery was reasonable and necessary because it was Petitioner's only treatment option, with the other option being that she become an unproductive member of society that heads toward disability. Dr. Gornet opined surgery would get Petitioner back to work without restrictions. Dr. Gornet testified that Petitioner's injuries are difficult to treat because no one wants to operate on a young person's neck; however, Petitioner has disabling neck pain and headaches that affect all aspects and quality of life so he has a choice of having a young disabled person or treat her condition. Dr. Gornet stated that patients with axial neck pain and headaches do very well with surgical intervention and that this is supported by peer reviewed publications. Dr. Gornet explained that he wants to perform surgery at all four levels because the predictive factors for a successful surgery is to treat all levels that have affected pathology. Dr. Gornet testified that the literature reflects instances where surgeries would only address the level where there was a large herniation and that the patient would still have axial neck pain because the smaller herniations were left untreated. Dr. Gornet also testified that he and Dr. Bernardi disagree when it is appropriate to surgically treat patients in that Dr. Bernardi will only provide care to patients that have radicular symptoms originating from the cervical or lumbar spine, while Dr. Gornet will provide care for patients having purely neck or back pain without radicular symptoms when it is appropriate. Dr. Gornet testified it is not

necessary to have a neurological deficit to be a candidate for surgery and that Petitioner did not have a significant cervical neurological deficit in his opinion.

Dr. Gornet testified he did not observe Petitioner display any signs of symptom magnification or malingering and her reported symptoms were consistent with the objective findings he saw on MRI. Dr. Gornet testified that the lack of notations concerning Petitioner's neck complaints between August and November 2018 was likely due to her care providers being focused on her facial/TMJ care. Dr. Gornet testified about the March, 2018 visit to SSM Health St. Mary's Hospital in that his review of the records indicated she was suffering from a pneumonia like issue in her left lung which could explain the symptoms she was having in her neck, left shoulder, and chest when she presented for care. Dr. Gornet opined that all of Petitioner's care to date was reasonable, necessary, and causally related to her 8/4/18 accident.

On cross-examination, Dr. Gornet acknowledged Petitioner had an issue with headaches before her accident and she had taken medication for same since 2013. Dr. Gornet stated group health insurance is not allowing three or four-level disc replacements because no FDA clinical trials have been done. Dr. Gornet explained that 95-98% of medicine is outside of FDA clinical trials, making such care "off-label usage". Dr. Gornet made a comparison to mitigating the spread of the coronavirus in that the literature tells us that hand washing and social distancing work to prevent the spread but there is no FDA clinical trial stating the same. Dr. Gornet testified that if Petitioner did not reduce her smoking to one-half pack a day he would not operate. On re-direct examination, Dr. Gornet testified he has performed hundreds of three and four level disc replacement surgeries.

Dr. Bernardi testified by way of evidence deposition on 4/3/20. Dr. Bernardi's testimony was consistent with his IME report and he reaffirmed the opinions contained therein. He testified he is a board-certified neurosurgeon that specializes 100% in spinal surgery and he performs between 5 to 9 surgeries per week. Dr. Bernardi testified he does not perform disc replacement surgery. Dr. Bernardi testified that Dr. Gornet recommended Petitioner undergo surgery for axial neck pain. Dr. Bernardi testified that Petitioner's 6/13/19 cervical MRI was an essentially normal study, except for some very mild degeneration, with no findings of acute or post-traumatic injury. Dr. Bernardi testified his physical examination was essentially normal except the left triceps was weaker compared to the right. Dr. Bernardi acknowledged that a punch to the face could cause a neck injury but opined it was not the kind of accident he would expect to cause chronic neck pain. Dr. Bernardi opined it was unlikely Petitioner injured all four discs in her neck from the punch as it stretched the limits of plausibility as usually only one disc is injured from trauma. Dr. Bernardi testified it was hard to see how a person needing a four-level disc replacement could go months without getting care for same in reference to the period August through November 2018 when there were no notations of neck care or symptoms. Dr. Bernardi testified the FDA has not approved four-level disc replacements, nor has any medical or surgical society approved surgery as a treatment option for axial neck pain.

On cross-examination Dr. Bernardi agreed that reasonable doctors can disagree in terms of diagnoses and course of care. Dr. Bernardi testified it is necessary to have nerve root contact or compression for disc replacement surgery to be a reasonable care option. Dr. Bernardi acknowledged that Petitioner reported neck pain immediately following her accident, which is

reflected in her medical records and incident reports. Dr. Bernardi acknowledged that medical providers will often focus on an injury they believe to be most significant. Dr. Bernardi stated he knew Petitioner was using a cervical pillow for sleep and a cervical traction device. Dr. Bernardi testified he had no reason to disagree that the punch dislocated Petitioner's jaw. Dr. Bernardi admitted he did not have the medical records from Crossroads Community Hospital other than the CT scan report. He further stated he did not have Dr. Huffstutler's medical records from 12/5/18. Dr. Bernardi testified her could not opine whether Petitioner had longstanding or persistent neck pain prior to 8/4/18 and he found Petitioner to be credible.

CONCLUSIONS OF LAW

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

Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill. 2d 469, 397 N.E.2d 834 (1979); *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 96–97, 197 Ill.Dec. 502, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 66 Ill.Dec. 347, 442 N.E.2d 908 (1982).

When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Comp. Comm'n*, 371 Ill. App. 3d 882, 864 N.E.2d 266, 272-273 (2007). Accidental injury need only be a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 797 N.E.2d 665, 672 (2003) (emphasis added). Even when a preexisting condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 797 N.E.2d 665 (2003). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Indus. Comm'n*, 359 Ill.App.3d 582, 834 N.E.2d 583 (2005).

Employers are to take their employees as they find them. *A.C.& S. v. Indus. Comm'n*, 304 Ill.App.3d 875, 710 N.E.2d 837 (1999) citing *General Electric Co. v. Indus. Comm'n*, 89 Ill.2d 432, 433 N.E.2d 671, 672 (1982). The law is clear that if a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 37 Ill.2d 123, 227 N.E.2d 65, 67-68 (1967); see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 66 Ill.2d 234, 362 N.E.2d 339 (1977). A compensable aggravation occurs when a claimant's need for surgery is accelerated. *Judith Wheaton v. State of Illinois/Choate Mental Health Center*, 13 I.W.C.C. 0467; *Bowman v. Gateway Reg'l Med. Ctr.*, 14 I.W.C.C. 1022; *Clutterbuck v. UPS*, 15 I.W.C.C. 0046; *Howard v. St. Clair Hwy. Dept.*, 16 I.W.C.C. 0187, *modified* 16 MR 106.

The Arbitrator finds Petitioner's current condition of ill being is causally related to the accident that occurred on August 4, 2018. The medical evidence supports that Petitioner's neck, left shoulder, and left upper extremity symptoms were essentially asymptomatic prior to 8/4/18, with the exception of the March 2018 emergency care visit. There is no evidence to contradict that Petitioner's neck symptoms resolved within a few days following the March 2018 visit. There is no evidence to suggest Petitioner was actively treating for neck or left upper extremity issue leading up to her work injury. Immediately after her injury, Petitioner began to complain of neck pain and continued to seek treatment for same. The Arbitrator notes that Petitioner's immediate focus was on treating her jaw symptoms as she was not able to open her mouth and was reduced to eating soft foods following the accident. It is not unexpected that Petitioner did not treat for her neck symptoms from August 7, 2018 through November 28, 2018 as Petitioner's jaw injury took predominance in terms of care as it was more symptomatic in the early stages of Petitioner's care. Both Dr. Gornet and Dr. Bernardi acknowledged it is a common occurrence where one injury is overlooked while the more symptomatic injury is being treated.

Dr. Gornet and Dr. Bernardi agreed Petitioner sustained an injury from being punched but disagree as to the extent of her injury. The Arbitrator finds Dr. Gornet's testimony to be more credible than the testimony of Dr. Bernardi. Dr. Bernardi diagnosed a myofascial strain and neck pain of uncertain etiology. Since Petitioner's symptoms have lasted for more than two years since the date of injury, it makes the diagnosis of strain less likely credible. The punch which Petitioner absorbed must have been of significant force as it dislocated her jaw and requires surgical repair. Petitioner and her co-worker who witnessed the accident stated Petitioner's head snapped back when she was punched. The Arbitrator finds Dr. Gornet's opinion more credible in that this amount of force and the snapping back of Petitioner's head would be significant enough to cause and consistent with a mechanism of injury that would cause a multi-level disc injury. While Dr. Bernardi did not appreciate the herniations or annular tears on Petitioner's MRI, Dr. Gornet and the reading radiologist observed herniations and annular tears at the C3-7 levels. Dr. Gornet opined that the only reasonable explanation for the cervical spine pathology at C3-7 is the etiology of her ongoing cervical and left upper extremity symptoms. There is no evidence to suggest these herniations or annular tears were symptomatic or present prior to 8/4/18.

Despite Petitioner's emergent care in March 2018 for neck pain, there is no evidence Petitioner missed work because of her symptoms and she continued to work full duty without restrictions between March and August 2018, including a significant amount of overtime. There is no evidence that any treatment was recommended for Petitioner's cervical spine prior to her 8/4/18 accident. The Arbitrator finds Petitioner has met her burden of proof and finds Petitioner's current condition of ill-being in her cervical spine is causally related to work accident of August 4, 2018.

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

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

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical

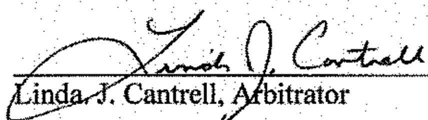
care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13, 229 Ill.Dec. 77 (Ill. 2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001). Specific procedures or treatments that have been prescribed by a medical service provider are "incurred" within the meaning of section 8(a) even if they have not been performed or paid for. *Dye v. Illinois Workers' Comp. Comm'n*, 2012 IL App (3d) 110907WC, ¶ 10, 981 N.E.2d 1193, 1198.

Based upon the above findings as to causal connection, the Arbitrator finds that Petitioner is entitled to medical benefits. Respondent shall therefore pay the expenses contained in Petitioner's group exhibit 10 as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall further hold Petitioner harmless for any and all subrogation claims asserted or to be asserted by Blue Cross Blue Shield of Illinois.

Further, Petitioner has exhausted all conservative means to relieve the effects of her injury without lasting relief and has not reached maximum medical improvement pursuant to the medical records and Dr. Gornet's opinion. Respondent shall authorize and pay for the treatment recommended by Dr. Matthew Gornet, including, but not limited to, a four-level disc replacement surgery.

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



Linda J. Cantrell, Arbitrator

12/14/20
DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	02WC048868
Case Name	MOORE, JACQUELINE (WIDOW) v. CITY OF CREST HILL
Consolidated Cases	02WC048869
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0518
Number of Pages of Decision	24
Decision Issued By	Stephen Mathis, Commissioner, Deborah Baker, Commissioner

Petitioner Attorney	Cameron Clark
Respondent Attorney	John Schmidt

DATE FILED: 10/18/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Charles Moore,

Petitioner,

vs. No. 02 WC 48868

City of Crest Hill,

Respondent.

DECISION AND OPINION ON REVIEW

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

Petitioner's application for adjustment of claim alleges that on February 19, 2001, Petitioner injured his back "[w]hile working." The Arbitrator denied the claim for failure to prove an accident arising out of the employment. The Arbitrator explained that she did not find Petitioner credible. The Arbitrator concluded: 1) Petitioner failed to prove he lifted a garage door on February 19, 2001; 2) Petitioner's early complaints of pain were centered on his right hip and not his back; and 3) "[P]etitioner failed to prove that traversing the slope was an increased risk, or that he injured his **back** as a result of this activity. Therefore, the Arbitrator finds petitioner failed to prove that his claimed back condition resulted from an accident that arose out of his employment with respondent on February 19, 2001." (Emphasis in original.)

The Commission corrects the analysis to bring it in line with the supreme court's subsequent decision in *McAllister v. Workers' Compensation Comm'n*, 2020 IL 124848. The Commission strikes the finding that traversing the slope is not an increased risk. The Commission affirms the Arbitrator's conclusion that Petitioner failed to prove a work accident

involving his back occurred on February 19, 2001, as alleged in the application for adjustment of claim.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 22, 2019, is hereby corrected, 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 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.

October 18, 2021

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

SJM/sk
o-08/18/2021
44

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

DISSENT

I disagree with the majority's decision to affirm the Arbitrator's finding that Petitioner failed to prove he sustained a compensable work accident on February 19, 2001 (case no. 02 WC 48868) and that Petitioner sustained a 60 percent loss of use of the left leg as a result of the stipulated November 14, 2001 work accident (case no. 02 WC 48869). In my view, Petitioner established by a preponderance of the evidence that he sustained a compensable work accident on February 19, 2001; Petitioner's lumbar spine injury is causally related to the February 19, 2001 injury; and Petitioner is entitled to associated medical and temporary total disability benefits ("TTD"). In case no. 02 WC 48869, I would find that Petitioner is entitled to an award of penalties pursuant to section 19(k) and section 19(l), and attorneys' fees pursuant to section 16 as there was no expert opinion or evidence to contradict Petitioner's claim that his left knee injury is causally related to the undisputed November 14, 2001 accident. Finally, I would find that Petitioner is permanently and totally disabled as a result of both his lumbar spine and left knee injuries.

In case no. 02 WC 48868, the Arbitrator found Petitioner's testimony was not credible and stated: "He hesitated with his answers and his memory seemed to conveniently lapse on cross-examination even when asked follow-up questions that he was able to answer on direct exam." I view Petitioner's credibility differently and find that he was credible as his testimony was straightforward, forthright, and clear. The Commission exercises original jurisdiction and is not bound by an arbitrator's findings. *See R & D Thiel v. Illinois Workers' Compensation*

Comm'n, 398 Ill. App. 3d 858, 866, 923 N.E.2d 870, 877 (1st Dist. 2010) (finding that 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 Arbitrator found that Petitioner's "memory seemed to conveniently lapse on cross-examination even when asked follow-up questions that he was able to answer on direct exam." I find that Petitioner's memory was reasonable and credible based on the facts of the case, the age of the case, and the types of questions asked on cross examination. To provide some background and context for this case, the injury at issue occurred in February 2001. Petitioner testified at the arbitration hearing in September 2017, approximately 16 years after the claimed date of injury. Additionally, at the time of the September 2017 arbitration hearing, Petitioner was 70 years old. These are all factors that should be considered when evaluating Petitioner's testimony.

Further, the Arbitrator did not point to any specific examples of when Petitioner was able to answer a question on direct examination, that he was unable to answer on cross examination. In my view, this did not occur. The following are examples of the types of questions Petitioner was asked about his medical treatment on direct examination, during which Petitioner's counsel asked leading questions with respect to medical treatment with no objection from Respondent's counsel:

> Q. Is it correct that you had a follow-up appointment with Dr. Munoz on May 8, 2001?
> A. Yes.
>
> Q. And following that exam, is it correct that Dr. Munoz released you to return to full duty work?
> A. Yes.
>
> ***
>
> Q. Mr. Moore, is it correct that you sought treatment with your family doctor, a Dr. Karcavich, K-a-r-c-a-v-i-c-h?
> A. Yes.
>
> Q. Is it correct that you were initially examined by Dr. Karcavich on May 29, 2001?
> A. Yes.
>
> Q. Is it correct that you had a follow-up appointment on June 6, 2001?
> A. Yes.
>
> Q. Following that exam, Mr. Moore, is it correct that the doctor recommended you undergo an MRI study of your lumbar spine and an EMG study?
> A. Yes. T. 24-25.

In contrast, on cross examination, Petitioner was asked questions about specific diagnoses, testing, and examinations from medical treatment in the 1990s and was unable to remember specific details with respect to numerous medical conditions, even those that were not being claimed as part of the instant workers' compensation claims. Examples of the types of questions asked on cross examination are as follows:

> Q. Do you remember treating for back issues all the way back in 1990 with Dr. Eguro, E-g-u-r-o?
> A. No.
>
> Q. Do you recall treating with him on April 9 of that date, 1990, where you were diagnosed with a cervical spine as well as L5, S1 lumbar spondylolisthesis which the doctor believed was a congenital condition?
> A. No.
>
> Q. Do you recall having to take straight leg raising tests because you were having numbness which traveled down into your foot?
> A. No. T.52-53.
>
> ***
>
> Q. Do you recall undergoing an MRI on March 6, 1996?
> A. No.
>
> Q. Do you recall undergoing a course of physical therapy in 1996 for this condition, for your back condition?
> A. No.
>
> Q. Again on April 20, 1996, do you recall Dr. Caron stating that surgery will be needed at some point in your life due to severe MRI changes?
> A. I can't remember the name of the doctor but this was from – occurred from getting hit between the eyes with the post pounder, and he was referring to my neck. They were working on my neck and my nose. T.57-58.
>
> Q. He is a neurosurgeon, is that correct, Dr. Caron?
> A. I don't recall the doctor.
>
> Q. You do remember seeing a Dr. Karcavich prior to January [sic]19, 2001, correct?
> THE ARBITRATOR: What was that date?
> [Respondent's counsel]: The accident date, February 19, 2001
> THE WITNESS: If that's what my doctor said. I don't recall the dates or anything.
>
> [BY RESPONDENT'S COUNSEL]:
> Q. You also treated – you had surgery on your feet, do you recall that?

You had some metatarsals removed from your foot in 1996?
A. I had work done on my big toe.

Q. And you had surgery in 1996 on your left hand?
A. Yes, I don't recall the date but I had surgery on my left hand. T. 58.

***

Q. Do you recall following up with Dr. Munoz for the left knee injury on October 31, 2000?
A. No.

Q. Do you recall sustaining a rib injury prior to November 14, 2001?
A. I can't match the dates.

Q. This would be before –
A. I had a rib injury when I hit the valve step.

Q. This is back on January 26, 2001. You sought treatment at Provena St. Joseph Medical Center for rib pain when you heard a crack in your chest. You were also there for back pain, spasms when you coughed, do you recall that?
A. I can't recall it. T. 64.

Based on the above, I find that Petitioner's testimony was credible and any inconsistencies in his treatment were benign.

In case no. 02 WC 48868, the Arbitrator found Petitioner failed to prove he sustained a compensable work-related accident on February 19, 2001. I disagree and find Petitioner established by a preponderance of the evidence that he sustained a compensable work accident on February 19, 2001.

In the instant case, Petitioner credibly testified that he felt discomfort in his lower back on February 19, 2001 when he and his coworker, Kaczmarski, were lifting a broken garage door. Later that day, while walking away from the "contact tanks" where he had just checked that there were no blockages which is something he did daily, Petitioner mis-stepped on a sloped, grassy area that led to the tanks and felt an extreme, sharp pain in his lower back. Petitioner's testimony as to the two incidents that occurred on February 19, 2001 was not rebutted by any of Respondent's witnesses. However, even when isolating the history of mis-stepping on a grassy, sloped area while walking back from his daily check of the "contact tanks," Petitioner's claim is still compensable. Again, neither of Respondent's witnesses rebutted Petitioner's testimony about mis-stepping while walking down the grassy slope.

Additionally, the medical records clearly document a history of mis-stepping on a slope. (The Joliet Medical Group records from the date of accident document that Petitioner sustained an injury while walking down an uneven slope; the records from St. Joseph Medical Center dated

May 29, 2001 document both the garage door incident and walking down an incline; the records from Chicago Institute of Neurosurgery dated August 7, 2001 document both the garage door incident and walking down an uneven grade of a hill; the records from Rush Pain Center document the garage door incident and walking down a hill).

The Arbitrator appeared to agree that Petitioner's testimony of mis-stepping on a slope was unrebutted in stating that the issue was "whether Petitioner's miss-step while walking down a slope qualifies as 'an accident' that arose out of his employment." However, the Arbitrator denied Petitioner's claim anyway finding that: (1) the medical records indicate Petitioner injured his right hip and not his lumbar spine; and (2) "traversing the slope was an increase risk." I view the evidence and the law differently.

First, the increased risk analysis is misapplied here. "Injuries resulting from a risk distinctly associated with employment, *i.e.*, an employment-related risk, are compensable under the Act." *Steak 'n Shake v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150500WC, ¶ 35, 67 N.E.3d 571, 578. "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*. *See also*, *McAllister v. Illinois Workers' Compensation Commission*, 2020 IL 124848, ¶ 36 ("'An injury 'arises out of' one's employment if it originates from a risk connected with, or incidental to, the employment, involving a causal connection between the employment and the accidental injury.' A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties.")

Applying *McAllister* to the facts of this case, which the Illinois Supreme Court decided after the Arbitration decision was issued, there is no need to undergo an increased risk analysis. Here, Petitioner walked to the "contact tanks" to check for blockages, which is a task he performed daily as a sewage operator, and while walking away from the tanks on a grassy slope, he mis-stepped and felt a sharp pain in his lower back. Petitioner's lower back injury originated from walking on the grassy slope. Petitioner was required to walk on the grassy slope in order to perform his job duty of checking the contact tanks. Thus, the act of walking on the slope was a risk incidental to Petitioner's employment, establishing that the February 19, 2001 accident arose out of his employment with Respondent.

Secondly, the medical records show that Petitioner reported sustaining an injury to his lower back in addition to his right hip in the initial medical records. The February 19, 2001, medical note from Joliet Medical Group (Dr. Munoz) states that Petitioner injured his right hip, however, it also indicates that Dr. Munoz examined Petitioner's lower back and found tenderness over the right sacroiliac joint and sacral notch with L5-S1 region spasms. Dr. Munoz diagnosed Petitioner with a right hip strain, right sacroiliac joint dysfunction, and a lumbar strain. On February 21, 2001, Dr. Munoz examined Petitioner again and found continued lower back tenderness and stiffness. Dr. Munoz continued to treat Petitioner for the lower back and right hip and right extremity symptoms. On May 8, 2001, Petitioner returned to Dr. Munoz and reported that his right hip and right leg symptoms had resolved, however, he continued to experience numb-

ness in his right toes. On May 29, 2001, Petitioner presented to Dr. Karcavich who diagnosed Petitioner with possible nerve compression in the lumbar spine and recommended that Petitioner undergo a lumbar spine MRI. I find that the medical records document consistent lumbar spine complaints and treatment.

In case no. 02 WC 48868, I find that Petitioner's lower back (lumbar spine) condition and need for lumbar spine surgeries is causally related to the February 19, 2001 accident based on the opinions of Dr. Goldberg, Respondent's section 12 examining physician, Dr. Coe, and Petitioner's treating physicians. I note that Dr. Goldberg was the first section 12 examining physician who opined that Petitioner's lumbar spine condition was causally related to the February 19, 2001 accident. Additionally, Dr. Goldberg opined that if Petitioner's condition worsened after undergoing conservative treatment and an FCE, he would be a candidate for surgery. Respondent did not send Petitioner back to Dr. Goldberg after undergoing the treatment recommended by Dr. Goldberg.

In case no. 02 WC 48869, I find that based on Dr. Coe's opinion (and a chain of events analysis), Petitioner's left knee condition and need for a left knee replacement is causally related to the undisputed November 14, 2001 work accident. I note that Respondent did not obtain a medical expert opinion as to Petitioner's left knee condition

Additionally, I would award all reasonable and necessary medical expenses for the lumbar spine condition (case no. 02 WC 48868) and left knee condition (case no. 02 WC 48868).

With respect to temporary total disability benefits, in case no. 02 WC 48868, I would award temporary total disability benefits as stipulated by the parties on the Request For Hearing Form from November 14, 2001 to January 11, 2002. In case no, 02 WC 48869, I would also award additional TTD from February 20, 2001 to May 8, 2001, February 21, 2002 through April 8, 2002, and from October 29, 2002 through March 3, 2003.

Further, I would find that Petitioner is permanently and totally disabled with respect to both the lumbar spine and left knee conditions based on Dr. Coe's uncontroverted opinion.

Finally, with respect to Petitioner's request for penalties and attorneys' fees, I would award penalties and fees in case no. 02 WC 48869 based on the fact that Respondent denied treatment and benefits for an undisputed accident without obtaining an expert opinion to support its denial of benefits.

For the above reasons, I respectfully dissent.

/s/ *Deborah J. Baker*

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0518
NOTICE OF ARBITRATOR DECISION

MOORE, CHARLES
Employee/Petitioner

Case# **02WC048868**

02WC048869

CITY OF CREST HILL
Employer/Respondent

On 4/22/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.39% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5614 LAW OFFICES OF CAMERON B CLARK
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CHICAGO, IL 60601

1505 SLAVIN & SLAVIN LLC
BRIAN H DRISCOLL
100 N LASALLE ST 25TH FL
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF DU PAGE)

- [ ] 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

Charles Moore
Employee/Petitioner

v.

City of Crest Hill
Employer/Respondent

Case # **02** WC **48868**

Consolidated case: **02** WC **48869**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christine Ory**, Arbitrator of the Commission, in the city of **Ottawa on September 25, 2017 and closed proofs in Wheaton/Elgin on April 6, 2018.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 19, 2001,** 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 **$45,708.00**; the average weekly wage was **$879.00**.

On the date of accident, Petitioner was **53** years of age, **married** with **0** dependent children.

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

Respondent ***does not owe*** for all appropriate charges for all reasonable and necessary medical services for which they are liable.

To date, Respondent has paid $ **0** in TTD and/or for maintenance benefits, and is entitled to a credit for any and all amounts paid.

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

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

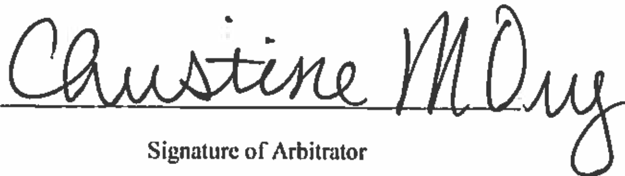
ORDER

Petitioner failed to prove that he sustained accidental injuries that arose out of and in the course of his employment with respondent on February 19, 2001.

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

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

April 18, 2019

Date

ICArbDec p. 2

APR 2 2 2019

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Charles Moore	)
Petitioner,	)
vs.	) **No. 02 WC 48868**
City of Crest Hill	) **(Consolidated with 02 WC 48869)**
Respondent.	)
	)

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

This matter proceeded to hearing in Ottawa on September 25, 2017 and proofs were closed in Wheaton/Elgin on April 6, 2019. The parties agree that on February 19, 2001, the petitioner and respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. They agree that Petitioner's wages, in the year pre-dating the claimed accidents were $45,708.00; and his average weekly wage, calculated pursuant to §10 was $879.00.

At issue in this hearing is as follows:

1. Whether the petitioner sustained accidental injuries that arose out of and in the course of his employment;
2. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
3. Whether respondent is liable for medical expenses.
4. Whether petitioner is due TTD.
5. The nature and extent of injury including whether petitioner is entitled to permanent total disability.
6. Whether petitioner is entitled to penalties and attorney's fees.

STATEMENT OF FACTS

Petitioner testified he was a member of the Army from 1967 to 1969. Petitioner was hired by respondent in 1986. On February 19, 2001, petitioner was employed by respondent as a senior sewage operator. Prior to February 19, 2001, petitioner had no problems with, or treatment to, his low back or right hip. His job duties included the complete maintenance and operation of the sewage plant. He had to lift bags of chemicals that weighed 40 to 60 pounds and raise pumps out of pits when they needed to be cleared. He had to walk at least a mile a day and climb towers that were the equivalent of a four-story building.

On February 19, 2001, petitioner was directed by respondent's superintendent, John Roberts, to lift the broken garage door high enough to remove a dumpster. He was working with co-worker Joe Kaczmarski. After lifting the door, he noticed some discomfort in his back. Thereafter he went to check on the contact tank to make sure there wasn't any blockage. While checking the tank, he miss-stepped as he was going down a grassy slope at a 45-degree angle and felt an extreme sharp pain in his lower back. He reported the incident immediately to John Roberts.

Petitioner was shown a form identified as Employees Report of Injury for Proper Benefit Consideration (Respondent's Exhibit 7). Petitioner indicated he signed it before it was completed. He needed to sign it in order to see a doctor. He was sent by respondent to Joliet Medical Group on February 19, 2001. He was examined by Dr. Munoz and X-rays were taken of his right hip. He continued follow up with Dr. Munoz through May 8, 2001; physical therapy was ordered. He was released to return to work on May 8, 2001.

On May 29, 2001, he sought treatment from his family doctor, Dr. Karcavich. He had a follow up appointment with Dr. Karcavich June 6, 2001; a lumbar MRI and EMG were ordered. He was referred by Dr. Karcavich to Dr. Hurley at CINN. He initially saw Dr. Hurley on August 7, 2001. Dr. Hurley recommended epidural steroid injections and possible lumbar fusion. He received the injections from Dr. Nath at Rush on November 5, 2001. Petitioner continued to work for respondent.

On November 14, 2001 he was working as a senior sewage operator for respondent. Prior to November 14, 2001, he had no problems with his left knee. Petitioner identified a photograph (PX.20) taken after his fall on November 14, 2001. After the incident, he returned to Dr. Karcavich. He obtained a MRI of the left knee. After the MRI, Dr. Karcavich referred petitioner to Dr. Dworsky. He had a follow-up appointment with Dr. Nath on December 7, 2001 and received an epidural steroid injection. He was examined by Dr. Edward Goldberg at Midwest Orthopedics at Rush on January 11, 2002 pursuant to §12.

He was seen by Dr. Dworsky on February 6, 2002 for treatment of his left knee. He followed up with Dr. Dworsky on February 25, 2002, who then recommended physical therapy and kept petitioner off work. He returned to Dr. Dworsky on March 18, 2002, who released him to return to work with restrictions and recommend therapy. He returned to Dr. Dworsky on April 8, 2002 and was released by him to return to full-duty work as it related to his left knee.

Petitioner returned to work, but continued to note discomfort. He noticed pain in his knee in taking the stairs and pain in his back that radiated down his leg.

He was referred by Dr. Nath to Dr. Fessler at CINN for examination of his lumbar spine. He was seen by Dr. Fessler on June 17, 2002, who recommended an updated MRI. Petitioner underwent a functional capacity exam at Health South on July 15, 2002. He obtained the MRI on August 23, 2002 and then followed up with Dr. Fessler on September 4, 2002, who recommended lumbar surgery. On October 13, 2002, Dr. Dworsky administered a steroid injection in the left knee.

Petitioner was examined by Dr. Gary Skaletsky on October 31, 2002 pursuant to §12.

He underwent back surgery by Dr. Fessler on November 4, 2002 at University of Chicago. Thereafter, petitioner returned to Dr. Dworsky, who recommended an update MRI on the left knee; which was done on January 8, 2003. Petitioner followed up with Dr. Fessler on January 29, 2003, who recommended petitioner continue with his care by Dr. Fessler for his left knee condition.

Dr. Dworsky recommended petitioner see Dr. Bush Joseph. Petitioner was seen by Dr. Bush Joseph at Rush on February 14, 2003. Dr. Bush Joseph recommended a total knee replacement. Dr. Nath referred petitioner to knee replacement specialist, Dr. Aaron Rosenberg at Midwest Orthopedics. Petitioner was examined by Dr. Aaron Rosenberg on February 27, 2003; who administered a steroid injection to his left knee and ordered physical therapy. He followed up with Dr. Rosenberg on April 10, 2003 and received updated X-rays of his left knee. Dr. Rosenberg recommended an injection or total knee replacement.

Petitioner sought a second opinion from Dr. John Nikoleit at Elmhurst Orthopedics, who saw petitioner on April 11, 2003 and recommended a total knee replacement and kept petitioner

off work. Petitioner underwent the total knee replacement by Dr. Nikoleit on April 24, 2003 at Elmhurst Hospital. He followed up with Dr. Nikoleit postoperatively and participated in physical therapy. On August 18, 2003, Dr. Nikoleit recommended petitioner see Dr. Koutsky for treatment of his spine.

He saw Dr. Koutsky on August 18, 2003 who recommended a discogram and a MRI; the MRI was done on August 18, 2003 and the discogram was done on September 29, 2003. On October 9, 2003 Dr. Koutsky recommended lumbar surgery and referred petitioner to Dr. Kenneth Heiferman for a neurosurgical evaluation. Petitioner was seen by Dr. Heiferman on November 3, 2003, who recommended a lumbar spinal fusion. Dr. Heiferman recommended petitioner follow up with Dr. Koutsky and also recommended a lumbar CT scan, which was done on November 6, 2003.

Petitioner underwent a lumbar fusion from the L3 through S1 level by Dr. Koutsky at Elmhurst on December 16, 2003. Petitioner had a post-operative MRI on January 3, 2004. Petitioner followed up with Dr. Koutsky on January 26, 2004 and March 8, 2004. Dr. Koutsky advised petitioner to discontinue use of the lumbar brace and begin physical therapy. Petitioner followed up with Dr. Koutsky on April 8, 2004; X-rays were performed. On May 6, 2004, Dr. Koutsky recommended work conditioning, which was done at CINN, followed by an FCE which was done at Brightmore Therapy Center. Petitioner followed up with Dr. Koutsky on October 13, 2004, January 19, 2005 and September 6, 2005. Dr. Koutsky recommended petitioner continue with pain management, including analgesic medications, which petitioner received through the Veterans Administration.

The majority of the treatment petitioner received was through petitioner's group insurance with respondent. Following Dr. Koutsky's surgery, a majority of the pain medication was received through the Veterans Administration.

Petitioner was examined by Dr. Jeffrey Coe on July 10, 2012 at the request of petitioner's attorney.

Petitioner did not receive any temporary total disability from February 20, 2001 through May 8, 2001. Petitioner performed modified work after his November 14, 2001 accident up until his left knee surgery on February 21, 2002. He was off work from February 21, 2002 through April 8, 2002; he was not paid temporary total disability during this period. On October 28, 2002, petitioner was off work due to his back condition. Respondent required petitioner to use his accrued sick and vacation time from October 28, 2002 through March 3, 2003. No temporary total disability was paid. Petitioner has not received any disability benefits from respondent since October 28, 2002. In November, 2003, petitioner was awarded social security benefits.

Petitioner denied sustaining any new injuries to his lower back and right hip since February 19, 2001 or his left knee since November 14, 2001. He continues to take Norco and Morphine from the VA.

Petitioner had not been offered any type of employment with respondent since he left its employ on October 28, 2002. No doctor, which included Dr. Nath, Dr. Nikoleit and Dr. Koutsky has ever released petitioner to return to his pre-injury employment.

He continues to have pain in his left knee and back.

On cross-examination, petitioner denied remembering seeing a Dr. Eguro in 1990 for cervical and lumbar spine issue, or having an EMG, or seeing Dr. Simms for numbness in his toes. He could not recall the name of the doctor, Dr. Pandya, who treated him for carpal tunnel syndrome and did not recall having a left shoulder arthrogram. He did not recall being evaluated by Dr. Barry Lake Fisher on December 13, 1993 relative to a post pounder hitting him in the face.

He did not recall having lumbar X-rays taken at the direction of Dr. Karcavich. He did not recall seeing Dr. Michael Caron or obtaining a CT scan in 1996. He did not recall being told by Dr. Caron he would be surgical candidate based upon an MRI on March 2, 1996. He agreed he had surgery to his foot and to his left hand in 1996.

He did not remember injuring his back on October 22, 1997 when carrying a five-gallon fuel can; or recall seeing Dr. Garbolski at Silver Cross, or Dr. Karcavich, relative to this incident. He did not recall seeing Dr. Munoz on October 27, 1997 for this incident. He denied using a cane for his lumbar pain prior to the January 19, 2001 (sic) accident. He denied being diagnosed with lumbosacral strain with sciatica and joint dysfunction. He did not recall having X-rays in 1997 for the lumbar back. He did not recall the physical therapy recommended by Dr. Munoz.

Petitioner denied he was diagnosed with diabetes in 1999. He stated he was not diagnosed with diabetes until after his heart attack.

He denied that he recalled seeing Dr. Munoz on October 16, 2000, after falling on his left knee and suffering a left knee patella laceration and contusion. He also denied following up with Dr. Munoz on October 31, 2000 for the left knee injury.

Petitioner agreed he injured his rib for which he received treatment at Provena St. Joseph Medical Center on January 26, 2001 for rib pain when he heard a crack after hitting the valve step. He didn't however recall being seen at the same time of back pain and spasms when he coughed.

Petitioner confirmed he reported his back injury to supervisor John Roberts when he returned from the contact tank.

Petitioner agreed he reviewed John Roberts deposition. He denied that he changed his story when he learned that Joe was not with him when he was lifting the door.

Petitioner denied recalling his testimony on direct about treatment by Dr. Munoz, Dr. Hurley or Dr. Goldberg releasing him to return to work. He could not recall any dates he returned to work or undergoing an FCE. He could not recall the dates he saw Dr. Skaletsky or the date of August 6, 2003 when another FCE was performed.

He did not recall that Dr. Koutsky advised him in January of 2004 that he would be at maximum medical improvement within six months after surgery. He did not recall that Dr. Koutsky provided a narrative report for his social security disability. He did not recall that the September 14 and September 15, 2004 FCE indicated he was capable of working at a light medium physical demand. He did not recall specifically following up with Dr. Koutsky in October, 2004 or January, 2005.

Petitioner agreed he was involved in an explosion and fire accident that occurred on his boat in May, 2005, but denied it was near death experience. He agreed he suffered burns, but denied trauma to his body. He admitted he had a traumatic brain injury long ago, but denied he suffered post-traumatic stress disorder after the explosion.

He didn't recall seeking treatment on October 21, 2005 at St. Joseph's Hospital for chest pains. He admitted he had a heart attack.

He denied returning to work after the boating accident or the heart attack.

He did not recall seeking mental health treatment in 2006 at the veterans' hospital.

He denied telling doctors he was repairing boats in Florida.

On redirect, petitioner was certain no doctor had recommend lumbar surgery before the February 19, 2001 accident. Petitioner also indicated his job required him to lift up to 60 pounds and to roll chemicals that weight up to 120 pounds.

Dr. Luis Munoz/Joliet Medical Group Records (PX.1)

These records reflect that on February 19, 2001, petitioner reported to Dr. Munoz that he injured his right hip while walking down an uneven slope at work. The diagnosis was right hip sprain, right SI joint dysfunction and mild lumbar-sacral strain. He followed up on February 21, May 8, 2001 petitioner reported his right hip and right leg was feeling fine. He had reached maximum medical improvement. He was discharged from care and released to return to work.

Dr. Provena St. Joseph Medical Center/Dr. Joseph Karcavich Medical Records (PX.2)

According to these records, petitioner was first seen by Dr. Karcavich on May 29, 2001 with a history of lifting the heavy garage door and feeling a pull in the hip area without pain. It was not until later he was walking down an incline he began feeling pain in the hip. The pain was slowly improving and not interfering in his ability to work. Dr. Karcavich concluded that he had possible nerve compression from his wallet as that was the side he kept his wallet.

The June 19, 2001 lumbar MRI showed generalized disc bulge or broad-based disc protrusion more prominently on the right at L3-4, mild spinal stenosis at L4-L5 and Grade I spondylolysis at L5-S1

These records also included the operative report by Dr. Dworsky, who performed an arthroscopic partial medial meniscectomy and chondroplasty of the medial femoral condyle of the left knee.

Chicago Institute of Neurosurgery Records (PX.3)

The records reflect that petitioner was seen on August 7, 2001 by Dr. Hurley with numbness in toes and pain into right leg. The records recite the lifting door/miss-step on slope incidences. Epidural steroid injections and surgical intervention including fusion at the L5-S1 level. He was kept at full-duty.

Petitioner returned to Dr. Hurley on October 15, 2001 for a referral for the epidural steroid injection.

Rush Medical Center/Dr. Heather Nath Records (PX.4)

Petitioner was seen by Dr. Nath on November 5, 2001. He received epidural steroid injections which reportedly provided no relief. On January 21, 2002, Dr. Nath recommended a FCE.

Joliet Orthopedic and Sports Medicine Center/Dr. Bradley Dworsky Records (PX.5)

Petitioner was seen by Dr. Dworsky on February 6, 2002 due to the injury he suffered to his left knee in November. Dr. Dworsky diagnosed medial meniscal tear. Dr. Dworsky performed arthroscopic partial medial meniscectomy and chondroplasty of the medial femoral condyle of the left knee on February 21, 2002. Physical therapy was prescribed. Petitioner followed up with Dr. Dworsky on February 25, 2002 and March 18, 2002, when he was to continue physical therapy and released to return to light duty work. On April 8, 2002, petitioner reported almost no symptomatology and was released to return to work without restrictions.

The records reflect that on April 22, 2002, petitioner's wife called stating [petitioner fell on his left knee which he had surgery on. Patient c/o limping, pain and mild swelling. Petitioner was advised to ice, elevate and [take] anti-inflammatory. If he had no improvement he was to see the doctor.

On May 1, 2002, petitioner returned advising he fell directly on the left knee two weeks before. The doctor diagnosed a contusion. On October 14, 2002, petitioner returned indicating his knee was swollen and uncomfortable. Dr. Dworsky believed petitioner had degenerative joint disease and suggested a trial of corticosteroid injections.

CINN/Dr. Richard Fessler Records (PX.6)

Petitioner was first seen by Dr. Fessler on June 17, 2002, with the history of lifting door and feeling pain while walking down a slope. The diagnosis was low back pain with right lumbosacral radiculitis.

Petitioner returned on September 4, 2002 after obtaining anther MRI which reportedly showed stenosis at L4,5 with a moderately size disk bulge on the right side. A right sided micro endoscopic discectomy at L4-5 was recommended and performed on November 4, 2002. On January 29, 2003, petitioner's physical therapy was put on hold secondary to his left knee issues.

Health South Medical Clinic/Functional Capacity Assessment July 15, 2002 Report (PX.7)

The FCE reports petitioner could perform light to medium physical demand level. Petitioner's job description provided he must lift 60 pounds on occasion. Therefore, petitioner did not meet the physical demands of the job.

June 18, 2001 Lumbar MRI Report (PX.8)

Included and discussed in PX.2.

CINN August 23, 2002 MRI Report (PX.9)

The diagnosis, according to the MRI report, was bilateral L5 spondylolysis, mild L5-S1 disc bulge, hypertrophic facet changes and Grade I spondylolisthesis with moderate bilateral neural foraminal stenosis, greater on the right; at L4-5 moderate diffuse disc bulge with some degenerative facet change and borderline neural foraminal stenosis, greater on the right; at L3-4 moderate diffuse disc bulge with some hypertrophic facet change and mild spinal stenosis and borderline foraminal stenosis greater on the right; at L1-L2 mild diffuse disc bulge on the left with possible small superimposed left-sided herniation.

Glenwood Medical Imaging January 8, 2003 Left Knee MRI Report (PX.10)

At the direction of Dr. Dworsky, petitioner underwent a left knee MRI on January 8, 2003, which showed a medial femoral bone bruise suprapatellar effusion and joint effusion, edema or hemorrhage surrounding the semimembranosus muscle with no evidence of meniscal injury.

Midwest Orthopaedics/Dr. Charles Bush Joseph February 14, 2003 Report (PX.11)

Dr. Bush Joseph examined petitioner at Dr. Dworsky's request on February 14, 2003. Dr. Bush Joseph diagnosed progressive medial compartment arthrosis of the left knee. He recommended a total knee replacement as opposed to an osteotomy.

Dr. Aaron Rosenberg's Records (PX.12)

Petitioner was seen by Dr. Rosenberg on February 27, 2003 and April 10, 2003 for moderate medial compartment degenerative arthritis; a total knee replacement was recommended.

Dr. John Nikoleit Records (PX.13)

Petitioner was first seen by Dr. Nikoleit on April 11, 2003 and underwent a total knee arthroplasty on April 24, 2003. On August 18, 2003 Dr. Nikoleit referred petitioner to Dr. Koutsky regarding the back issues and kept petitioner off until Mid-October [2003] pending return of petitioner's back specialist who was out of town until then (4).

Dr. Nikoleit authored a letter on April 29, 2003 indicating petitioner underwent a total knee arthroplasty on April 23, 2003 (sic) and would be off work for approximately two to three months for intensive rehabilitation (43). Dr. Nikoleit's records also include a physician's statement of disability on July 30, 2003 indicating petitioner should be able to work as of September 23, 2003 (26).

Dr. Kevin Koutsky/Elmhurst Orthopaedic Associates (PX. 14)

Petitioner was seen by Dr. Koutsky on August 18, 2003 as a referral by Dr. Nikoleit. Dr. Koutsky concluded petitioner had L5-S1 spondylolisthesis and severe degenerative disc disease at L5-S1 and L4-L5. Dr. Koutsky performed a decompression and fusion on December 16, 2003 at the L3 through S1 level. Physical therapy and then work hardening was ordered.

Brightmore Physical Therapy September 13 & 15, 2004 FCE Report (PX.15)

The functional capacity evaluation determined petitioner was functioning at the light physical demand level.

Job Requirements for Senior Water Operator and Senior Sewer Operator (PX.16)

The document provides a description of the jobs petitioner performed for respondent.

Dr. Jeffrey Coe August 8, 2014 Deposition (PX.17)

Dr. Jeffrey Coe, board certified in occupation medicine, testified in behalf of petitioner via deposition. Dr. Coe examined petitioner on July 10, 2012, reviewed medical records and authored a report at petitioner's attorney's request. Dr. Coe discussed all medical records he reviewed (20-49). Dr. Coe performed an examination of petitioner (51-59).

Dr. Coe's diagnosis was degenerative disc disease and degenerative arthritis at the L3 through S1 of the lumbar spine (59) and post left total knee arthroplasty (60). Based upon Dr. Coe's exam of petitioner and review of petitioner's medical records, he believed petitioner's condition of ill-being involving his lumbar spine and left knee were caused by the work accidents of February 19, 2001 and November 14, 2001 (60-61).

Based upon Dr. Coe's exam of petitioner and his medical records, Dr. Coe determined petitioner was medically incapable of performing gainful employment due to his back and left knee condition (66-67). Dr. Coe also believed the treatment rendered to petitioner's lumbar spine and left knee were reasonable and necessary to treat petitioner of his symptomatic complaints (67-68).

On cross-examination, Dr. Coe agreed he had not reviewed any of petitioner's medical records after 2004.

Notice from the State of Illinois Environmental Protection Agency (PX.18)

Petitioner received notice on June 16, 2010 from the IEPA that he was terminated due to disability as of October 1, 2003 that was not sent to the IEPA by respondent until March, 2007.

Respondent's March 18, 2003 Response to Petitioner's 19b Petition (PX.19)

Petitioner Photo (PX.20)

Photo of petitioner identified as a picture taken by petitioner's wife after the November 14, 2001 accident.

Department of Veterans Affairs Bill Ledger (PX.21)

Prescriptions totaling $1,879.26

Chicago Institute Neurosurgery Bill (PX.22)

Bill from November, 2002 totaling $350.00 for physical therapy evaluation.

Joliet Orthopedic/Sports Medicine Center Bill (PX.23)

Bill from Dr. John Nikoleit totaling $3,290.00.

University of Chicago Dept. of Anesthesia Bills (PX.24 & 25)

$304.00 - U of C Department of Anesthesia 10/23/2002
$2,030.00 - U of C Department of Anesthesia 11/04/2002

Bills (PX.26)

$102.00 Associated Radiologist Joliet for MRI on 08/27/2002
$133.00 Dr. Richard Fessler 09/04/2002
$727.00 University of Chicago Hospitals 10/23/2002
$133.00 Dr. Richard Fessler 12/18/2002

Dr. Richard Fessler Bill (PX. 27)

$140.00 Dr. Richard Fessler 10/08/2002

Dr. Richard Fessler Bill (PX.28)

$56.00 Dr. Richard Fessler 01/29/2003

University of Chicago Hospitals (PX.29)

$16,622.04 for services rendered 11/04/2002

Dr. Richard Fessler Bill (PX.30)

$8,740.00 Dr. Fessler services on 11/04/2002 (Balance of $115.81)

Provena St. Joseph Medical Center (PX.31)

$4,048.70 for services rendered on 04/23/2003

St. James Hospital Bill (PX.32)

$378.00 for services 06/25/2003 to 06/30/2003
$600.00 for services 06/15/2003 to 06/23/2003
$1,263.00 for services 07/01/2003 to 07/31/2003

Penalties Petition (PX.33)

IMRF Payments (PX.34)
Payment made by IMRF for disability and retirement.

Dr. Hirsho Eguro (RX.1)
Petitioner was seen by Dr. Eguro on April 9, 1990 due to cervical and low back pain after he was struck in the face by a steel driver and fell back on March 26, 1990. The diagnosis was cervical strain, traumatic and Spondylolisthesis, Grade I L5-S1 level which was believed to be congenital. He was released from care on May 3, 1990.

Dr. Hirsho Eguro Supplementary Report of April 24, 1990 (RX.2)
Petitioner was seen by Dr. Eguro on April 17, 1990 due to his legs going numb and both feet going cold while reading meters the week before. An EMG was ordered and referral to vascular surgeon.

Barry Lake Fischer January 10, 1994 Report (RX.3)
The report discusses injuries petitioner sustained when he was hit in the face with a post pounder. The injuries were only to the cervical spine.

The Joliet Medical Group/Dr. Munoz November 3, 1997 Record (RX.4)
Petitioner was seen by Dr. Munoz on November 3, 1997 for a lumbosacral strain and SI joint dysfunction.

The Joliet Medical Group/Dr. Munoz October 27, 1997 Record (RX.5)
Petitioner was seen by Dr. Munoz on October 27, 1997 with a history of injuring his lower back when he miss-stepped while carrying four-gallon gasoline container on uneven ground. He suffered a lumbosacral strain with sciatica and SI joint dysfunction.

Dr. Jeffrey Piccirillo November 12, 1998 Report (RX.6)
The report discusses petitioner's carpal tunnel condition.

Employee's Report of Injury (RX.7)
The report was identified by petitioner as one he signed in blank in order to obtain medical treatment. Also attached is the Supervisor's Investigation Report indicating petitioner hurt his hip when checking sludge blankets in tanks.

(RX.8 withdrawn)

Dr. Luis Munoz May 8, 2001 (RX.9)
Petitioner was determined by Dr. Munoz to be at maximum medical improvement from the right hip sprain/strain and right SI joint dysfunction as of May 8, 2001.

Dr. Thomas Hurley August 7, 2001 Report (RX.10)
Petitioner was seen by Dr. Thomas Hurley on August 7, 2001, who determined petitioner had Grade I spondylolisthesis at L5-S1 and focal right knee arthropathy.

Dr. Edward Goldberg January 11, 2002 Report (RX.11)

On January 11, 2002, Dr. Goldberg examined the petitioner and reviewed medical records at respondent's request. Dr. Goldberg determined petitioner had likely aggravated his degenerative disc disease at L3-L4 through L5-L5, spinal stenosis at L4-L5 and his isthmic spondylolisthesis at L5-S1 as a result of the claimed work accident of February 19, 2001. Dr. Goldberg was against the three-level fusion proposed. However, he further stated if petitioner's progressed he may be a surgical candidate. He recommended a functional capacity evaluation to determine petitioner's limitations.

Joliet Orthopedics & Sports Center Record (RX.12)

This record covers the period from March 18, 2002 to April 22, 2002. The report indicated petitioner was released to return to work without restrictions as of April 8, 2002. Then on April 22, 2002, petitioner's wife called to advise petitioner fell on his left knee. He was to return to doctor if no improvement with ice, elevation and anti-inflammatory.

Dr. Avi Bernstein July 19, 2017 Report (RX.13)

Dr. Bernstein performed a records review only and authored this report. Based upon the review of the records Dr. Bernstein concluded petitioner had a temporary aggravation of the pre-existing L5-S1 grade I spondylolisthesis as a result of the work accident of February 19, 2001 that resolved as of May 8, 2001. All treatment to that date was reasonably related to the work accident.

Provena St. Joseph Medical Center Records (RX.14)

These records cover petitioner's hospital admission for his heart attack in October, 2005.

Brightmore Physical Therapy FCE Report (RX.15)

This is part of PX.15.

Loyola Medicine Record (RX.16)

The record covers petitioner's hospitalization at Loyola from May 5, 2005 to May 24, 2005 for burns covering 15% of his body as a result of a boat explosion.

Performance Physical Therapy Services FCE August 6 and 7, 2003 (RX.17)

According to the FCE, petitioner gave maximum effort and was released to return to light to medium work levels.

Dr. Charles Bush Joseph February 14, 2003 Report (RX.18)

This is the same as PX.10.

Dr. Gary Skaletsky October 31. 2002 Report (RX.19)

Dr. Skaletsky examined the petitioner on October 31, 2002, and reviewed certain medical records and concluded petitioner had sustained a lumbar strain with mild radiculopathy as a result of the work accident of February 19, 2001, which resolved with conservative treatment.

Dr. Skaletsky believed petitioner's ongoing condition was the result of progression of degenerative changes in the lumbar spine which would occur absence of trauma. Dr. Skaletsky agreed with Dr. Goldberg that a spinal fusion was not necessary.

John Roberts February 23, 2012 Evidence Deposition (RX.20)

John Roberts testified in behalf of respondent via deposition on February 23, 2012. He was in his twenty first year of employment with respondent. His position with respondent was water and waste superintendent; which he had been in since 1996.

Roberts testified that on February 19, 2001 petitioner came into Robert's office to report he had hurt his back. Petitioner reported he was lifting a door to get the dumpster out. Roberts gave petitioner forms to fill out. The petitioner went into the lavatory to complete the forms. At that time, Joe Kaczmarski came in and told Roberts petitioner had not hurt himself lifting the door as petitioner did not assist Kaczmarski lift the door; it was the garbage truck driver who assisted Kaczmarski lift the door. (5)

Thereafter Roberts went to petitioner in the lavatory. It was then petitioner told Roberts he had hurt himself at the contact tanks taking sludge blankets. Roberts explained that about three feet from the tank it slopes down. Roberts claimed petitioner changed his story. (6)

Roberts reviewed the report identified as Employee's Report of Injury. According to Roberts, petitioner completed the report; it was in his handwriting. The report recites petitioner injury occurred when he was traversing an uneven surface on slope. He injured his right hip. (6-7)

Roberts confirmed he supervised petitioner beginning in March, 1996 (14).

Joseph Kaczmarski, Jr. February 21, 2018 Evidence Deposition (RX.21)

Joseph Kaczmarski testified in behalf of respondent via deposition on February 21, 2018. He was retired from his position as a senior operator with respondent, where he had worked for 19 years.

Mr. Kaczmarski knew very little about the events of February 19, 2001 concerning petitioner. On February 19, 2001, Mr. Kaczmarski had run an errand and when he came back into John Roberts' office he was asked if he knew that petitioner got hurt; Mr. Kaczmarski advised Roberts he did not know anything about it. Mr. Kaczmarski advised he did his thing and petitioner did his own thing. A lot of times he and petitioner worked by themselves. (6-8)

Hines VAMC Records (RX. 22)

Petitioner did not receive any treatment at the Veteran's Hospital for either his lower back or left knee condition. Petitioner received treatment for PTSD, heart condition, chest lesion and diabetes.

Health South July 15, 2002 FCE (RX.23)

This is the same as PX.7

Respondents Payment List of TTD and Medical (RX.24)

Respondent claims to have paid TTD from February 21, 2002 through March 18, 2002.

Respondent claims to have paid a total of $4,346.64 for medical expenses for the accident of November 14, 2001.

Respondent claims to have paid $25,346.94 for medical expenses for the accident of February 19, 2001.

Respondent also claims to have paid a $5,000 PPD advance.

Respondent's Response to Petitioner's Penalties Petition (RX.25)

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

The Arbitrator did not find petitioner to be credible. He hesitated with his answers and his memory seemed to conveniently lapse on cross-examination even when asked follow-up questions that he was able to answer on direct exam.

C. With respect to the issue of whether an accident occurred that arose out of and in the course of petitioner's employment by respondent, the Arbitrator makes the following conclusions of law:

Petitioner claimed he injured his back due to two incidences that occurred on February 19, 2001. The first occurred when he was purportedly assisting co-worker Joe Kaczmarski lift a broken garage door to remove a dumpster. He testified after that incident he felt some discomfort in his back. The second incident occurred shortly thereafter when he purportedly miss-stepped going down a grassy 45-degree angled slope at the contact tank. He testified that after this second incident he felt a sharp pain in his back. Thereafter he went and immediately reported the injury to his supervisor.

Petitioner testified he signed the Employee's Report of Injury in blank in order to obtain medical treatment (RX.7). His supervisor, John Roberts, contradicted petitioner's testimony. Roberts testified petitioner completed his own report and Roberts completed the Supervisor's Investigation Report (RX.7). It appears these two reports were completed by different people.

The Arbitrator considered the testimony of John Roberts, who testified petitioner first reported he hurt his back lifting the garage door with Kaczmarski. Roberts testified that after petitioner reported the injury, he gave the injury report to petitioner to complete. According to Roberts, petitioner took the report into the lavatory to complete. At the time petitioner was in the lavatory, Kaczmarski came into the office and told Roberts that petitioner did not assist in lifting the garage door; but rather the garbage truck driver had assisted Kaczmarski lift the door. After Roberts confronted petitioner with this fact, petitioner changed his story that he hurt his back when he stepped down at the contact tank slope.

Unfortunately, as Kaczmarski was not deposed until February 21, 2018, more than 17 years after the alleged incidences, he could not confirm or deny any of the facts of the alleged garage door lifting incident. Kaczmarski, therefore, added little to affirm or deny the claimed occurrence.

The Arbitrator also considered petitioner's history to Dr. Luis Munoz, from whom received treatment on the date of the claimed occurrence. The history contained in Dr. Munoz's February 19, 2001 records was: "the patient states today, while doing his duties for the City of Crest Hill, the patient injured his right hip. He states he was coming down from an area which he was checking certain operational activities and miss-stepped and twisted his right hip." It was not until petitioner received treatment from Dr. Karcavich on May 29, 2001, almost three months after the claimed accidents, that his history included the history of lifting a heavy garage door.

Considering the total evidence and petitioner's credibility, the Arbitrator finds petitioner failed to prove he lifted a garage door on February 19, 2001.

The question was whether petitioner's miss-step while walking down a slope qualifies as "an accident" that arose out of his employment. There are four different accounts as to exactly what petitioner was doing at the contact tank when he claimed to have injured his back. (1) The petitioner testified he was going down a grassy slope at a 45-degree angle and felt and extreme sharp pain in his lower back. (2) Although petitioner disputes he completed the Employee's Report

of Injury, the report indicates he was traversing uneven surface on a slope causing injury to his right hip. (3) Again, the history he gave to Dr. Munoz that he was checking certain operational activities and miss-stepped twisting his right hip. (4) The history to Dr. Kaczmarski on May 29, 2001 was that he was walking down an incline and began feeling pain in the hip. [It should be noted that Dr. Kaczmarski attributed petitioner's pain to possible nerve compression from his wallet that he kept on the right side.]

Furthermore, the petitioner's early complaints of pain were centered on his right hip only (and not his back).

Although petitioner denied he had previous problems with, or received treatment for, his right hip or back, the records from Dr. Munoz of October 27, 1997 indicated petitioner had a history of injuring his lower back when he miss-stepped while carrying four-gallon container on uneven ground suffering a lumbosacral strain with sciatica and SI joint dysfunction. And, although petitioner claimed he did not complete the Employee's Report of Injury (RX.7), the report indicated petitioner had a previous history of his right hip going out at work.

The Arbitrator, taking the evidence as a whole and considering petitioner's lack of credibility, finds petitioner failed to prove that traversing the slope was an increase risk, or that he injured his **back** as a result of this activity. Therefore, the Arbitrator finds petitioner failed to prove that his claimed back condition resulted from an accident that arose out of his employment with respondent on February 19, 2001.

As the Arbitrator determined petitioner was not injured in an accident that arose out of his employment with respondent on February 19, 2001, the claim is denied and all other issues are moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	02WC048869
Case Name	MOORE, JACQUELINE (WIDOW) v. CITY OF CREST HILL
Consolidated Cases	02WC048868
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0519
Number of Pages of Decision	25
Decision Issued By	Stephen Mathis, Commissioner, Deborah Baker, Commissioner

Petitioner Attorney	Cameron Clark
Respondent Attorney	John Schmidt

DATE FILED: 10/18/2021

/s/*Stephen Mathis, Commissioner*
Signature

DISSENT

/s/*Deborah Baker, Commissioner*
Signature

STATE OF ILLINOIS	)
	) SS.
COUNTY OF DUPAGE	)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Charles Moore,

Petitioner,

vs. No. 02 WC 48869

City of Crest Hill,

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 temporary disability, permanent disability, penalties and attorney fees, and being advised of the facts and law, affirms and adopts the corrected Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the corrected Decision of the Arbitrator filed May 15, 2019 is hereby affirmed and adopted.

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

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

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.

October 18, 2021

SJM/sk
o-08/18/2021
44

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

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

DISSENT

I disagree with the majority's decision to affirm the Arbitrator's finding that Petitioner failed to prove he sustained a compensable work accident on February 19, 2001 (case no. 02 WC 48868) and that Petitioner sustained a 60 percent loss of use of the left leg as a result of the stipulated November 14, 2001 work accident (case no. 02 WC 48869). In my view, Petitioner established by a preponderance of the evidence that he sustained a compensable work accident on February 19, 2001; Petitioner's lumbar spine injury is causally related to the February 19, 2001 injury; and Petitioner is entitled to associated medical and temporary total disability benefits ("TTD"). In case no. 02 WC 48869, I would find that Petitioner is entitled to an award of penalties pursuant to section 19(k) and section 19(l), and attorneys' fees pursuant to section 16 as there was no expert opinion or evidence to contradict Petitioner's claim that his left knee injury is causally related to the undisputed November 14, 2001 accident. Finally, I would find that Petitioner is permanently and totally disabled as a result of both his lumbar spine and left knee injuries.

In case no. 02 WC 48868, the Arbitrator found Petitioner's testimony was not credible and stated: "He hesitated with his answers and his memory seemed to conveniently lapse on cross-examination even when asked follow-up questions that he was able to answer on direct exam." I view Petitioner's credibility differently and find that he was credible as his testimony was straightforward, forthright, and clear. The Commission exercises original jurisdiction and is not bound by an arbitrator's findings. *See R & D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 866, 923 N.E.2d 870, 877 (1st Dist. 2010) (finding that 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 Arbitrator found that Petitioner's "memory seemed to conveniently lapse on cross-examination even when asked follow-up questions that he was able to answer on direct exam." I find that Petitioner's memory was reasonable and credible based on the facts of the case, the age of the case, and the types of questions asked on cross examination. To provide some background

and context for this case, the injury at issue occurred in February 2001. Petitioner testified at the arbitration hearing in September 2017, approximately 16 years after the claimed date of injury. Additionally, at the time of the September 2017 arbitration hearing, Petitioner was 70 years old. These are all factors that should be considered when evaluating Petitioner's testimony.

Further, the Arbitrator did not point to any specific examples of when Petitioner was able to answer a question on direct examination, that he was unable to answer on cross examination. In my view, this did not occur. The following are examples of the types of questions Petitioner was asked about his medical treatment on direct examination, during which Petitioner's counsel asked leading questions with respect to medical treatment with no objection from Respondent's counsel:

> Q. Is it correct that you had a follow-up appointment with Dr. Munoz on May 8, 2001?
> A. Yes.
>
> Q. And following that exam, is it correct that Dr. Munoz released you to return to full duty work?
> A. Yes.
>
> ***
>
> Q. Mr. Moore, is it correct that you sought treatment with your family doctor, a Dr. Karcavich, K-a-r-c-a-v-i-c-h?
> A. Yes.
>
> Q. Is it correct that you were initially examined by Dr. Karcavich on May 29, 2001?
> A. Yes.
>
> Q. Is it correct that you had a follow-up appointment on June 6, 2001?
> A. Yes.
>
> Q. Following that exam, Mr. Moore, is it correct that the doctor recommended you undergo an MRI study of your lumbar spine and an EMG study?
> A. Yes. T. 24-25.

In contrast, on cross examination, Petitioner was asked questions about specific diagnoses, testing, and examinations from medical treatment in the 1990s and was unable to remember specific details with respect to numerous medical conditions, even those that were not being claimed as part of the instant workers' compensation claims. Examples of the types of questions asked on cross examination are as follows:

> Q. Do you remember treating for back issues all the way back in 1990 with Dr. Eguro, E-g-u-r-o?

A. No.

Q. Do you recall treating with him on April 9 of that date, 1990, where you were diagnosed with a cervical spine as well as L5, S1 lumbar spondylolisthesis which the doctor believed was a congenital condition?
A. No.

Q. Do you recall having to take straight leg raising tests because you were having numbness which traveled down into your foot?
A. No. T.52-53.

***

Q. Do you recall undergoing an MRI on March 6, 1996?
A. No.

Q. Do you recall undergoing a course of physical therapy in 1996 for this condition, for your back condition?
A. No.

Q. Again on April 20, 1996, do you recall Dr. Caron stating that surgery will be needed at some point in your life due to severe MRI changes?
A. I can't remember the name of the doctor but this was from – occurred from getting hit between the eyes with the post pounder, and he was referring to my neck. They were working on my neck and my nose. T.57-58.

Q. He is a neurosurgeon, is that correct, Dr. Caron?
A. I don't recall the doctor.

Q. You do remember seeing a Dr. Karcavich prior to January [sic]19, 2001, correct?
THE ARBITRATOR: What was that date?
[Respondent's counsel]: The accident date, February 19, 2001
THE WITNESS: If that's what my doctor said. I don't recall the dates or anything.

[BY RESPONDENT'S COUNSEL]:
Q. You also treated – you had surgery on your feet, do you recall that? You had some metatarsals removed from your foot in 1996?
A. I had work done on my big toe.

Q. And you had surgery in 1996 on your left hand?
A. Yes, I don't recall the date but I had surgery on my left hand. T. 58.

***

Q. Do you recall following up with Dr. Munoz for the left knee injury on October 31, 2000?
A. No.

Q. Do you recall sustaining a rib injury prior to November 14, 2001?
A. I can't match the dates.

Q. This would be before –
A. I had a rib injury when I hit the valve step.

Q. This is back on January 26, 2001. You sought treatment at Provena St. Joseph Medical Center for rib pain when you heard a crack in your chest. You were also there for back pain, spasms when you coughed, do you recall that?
A. I can't recall it. T. 64.

Based on the above, I find that Petitioner's testimony was credible and any inconsistencies in his treatment were benign.

In case no. 02 WC 48868, the Arbitrator found Petitioner failed to prove he sustained a compensable work-related accident on February 19, 2001. I disagree and find Petitioner established by a preponderance of the evidence that he sustained a compensable work accident on February 19, 2001.

In the instant case, Petitioner credibly testified that he felt discomfort in his lower back on February 19, 2001 when he and his coworker, Kaczmarski, were lifting a broken garage door. Later that day, while walking away from the "contact tanks" where he had just checked that there were no blockages which is something he did daily, Petitioner mis-stepped on a sloped, grassy area that led to the tanks and felt an extreme, sharp pain in his lower back. Petitioner's testimony as to the two incidents that occurred on February 19, 2001 was not rebutted by any of Respondent's witnesses. However, even when isolating the history of mis-stepping on a grassy, sloped area while walking back from his daily check of the "contact tanks," Petitioner's claim is still compensable. Again, neither of Respondent's witnesses rebutted Petitioner's testimony about mis-stepping while walking down the grassy slope.

Additionally, the medical records clearly document a history of mis-stepping on a slope. (The Joliet Medical Group records from the date of accident document that Petitioner sustained an injury while walking down an uneven slope; the records from St. Joseph Medical Center dated May 29, 2001 document both the garage door incident and walking down an incline; the records from Chicago Institute of Neurosurgery dated August 7, 2001 document both the garage door incident and walking down an uneven grade of a hill; the records from Rush Pain Center document the garage door incident and walking down a hill).

The Arbitrator appeared to agree that Petitioner's testimony of mis-stepping on a slope was unrebutted in stating that the issue was "whether Petitioner's miss-step while walking down a slope qualifies as 'an accident' that arose out of his employment." However, the Arbitrator

denied Petitioner's claim anyway finding that: (1) the medical records indicate Petitioner injured his right hip and not his lumbar spine; and (2) "traversing the slope was an increase risk." I view the evidence and the law differently.

First, the increased risk analysis is misapplied here. "Injuries resulting from a risk distinctly associated with employment, *i.e.*, an employment-related risk, are compensable under the Act." *Steak 'n Shake v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150500WC, ¶ 35, 67 N.E.3d 571, 578. "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. See also*, *McAllister v. Illinois Workers' Compensation Commission*, 2020 IL 124848, ¶ 36 ("'An injury 'arises out of' one's employment if it originates from a risk connected with, or incidental to, the employment, involving a causal connection between the employment and the accidental injury.' A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties.")

Applying *McAllister* to the facts of this case, which the Illinois Supreme Court decided after the Arbitration decision was issued, there is no need to undergo an increased risk analysis. Here, Petitioner walked to the "contact tanks" to check for blockages, which is a task he performed daily as a sewage operator, and while walking away from the tanks on a grassy slope, he mis-stepped and felt a sharp pain in his lower back. Petitioner's lower back injury originated from walking on the grassy slope. Petitioner was required to walk on the grassy slope in order to perform his job duty of checking the contact tanks. Thus, the act of walking on the slope was a risk incidental to Petitioner's employment, establishing that the February 19, 2001 accident arose out of his employment with Respondent.

Secondly, the medical records show that Petitioner reported sustaining an injury to his lower back in addition to his right hip in the initial medical records. The February 19, 2001, medical note from Joliet Medical Group (Dr. Munoz) states that Petitioner injured his right hip, however, it also indicates that Dr. Munoz examined Petitioner's lower back and found tenderness over the right sacroiliac joint and sacral notch with L5-S1 region spasms. Dr. Munoz diagnosed Petitioner with a right hip strain, right sacroiliac joint dysfunction, and a lumbar strain. On February 21, 2001, Dr. Munoz examined Petitioner again and found continued lower back tenderness and stiffness. Dr. Munoz continued to treat Petitioner for the lower back and right hip and right extremity symptoms. On May 8, 2001, Petitioner returned to Dr. Munoz and reported that his right hip and right leg symptoms had resolved, however, he continued to experience numbness in his right toes. On May 29, 2001, Petitioner presented to Dr. Karcavich who diagnosed Petitioner with possible nerve compression in the lumbar spine and recommended that Petitioner undergo a lumbar spine MRI. I find that the medical records document consistent lumbar spine complaints and treatment.

In case no. 02 WC 48868, I find that Petitioner's lower back (lumbar spine) condition and need for lumbar spine surgeries is causally related to the February 19, 2001 accident based on the opinions of Dr. Goldberg, Respondent's section 12 examining physician, Dr. Coe, and Petitioner's treating physicians. I note that Dr. Goldberg was the first section 12 examining

physician who opined that Petitioner's lumbar spine condition was causally related to the February 19, 2001 accident. Additionally, Dr. Goldberg opined that if Petitioner's condition worsened after undergoing conservative treatment and an FCE, he would be a candidate for surgery. Respondent did not send Petitioner back to Dr. Goldberg after undergoing the treatment recommended by Dr. Goldberg.

In case no. 02 WC 48869, I find that based on Dr. Coe's opinion (and a chain of events analysis), Petitioner's left knee condition and need for a left knee replacement is causally related to the undisputed November 14, 2001 work accident. I note that Respondent did not obtain a medical expert opinion as to Petitioner's left knee condition

Additionally, I would award all reasonable and necessary medical expenses for the lumbar spine condition (case no. 02 WC 48868) and left knee condition (case no. 02 WC 48868).

With respect to temporary total disability benefits, in case no. 02 WC 48868, I would award temporary total disability benefits as stipulated by the parties on the Request For Hearing Form from November 14, 2001 to January 11, 2002. In case no, 02 WC 48869, I would also award additional TTD from February 20, 2001 to May 8, 2001, February 21, 2002 through April 8, 2002, and from October 29, 2002 through March 3, 2003.

Further, I would find that Petitioner is permanently and totally disabled with respect to both the lumbar spine and left knee conditions based on Dr. Coe's uncontroverted opinion.

Finally, with respect to Petitioner's request for penalties and attorneys' fees, I would award penalties and fees in case no. 02 WC 48869 based on the fact that Respondent denied treatment and benefits for an undisputed accident without obtaining an expert opinion to support its denial of benefits.

For the above reasons, I respectfully dissent.

/s/ *Deborah J. Baker*

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0519
NOTICE OF ARBITRATOR DECISION
CORRECTED

MOORE, CHARLES
Employee/Petitioner

Case# **02WC048869**

02WC048868

CITY OF CREST HILL
Employer/Respondent

On 5/15/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.35% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5614 LAW OFFICES OF CAMERON B CLARK
203 N LASALLE ST
SUITE 2100
CHICAGO, IL 60601

1505 SLAVIN & SLAVIN LLC
BRIAN H DRISCOLL
100 N LASALLE ST 25TH FL
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF DU PAGE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Charles Moore
Employee/Petitioner

v.

City of Crest Hill
Employer/Respondent

Case # **02** WC **48869**

Consolidated case: **02** WC **48868**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christine Ory**, Arbitrator of the Commission, in the city of **Ottawa on September 25, 2017 and closed proofs in Wheaton/Elgin on April 6, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 14, 2001**, 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 as to the total knee replacement ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$45,708.00**; the average weekly wage was **$879.00**.

On the date of accident, Petitioner was **53** years of age, **married** with **0** dependent children.

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

Respondent ***owes*** for all appropriate charges for all reasonable and necessary medical services for which they are liable.

To date, Respondent has paid $**2,1765.55** in TTD and/or for maintenance benefits, and is entitled to a credit for any and all amounts paid.

Respondent shall be given a credit of $**2,176.55 for** TTD, $**0** for TPD, $**0** for maintenance, and **$5,000.00** for other benefits, for a total credit of $**7,176.55.**

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

ORDER

Medical

Respondent shall pay bills totaling **$3,290.00** subject to any payments made by directly or by the group insurance subject to an 8 j credit.

Temporary Total Disability Benefits

Respondent shall pay **TTD** from **February 21, 2002 through April 8, 2002**, and from **April 24, 2003 through September 23, 2003** or, **28-4/7 weeks @ $586.00 per week.**

Permanent Partial disability

Petitioner is entitled to **120 weeks @$527.40 per week** as petitioner's permanent disability has resulted in **60% loss of use of the left leg pursuant to § 8 (e) 12 of the Act.**

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

May 13, 2019

Date

ICArbDec p. 2

MAY 15 2019

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Charles Moore	)
Petitioner,	)
vs.	**) No. 02 WC 48869**
City of Crest Hill	**) (Consolidated with 02 WC 48868)**
Respondent.	)
	)

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

This matter proceeded to hearing in Ottawa on September 25, 2017 and proofs were closed in Wheaton/Elgin on April 6, 2019. The parties agree that on November 14, 2001, the petitioner and respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer and that petitioner sustained injuries in an accident that arose out of and in the course of petitioner's employment with respondent. They agree that Petitioner's wages, in the year pre-dating the accident, were $45,708.00; and his average weekly wage, calculated pursuant to §10 was $879.00.

At issue in this hearing is as follows:

1. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
2. Whether respondent is liable for medical expenses.
3. Whether petitioner is due TTD.
4. The nature and extent of injury; including whether petitioner is entitled to permanent total disability.
5. Whether petitioner is entitled to penalties and attorney's fees

STATEMENT OF FACTS

Petitioner testified he was a member of the Army from 1967 to 1969. Petitioner was hired by respondent in 1986. On February 19, 2001, petitioner was employed by respondent as a senior sewage operator. Prior to February 19, 2001, petitioner had no problems with, or treatment to, his low back or right hip. His job duties included the complete maintenance and operation of the sewage plant. He had to lift bags of chemicals that weighed 40 to 60 pounds and raise pumps out of pits when they needed to be cleared. He had to walk at least a mile a day and climb towers that were the equivalent of a four-story building.

On February 19, 2001, petitioner was directed by respondent's superintendent, John Roberts, to lift the broken garage door high enough to remove a dumpster. He was working with co-worker Joe Kaczmarski. After lifting the door, he noticed some discomfort in his back. Thereafter he went to check on the contact tank to make sure there wasn't any blockage. While checking the tank, he miss-stepped as he was going down a grassy slope at a 45-degree angle and felt an extreme sharp pain in his lower back. He reported the incident immediately to John Roberts.

Petitioner was shown a form identified as Employees Report of Injury for Proper Benefit Consideration (Respondent's Exhibit 7). Petitioner indicated he signed it before it was completed. He needed to sign it in order to see a doctor. He was sent by respondent to Joliet Medical Group on February 19, 2001. He was examined by Dr. Munoz and X-rays were taken of his right hip. He continued follow up with Dr. Munoz through May 8, 2001; physical therapy was ordered He was released to return to work on May 8, 2001.

On May 29, 2001, he sought treatment from his family doctor, Dr. Karcavich. He had a follow up appointment with Dr. Karcavich June 6, 2001; a lumbar MRI and EMG were ordered. He was referred by Dr. Karcavich to Dr. Hurley at CINN. He initially saw Dr. Hurley on August 7, 2001. Dr. Hurley recommended epidural steroid injections and possible lumbar fusion. He received the injections from Dr. Nath at Rush on November 5, 2001. Petitioner continued to work for respondent.

On November 14, 2001 he was working as a senior sewage operator for respondent. Prior to November 14, 2001, he had no problems with his left knee. Petitioner identified a photograph (PX.20) taken after his fall on November 14, 2001. After the incident, he returned to Dr. Karcavich. He obtained a MRI of the left knee. After the MRI, Dr. Karcavich referred petitioner to Dr. Dworsky. He had a follow-up appointment with Dr. Nath on December 7, 2001 and received an epidural steroid injection. He was examined by Dr. Edward Goldberg at Midwest Orthopedics at Rush on January 11, 2002 pursuant to §12.

He was seen by Dr. Dworsky on February 6, 2002 for treatment of his left knee. He followed up with Dr. Dworsky on February 25, 2002, who then recommended physical therapy and kept petitioner off work. He returned to Dr. Dworsky on March 18, 2002, who released him to return to work with restrictions and recommend therapy. He returned to Dr. Dworsky on April 8, 2002 and was released by him to return to full-duty work as it related to his left knee.

Petitioner returned to work, but continued to note discomfort. He noticed pain in his knee in taking the stairs and pain in his back that radiated down his leg.

He was referred by Dr. Nath to Dr. Fessler at CINN for examination of his lumbar spine. He was seen by Dr. Fessler on June 17, 2002, who recommended an updated MRI. Petitioner underwent a functional capacity exam at Health South on July 15, 2002. He obtained the MRI on August 23, 2002 and then followed up with Dr. Fessler on September 4, 2002, who recommended lumbar surgery. On October 13, 2002, Dr. Dworsky administered a steroid injection in the left knee.

Petitioner was examined by Dr. Gary Skaletsky on October 31, 2002 pursuant to §12.

He underwent back surgery by Dr. Fessler on November 4, 2002 at University of Chicago. Thereafter, petitioner returned to Dr. Dworsky, who recommended an update MRI on the left knee; which was done on January 8, 2003. Petitioner followed up with Dr. Fessler on January 29, 2003, who recommended petitioner continue with his care by Dr. Fessler for his left knee condition.

Dr. Dworsky recommended petitioner see Dr. Bush Joseph. Petitioner was seen by Dr. Bush Joseph at Rush on February 14, 2003. Dr. Bush Joseph recommended a total knee replacement. Dr. Nath referred petitioner to knee replacement specialist, Dr. Aaron Rosenberg at Midwest Orthopedics. Petitioner was examined by Dr. Aaron Rosenberg on February 27, 2003; who administered a steroid injection to his left knee and ordered physical therapy. He followed up with Dr. Rosenberg on April 10, 2003 and received updated X-rays of his left knee. Dr. Rosenberg recommended an injection or total knee replacement.

Petitioner sought a second opinion from Dr. John Nikoleit at Elmhurst Orthopedics, who saw petitioner on April 11, 2003 and recommended a total knee replacement and kept petitioner

off work. Petitioner underwent the total knee replacement by Dr. Nikoleit on April 24, 2003 at Elmhurst Hospital. He followed up with Dr. Nikoleit postoperatively and participated in physical therapy. On August 18, 2003, Dr. Nikoleit recommended petitioner see Dr. Koutsky for treatment of his spine.

He saw Dr. Koutsky on August 18, 2003 who recommended a discogram and a MRI; the MRI was done on August 18, 2003 and the discogram was done on September 29, 2003. On October 9, 2003 Dr. Koutsky recommended lumbar surgery and referred petitioner to Dr. Kenneth Heiferman for a neurosurgical evaluation. Petitioner was seen by Dr. Heiferman on November 3, 2003, who recommended a lumbar spinal fusion. Dr. Heiferman recommended petitioner follow up with Dr. Koutsky and also recommended a lumbar CT scan, which was done on November 6, 2003.

Petitioner underwent a lumbar fusion from the L3 through S1 level by Dr. Koutsky at Elmhurst on December 16, 2003. Petitioner had a post-operative MRI on January 3, 2004. Petitioner followed up with Dr. Koutsky on January 26, 2004 and March 8, 2004. Dr. Koutsky advised petitioner to discontinue use of the lumbar brace and begin physical therapy. Petitioner followed up with Dr. Koutsky on April 8, 2004; X-rays were performed. On May 6, 2004, Dr. Koutsky recommended work conditioning, which was done at CINN, followed by an FCE which was done at Brightmore Therapy Center. Petitioner followed up with Dr. Koutsky on October 13, 2004, January 19, 2005 and September 6, 2005. Dr. Koutsky recommended petitioner continue with pain management, including analgesic medications, which petitioner received through the Veterans Administration.

The majority of the treatment petitioner received was through petitioner's group insurance with respondent. Following Dr. Koutsky's surgery, a majority of the pain medication was received through the Veterans Administration.

Petitioner was examined by Dr. Jeffrey Coe on July 10, 2012 at the request of petitioner's attorney.

Petitioner did not receive any temporary total disability from February 20, 2001 through May 8, 2001. Petitioner performed modified work after his November 14, 2001 accident up until his left knee surgery on February 21, 2002. He was off work from February 21, 2002 through April 8, 2002; he was not paid temporary total disability during this period. On October 28, 2002, petitioner was off work due to his back condition. Respondent required petitioner to use his accrued sick and vacation time from October 28, 2002 through March 3, 2003. No temporary total disability was paid. Petitioner has not received any disability benefits from respondent since October 28, 2002. In November, 2003, petitioner was awarded social security benefits.

Petitioner denied sustaining any new injuries to his lower back and right hip since February 19, 2001 or his left knee since November 14, 2001. He continues to take Norco and Morphine from the VA.

Petitioner had not been offered any type of employment with respondent since he left its employ on October 28, 2002. No doctor, which included Dr. Nath, Dr. Nikoleit and Dr. Koutsky has ever released petitioner to return to his pre-injury employment.

He continues to have pain in his left knee and back.

On cross-examination, petitioner denied remembering seeing a Dr. Eguro in 1990 for cervical and lumbar spine issue, or having an EMG, or seeing Dr. Simms for numbness in his toes. He could not recall the name of the doctor, Dr. Pandya, who treated him for carpal tunnel syndrome and did not recall having a left shoulder arthrogram. He did not recall being evaluated by Dr. Barry Lake Fisher on December 13, 1993 relative to a post pounder hitting him in the face.

He did not recall having lumbar X-rays taken at the direction of Dr. Karcavich. He did not recall seeing Dr. Michael Caron or obtaining a CT scan in 1996. He did not recall being told by Dr. Caron he would be surgical candidate based upon an MRI on March 2, 1996. He agreed he had surgery to his foot and to his left hand in 1996.

He did not remember injuring his back on October 22, 1997 when carrying a five-gallon fuel can; or recall seeing Dr. Garbolski at Silver Cross, or Dr. Karcavich, relative to this incident. He did not recall seeing Dr. Munoz on October 27, 1997 for this incident. He denied using a cane for his lumbar pain prior to the January 19, 2001 (sic) accident. He denied being diagnosed with lumbosacral strain with sciatica and joint dysfunction. He did not recall having X-rays in 1997 for the lumbar back. He did not recall the physical therapy recommended by Dr. Munoz.

Petitioner denied he was diagnosed with diabetes in 1999. He stated he was not diagnosed with diabetes until after his heart attack.

He denied that he recalled seeing Dr. Munoz on October 16, 2000, after falling on his left knee and suffering a left knee patella laceration and contusion. He also denied following up with Dr. Munoz on October 31, 2000 for the left knee injury.

Petitioner agreed he injured his rib for which he received treatment at Provena St. Joseph Medical Center on January 26, 2001 for rib pain when he heard a crack after hitting the valve step. He didn't however recall being seen at the same time of back pain and spasms when he coughed.

Petitioner confirmed he reported his back injury to supervisor John Roberts when he returned from the contact tank.

Petitioner agreed he reviewed John Roberts deposition. He denied that he changed his story when he learned that Joe was not with him when he was lifting the door.

Petitioner denied recalling his testimony on direct about treatment by Dr. Munoz, Dr. Hurley or Dr. Goldberg releasing him to return to work. He could not recall any dates he returned to work or undergoing an FCE. He could not recall the dates he saw Dr. Skaletsky or the date of August 6, 2003 when another FCE was performed.

He did not recall that Dr. Koutsky advised him in January of 2004 that he would be at maximum medical improvement within six months after surgery. He did not recall that Dr. Koutsky provided a narrative report for his social security disability. He did not recall that the September 14 and September 15, 2004 FCE indicated he was capable of working at a light medium physical demand. He did not recall specifically following up with Dr. Koutsky in October, 2004 or January, 2005.

Petitioner agreed he was involved in an explosion and fire accident that occurred on his boat in May, 2005, but denied it was near death experience. He agreed he suffered burns, but denied trauma to his body. He admitted he had a traumatic brain injury long ago, but denied he suffered post-traumatic stress disorder after the explosion.

He didn't recall seeking treatment on October 21, 2005 at St. Joseph's Hospital for chest pains. He admitted he had a heart attack.

He denied returning to work after the boating accident or the heart attack.

He did not recall seeking mental health treatment in 2006 at the veterans' hospital.

He denied telling doctors he was repairing boats in Florida.

On redirect, petitioner was certain no doctor had recommend lumbar surgery before the February 19, 2001 accident. Petitioner also indicated his job required him to lift up to 60 pounds and to roll chemicals that weight up to 120 pounds.

Dr. Luis Munoz/Joliet Medical Group Records (PX.1)

These records reflect that on February 19, 2001, petitioner reported to Dr. Munoz that he injured his right hip while walking down an uneven slope at work. The diagnosis was right hip sprain, right SI joint dysfunction and mild lumbar-sacral strain. He followed up on February 21, May 8, 2001 petitioner reported his right hip and right leg was feeling fine. He had reached maximum medical improvement. He was discharged from care and released to return to work.

Dr. Provena St. Joseph Medical Center/Dr. Joseph Karcavich Medical Records (PX.2)

According to these records, petitioner was first seen by Dr. Karcavich on May 29, 2001 with a history of lifting the heavy garage door and feeling a pull in the hip area without pain. It was not until later he was walking down an incline he began feeling pain in the hip. The pain was slowly improving and not interfering in his ability to work. Dr. Karcavich concluded that he had possible nerve compression from his wallet as that was the side he kept his wallet.

The June 19, 2001 lumbar MRI showed generalized disc bulge or broad-based disc protrusion more prominently on the right at L3-4, mild spinal stenosis at L4-L5 and Grade I spondylolysis at L5-S1

These records also included the operative report by Dr. Dworsky, who performed an arthroscopic partial medial meniscectomy and chondroplasty of the medial femoral condyle of the left knee.

Chicago Institute of Neurosurgery Records (PX.3)

The records reflect that petitioner was seen on August 7, 2001 by Dr. Hurley with numbness in toes and pain into right leg. The records recite the lifting door/miss-step on slope incidences. Epidural steroid injections and surgical intervention including fusion at the L5-S1 level. He was kept at full-duty.

Petitioner returned to Dr. Hurley on October 15, 2001 for a referral for the epidural steroid injection.

Rush Medical Center/Dr. Heather Nath Records (PX.4)

Petitioner was seen by Dr. Nath on November 5, 2001. He received epidural steroid injections which reportedly provided no relief. On January 21, 2002, Dr. Nath recommended a FCE.

Joliet Orthopedic and Sports Medicine Center/Dr. Bradley Dworsky Records (PX.5)

Petitioner was seen by Dr. Dworsky on February 6, 2002 due to the injury he suffered to his left knee in November. Dr. Dworsky diagnosed medial meniscal tear. Dr. Dworsky performed arthroscopic partial medial meniscectomy and chondroplasty of the medial femoral condyle of the left knee on February 21, 2002. Physical therapy was prescribed. Petitioner followed up with Dr. Dworsky on February 25, 2002 and March 18, 2002, when he was to continue physical therapy and released to return to light duty work. On April 8, 2002, petitioner reported almost no symptomatology and was released to return to work without restrictions.

The records reflect that on April 22, 2002, petitioner's wife called stating [petitioner fell on his left knee which he had surgery on. Patient c/o limping, pain and mild swelling. Petitioner was advised to ice, elevate and [take] anti-inflammatory. If he had no improvement he was to see the doctor.

On May 1, 2002, petitioner returned advising he fell directly on the left knee two weeks before. The doctor diagnosed a contusion. On October 14, 2002, petitioner returned indicating his knee was swollen and uncomfortable. Dr. Dworsky believed petitioner had degenerative joint disease and suggested a trial of corticosteroid injections.

CINN/Dr. Richard Fessler Records (PX.6)

Petitioner was first seen by Dr. Fessler on June 17, 2002, with the history of lifting door and feeling pain while walking down a slope. The diagnosis was low back pain with right lumbosacral radiculitis.

Petitioner returned on September 4, 2002 after obtaining anther MRI which reportedly showed stenosis at L4,5 with a moderately size disk bulge on the right side. A right sided micro endoscopic discectomy at L4-5 was recommended and performed on November 4, 2002. On January 29, 2003, petitioner's physical therapy was put on hold secondary to his left knee issues.

Health South Medical Clinic/Functional Capacity Assessment July 15, 2002 Report (PX.7)

The FCE reports petitioner could perform light to medium physical demand level. Petitioner's job description provided he must lift 60 pounds on occasion. Therefore, petitioner did not meet the physical demands of the job.

June 18, 2001 Lumbar MRI Report (PX.8)

Included and discussed in PX.2.

CINN August 23, 2002 MRI Report (PX.9)

The diagnosis, according to the MRI report, was bilateral L5 spondylolysis, mild L5-S1 disc bulge, hypertrophic facet changes and Grade I spondylolisthesis with moderate bilateral neural foraminal stenosis, greater on the right; at L4-5 moderate diffuse disc bulge with some degenerative facet change and borderline neural foraminal stenosis, greater on the right; at L3-4 moderate diffuse disc bulge with some hypertrophic facet change and mild spinal stenosis and borderline foraminal stenosis greater on the right; at L1-L2 mild diffuse disc bulge on the left with possible small superimposed left-sided herniation.

Glenwood Medical Imaging January 8, 2003 Left Knee MRI Report (PX.10)

At the direction of Dr. Dworsky, petitioner underwent a left knee MRI on January 8, 2003, which showed a medial femoral bone bruise suprapatellar effusion and joint effusion, edema or hemorrhage surrounding the semimembranosus muscle with no evidence of meniscal injury.

Midwest Orthopaedics/Dr. Charles Bush Joseph February 14, 2003 Report (PX.11)

Dr. Bush Joseph examined petitioner at Dr. Dworsky's request on February 14, 2003. Dr. Bush Joseph diagnosed progressive medial compartment arthrosis of the left knee. He recommended a total knee replacement as opposed to an osteotomy.

Dr. Aaron Rosenberg's Records (PX.12)

Petitioner was seen by Dr. Rosenberg on February 27, 2003 and April 10, 2003 for moderate medial compartment degenerative arthritis; a total knee replacement was recommended.

Dr. John Nikoleit Records (PX.13)

Petitioner was first seen by Dr. Nikoleit on April 11, 2003 and underwent a total knee arthroplasty on April 24, 2003. On August 18, 2003 Dr. Nikoleit referred petitioner to Dr. Koutsky regarding the back issues and kept petitioner off until Mid-October [2003] pending return of petitioner's back specialist who was out of town until then (4).

Dr. Nikoleit authored a letter on April 29, 2003 indicating petitioner underwent a total knee arthroplasty on April 23, 2003 (sic) and would be off work for approximately two to three months for intensive rehabilitation (43). Dr. Nikoleit's records also include a physician's statement of disability on July 30, 2003 indicating petitioner should be able to work as of September 23, 2003 (26).

Dr. Kevin Koutsky/Elmhurst Orthopaedic Associates (PX. 14)

Petitioner was seen by Dr. Koutsky on August 18, 2003 as a referral by Dr. Nikoleit. Dr. Koutsky concluded petitioner had L5-S1 spondylolisthesis and severe degenerative disc disease at L5-S1 and L4-L5. Dr. Koutsky performed a decompression and fusion on December 16, 2003 at the L3 through S1 level. Physical therapy and then work hardening was ordered.

Brightmore Physical Therapy September 13 & 15, 2004 FCE Report (PX.15)

The functional capacity evaluation determined petitioner was functioning at the light physical demand level.

Job Requirements for Senior Water Operator and Senior Sewer Operator (PX.16)

The document provides a description of the jobs petitioner performed for respondent.

Dr. Jeffrey Coe August 8, 2014 Deposition (PX.17)

Dr. Jeffrey Coe, board certified in occupation medicine, testified in behalf of petitioner via deposition. Dr. Coe examined petitioner on July 10, 2012, reviewed medical records and authored a report at petitioner's attorney's request. Dr. Coe discussed all medical records he reviewed (20-49). Dr. Coe performed an examination of petitioner (51-59).

Dr. Coe's diagnosis was degenerative disc disease and degenerative arthritis at the L3 through S1 of the lumbar spine (59) and post left total knee arthroplasty (60). Based upon Dr. Coe's exam of petitioner and review of petitioner's medical records, he believed petitioner's condition of ill-being involving his lumbar spine and left knee were caused by the work accidents of February 19, 2001 and November 14, 2001 (60-61).

Based upon Dr. Coe's exam of petitioner and his medical records, Dr. Coe determined petitioner was medically incapable of performing gainful employment due to his back and left knee condition (66-67). Dr. Coe also believed the treatment rendered to petitioner's lumbar spine and left knee were reasonable and necessary to treat petitioner of his symptomatic complaints (67-68).

On cross-examination, Dr. Coe agreed he had not reviewed any of petitioner's medical records after 2004.

Notice from the State of Illinois Environmental Protection Agency (PX.18)

Petitioner received notice on June 16, 2010 from the IEPA that he was terminated due to disability as of October 1, 2003 that was not sent to the IEPA by respondent until March, 2007.

Respondent's March 18, 2003 Response to Petitioner's 19b Petition (PX.19)

Petitioner Photo (PX.20)

Photo of petitioner identified as a picture taken by petitioner's wife after the November 14, 2001 accident.

Department of Veterans Affairs Bill Ledger (PX.21)

Prescriptions totaling $1,879.26

Chicago Institute Neurosurgery Bill (PX.22)

Bill from November, 2002 totaling $350.00 for physical therapy evaluation.

Joliet Orthopedic/Sports Medicine Center Bill (PX.23)

Bill from Dr. John Nikoleit totaling $3,290.00.

University of Chicago Dept. of Anesthesia Bills (PX.24 & 25)

$304.00 - U of C Department of Anesthesia 10/23/2002
$2,030.00 - U of C Department of Anesthesia 11/04/2002

Bills (PX.26)

$102.00 Associated Radiologist Joliet for MRI on 08/27/2002
$133.00 Dr. Richard Fessler 09/04/2002
$727.00 University of Chicago Hospitals 10/23/2002
$133.00 Dr. Richard Fessler 12/18/2002

Dr. Richard Fessler Bill (PX. 27)

$140.00 Dr. Richard Fessler 10/08/2002

Dr. Richard Fessler Bill (PX.28)

$56.00 Dr. Richard Fessler 01/29/2003

University of Chicago Hospitals (PX.29)

$16,622.04 for services rendered 11/04/2002

Dr. Richard Fessler Bill (PX.30)

$8,740.00 Dr. Fessler services on 11/04/2002 (Balance of $115.81)

Provena St. Joseph Medical Center (PX.31)

$4,048.70 for services rendered on 04/23/2003

St. James Hospital Bill (PX.32)

$378.00 for services 06/25/2003 to 06/30/2003
$600.00 for services 06/15/2003 to 06/23/2003
$1,263.00 for services 07/01/2003 to 07/31/2003

Penalties Petition (PX.33)

IMRF Payments (PX.34)

Payment made by IMRF for disability and retirement.

Dr. Hirsho Eguro (RX.1)

Petitioner was seen by Dr. Eguro on April 9, 1990 due to cervical and low back pain after he was struck in the face by a steel driver and fell back on March 26, 1990. The diagnosis was cervical strain, traumatic and Spondylolisthesis, Grade I L5-S1 level which was believed to be congenital. He was released from care on May 3. 1990.

Dr. Hirsho Eguro Supplementary Report of April 24, 1990 (RX.2)

Petitioner was seen by Dr. Eguro on April 17, 1990 due to his legs going numb and both feet going cold while reading meters the week before. An EMG was ordered and referral to vascular surgeon.

Barry Lake Fischer January 10, 1994 Report (RX.3)

The report discusses injuries petitioner sustained when he was hit in the face with a post pounder. The injuries were only to the cervical spine.

The Joliet Medical Group/Dr. Munoz November 3, 1997 Record (RX.4)

Petitioner was seen by Dr. Munoz on November 3, 1997 for a lumbosacral strain and SI joint dysfunction.

The Joliet Medical Group/Dr. Munoz October 27, 1997 Record (RX.5)

Petitioner was seen by Dr. Munoz on October 27, 1997 with a history of injuring his lower back when he miss-stepped while carrying four-gallon gasoline container on uneven ground. He suffered a lumbosacral strain with sciatica and SI joint dysfunction.

Dr. Jeffrey Piccirillo November 12, 1998 Report (RX.6)

The report discusses petitioner's carpal tunnel condition.

Employee's Report of Injury (RX.7)

The report was identified by petitioner as one he signed in blank in order to obtain medical treatment. Also attached is the Supervisor's Investigation Report indicating petitioner hurt his hip when checking sludge blankets in tanks.

(RX.8 withdrawn)

Dr. Luis Munoz May 8, 2001 (RX.9)

Petitioner was determined by Dr. Munoz to be at maximum medical improvement from the right hip sprain/strain and right SI joint dysfunction as of May 8, 2001.

Dr. Thomas Hurley August 7, 2001 Report (RX.10)

Petitioner was seen by Dr. Thomas Hurley on August 7, 2001, who determined petitioner had Grade I spondylolisthesis at L5-S1 and focal right knee arthropathy.

Dr. Edward Goldberg January 11, 2002 Report (RX.11)

On January 11, 2002, Dr. Goldberg examined the petitioner and reviewed medical records at respondent's request. Dr. Goldberg determined petitioner had likely aggravated his degenerative disc disease at L3-L4 through L5-L5, spinal stenosis at L4-L5 and his isthmic spondylolisthesis at L5-S1 as a result of the claimed work accident of February 19, 2001. Dr. Goldberg was against the three-level fusion proposed. However, he further stated if petitioner's progressed he may be a surgical candidate. He recommended a functional capacity evaluation to determine petitioner's limitations.

Joliet Orthopedics & Sports Center Record (RX.12)
This record covers the period from March 18, 2002 to April 22, 2002. The report indicated petitioner was released to return to work without restrictions as of April 8, 2002. Then on April 22, 2002, petitioner's wife called to advise petitioner fell on his left knee. He was to return to doctor if no improvement with ice, elevation and anti-inflammatory.

Dr. Avi Bernstein July 19, 2017 Report (RX.13)
Dr. Bernstein performed a records review only and authored this report. Based upon the review of the records Dr. Bernstein concluded petitioner had a temporary aggravation of the pre-existing L5-S1 grade I spondylolisthesis as a result of the work accident of February 19, 2001 that resolved as of May 8, 2001. All treatment to that date was reasonably related to the work accident.

Provena St. Joseph Medical Center Records (RX.14)
These records cover petitioner's hospital admission for his heart attack in October, 2005.

Brightmore Physical Therapy FCE Report (RX.15)
This is part of PX.15.

Loyola Medicine Record (RX.16)
The record covers petitioner's hospitalization at Loyola from May 5, 2005 to May 24, 2005 for burns covering 15% of his body as a result of a boat explosion.

Performance Physical Therapy Services FCE August 6 and 7, 2003 (RX.17)
According to the FCE, petitioner gave maximum effort and was released to return to light to medium work levels.

Dr. Charles Bush Joseph February 14, 2003 Report (RX.18)
This is the same as PX.10.

Dr. Gary Skaletsky October 31. 2002 Report (RX.19)
Dr. Skaletsky examined the petitioner on October 31, 2002, and reviewed certain medical records and concluded petitioner had sustained a lumbar strain with mild radiculopathy as a result of the work accident of February 19, 2001, which resolved with conservative treatment.

Dr. Skaletsky believed petitioner's ongoing condition was the result of progression of degenerative changes in the lumbar spine which would occur absence of trauma. Dr. Skaletsky agreed with Dr. Goldberg that a spinal fusion was not necessary.

John Roberts February 23, 2012 Evidence Deposition (RX.20)

John Roberts testified in behalf of respondent via deposition on February 23, 2012. He was in his twenty first year of employment with respondent. His position with respondent was water and waste superintendent; which he had been in since 1996.

Roberts testified that on February 19, 2001 petitioner came into Robert's office to report he had hurt his back. Petitioner reported he was lifting a door to get the dumpster out. Roberts gave petitioner forms to fill out. The petitioner went into the lavatory to complete the forms. At that time, Joe Kaczmarski came in and told Roberts petitioner had not hurt himself lifting the door as petitioner did not assist Kaczmarski lift the door; it was the garbage truck driver who assisted Kaczmarski lift the door. (5)

Thereafter Roberts went to petitioner in the lavatory. It was then petitioner told Roberts he had hurt himself at the contact tanks taking sludge blankets. Roberts explained that about three feet from the tank it slopes down. Roberts claimed petitioner changed his story. (6)

Roberts reviewed the report identified as Employee's Report of Injury. According to Roberts, petitioner completed the report; it was in his handwriting. The report recites petitioner injury occurred when he was traversing an uneven surface on slope. He injured his right hip. (6-7)

Roberts confirmed he supervised petitioner beginning in March, 1996 (14).

Joseph Kaczmarski, Jr. February 21, 2018 Evidence Deposition (RX.21)

Joseph Kaczmarski testified in behalf of respondent via deposition on February 21, 2018. He was retired from his position as a senior operator with respondent, where he had worked for 19 years.

Mr. Kaczmarski knew very little about the events of February 19, 2001 concerning petitioner. On February 19, 2001, Mr. Kaczmarski had run an errand and when he came back into John Roberts' office he was asked if he knew that petitioner got hurt; Mr. Kaczmarski advised Roberts he did not know anything about it. Mr. Kaczmarski advised he did his thing and petitioner did his own thing. A lot of times he and petitioner worked by themselves. (6-8)

Hines VAMC Records (RX. 22)

Petitioner did not receive any treatment at the Veteran's Hospital for either his lower back or left knee condition. Petitioner received treatment for PTSD, heart condition, chest lesion and diabetes.

Health South July 15, 2002 FCE (RX.23)

This is the same as PX.7

Respondents Payment List of TTD and Medical (RX.24)

Respondent claims to have paid TTD from February 21, 2002 through March 18, 2002.

Respondent claims to have paid a total of $4,346.64 for medical expenses for the accident of November 14, 2001.

Respondent claims to have paid $25,346.94 for medical expenses for the accident of February 19, 2001.

Respondent also claims to have paid a $5,000 PPD advance.

Respondent's Response to Petitioner's Penalties Petition (RX.25)

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

The Arbitrator did not find petitioner to be credible. He hesitated with his answers and his memory seemed to conveniently lapse on cross-examination even when asked follow-up questions that he was able to answer on direct exam.

F. In support of the Arbitrator's decision with regard to whether petitioner's condition of ill-being is causally related to the injury, the Arbitrator makes the following conclusions of law:

Petitioner suffered a medial meniscus tear, for which he underwent arthroscopic partial medial meniscectomy and chondroplasty of the medial femoral condyle of the left knee on February 6, 2002 by Dr. Bradley Dworsky as a result of the work accident of November 14, 2001. He received post-operative physical therapy and was released to return without restrictions as of April 8, 2002, reportedly having no symptomatology at that time. On April 22, 2002, petitioner's wife called to report her husband had fallen directly on the left/operated knee.

He returned to Dr. Dworsky on May 1, 2002 and advised he had fallen directly on the operated knee. He was diagnosed with a contusion of he left knee. On October 14, 2002, petitioner returned to Dr. Dworsky his left knee was swollen. Dr. Dworsky diagnosed degenerative joint disease and suggested corticosteroid injections. The January 8, 2003 left knee MRI showed a medial femoral bone bruise, suprapatellar effusion, edema or hemorrhaging surrounding the semimembranosus muscle with no evidence of meniscal injury. Petitioner was seen by Dr. Bush Joseph on February 14, 2003, who diagnosed progressive medial compartment arthrosis of the left knee. Dr. Bush Joseph recommended a total knee replacement.

Petitioner was also seen by Dr. Aaron Rosenberg on February 27, 2003 and April 10, 2003 for moderate medial compartment degenerative arthritis and recommended a total knee replacement.

Petitioner first saw Dr. John Nikoleit on April 11, 2003 with a history of undergoing a left knee arthroscopy a year before and having persistent left knee pain. Dr. Nikoleit performed a total knee replacement on April 24, 2003 due to left knee degenerative arthritis.

None of petitioner's treating physicians, including Dr. Dworsky, who had provided treatment to petitioner since he was released on April 8, 2002 having no symptomology, attributed the need for a total knee replacement directly to the work accident, but rather to degenerative arthritis. In addition, according to petitioner's wife, petitioner admitted he fell directly on the knee within two weeks after April 8, 2002, when he reportedly had no symptomology. Nonetheless, petitioner offered the opinion of Dr. Jeffrey Coe, who related petitioner's ongoing left knee condition, which resulted in a total knee replacement, to the original work accident of November 14, 2001. Respondent offered no evidence to refute Dr. Coe's opinion on causation.

The Arbitrator, therefore, finds petitioner's left knee injury suffered on November 14, 2001, caused petitioner's ongoing left knee condition, for which he underwent a total knee replacement.

J. In support of the Arbitrator findings as to whether the medical services that were provide to Petitioner reasonable and necessary, and whether Respondent paid all appropriate charges for all reasonable and necessary, the Arbitrator makes the following conclusions of law:

The Arbitrator finds that the only bill submitted for treatment of petitioner's left knee is a bill from Dr. John Nikoleit of Joliet Orthopedic/Sports Medicine Center for $3,290.00; and awards same subject to any previous payment made by respondent directly or by respondent's health insurance for which it claims credit pursuant to §8 j.

(All other bills relate to petitioner's back claim, which is the subject of 02 WC 48868.)

K. In support of the Arbitrator's decision with regard to temporary total disability benefits, the Arbitrator makes the following conclusions of law:

Petitioner was temporarily totally disabled beginning on the date of the left knee arthroscopic surgery of February 21, 2002 through March 18, 2002, when he was released with restrictions. According to the record, petitioner remained off work until April 8, 2002, when he was released to return to work without restrictions.

Although petitioner was receiving treatment to his left knee by Dr. Dworsky, Dr. Bush Joseph, Dr. Aaron Rosenberg and Dr. John Nikoliet, after April 8, 2002, none of the doctors indicated petitioner was to be off work due to his left knee injury. It was not until petitioner underwent the total knee replacement by Dr. Nikoleit on April 24, 2003, there was evidence he was off work due to the knee injury. On August 18, 2003, Dr. Nikoliet advised petitioner was having some back issues and, therefore, he was keeping petitioner off until mid-October, 2003 when petitioner's back specialist returned from out of town. However, Dr. Nikoleit had completed a disability form indicating petitioner would be able to return to work on September 23, 2003 as it relates to his left knee condition (PX.13, p.26). Based upon this evidence, petitioner proved he was also temporarily totally disabled from April 24, 2003 until September 23, 2003 due to the left knee injury.

Accordingly, the Arbitrator awards TTD for the period from February 21, 2002 through April 8, 2002 and from April 24, 2003 to September 23, 2003, which is 28-4/7 weeks at the rate of $586.00 per week.

L. In support of the Arbitrator's decision with regard to the nature and extent of petitioner's injury, including whether petitioner is entitled to permanent total disability benefits, the Arbitrator makes the following conclusions of law:

The Arbitrator found petitioner sustained a torn medial meniscus, for which he underwent arthroscopic partial medial meniscectomy and chondroplasty of the medial femoral condyle of the left knee; which eventually required a total knee replacement as a result of the work accident of November 14, 2001. The Arbitrator therefore finds petitioner sustained a loss of 60% loss of use of the left leg and awards 120 weeks PPD (as petitioner's accident occurred prior to the 2005 Amendment to the Act) at the rate of $527.40 per week pursuant to § 8 (e) 12.

M. In support of the Arbitrator's decision with regard to whether penalties or attorneys' fees should be imposed upon respondent, the Arbitrator makes the following conclusions of law:

It was clear from the evidence that petitioner was temporarily totally disabled as of February 21, 2002 to March 18, 2002, for which he as paid temporary total disability benefits.

What is not clear is whether petitioner was provided light-duty work after March 18, 2002 until he was given a full duty release to return to work on April 8, 2002.

(The Arbitrator notes petitioner was provided light-duty work after the November 14, 2001 accident until he had arthroscopic surgery on February 21, 2002. The record is silent as to whether he was offered work, or actually worked within his restrictions, after March 18, 2002.)

The second period of disability claimed for the left knee injury began on April 24, 2003. Until petitioner provided the opinion of Dr. Coe on July 10, 2012, ten years after the injury and nine years after the total knee replacement, the medical records were silent as to the causal connection of the total knee replacement and the work accident of November 14, 2001. All four treating physicians failed to relate the need for the knee replacement to the work accident; rather, all four related it to degenerative arthritis.

Furthermore, petitioner was off work at the time of the total knee replacement due to his back condition, which was the subject of case 02 WC 48868: that claim was denied.

These issues justify respondent's delay in payment of temporary total disability for the period after March 18, 2002. Therefore, the claim for penalties and attorneys' fees is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC022256
Case Name	TORRES, BLANCA v. LABOR NETWORK
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0520
Number of Pages of Decision	13
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Daniel Klosowski
Respondent Attorney	JASON ALLAIN

DATE FILED: 10/18/2021

/s/Kathryn Doerries, Commissioner

Signature

21IWCC0520

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BLANCA TORRES,

Petitioner,

vs. NO: 14 WC 022256

LABOR NETWORK,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms and adopts the Arbitrator's Decision with the exception of the permanent disability award and a scrivener's error. With respect to the scrivener's error, the Commission strikes the words "the past six visits" from the third sentence, paragraph four on page three of the Arbitrator's Decision and substitutes "past the six visits." The sentence, should now read, "[h]e found no justification for referral to Drs. Shaefer and Dixon, and no justification for the chiropractic treatment past the six visits."

Permanent Disability

The Commission agrees with the Arbitrator, that permanent partial disability is established using the criteria found in 820 ILCS 305/8.1b. However, the Commission views the evidence differently with respect to Section 8.1b(b) factor (v) and the nature and extent of the Petitioner's disability.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by

treating medical records, the Commission notes Petitioner has not treated in nearly four years. The Commission finds Petitioner's continued complaints four years later from a soft tissue injury that would have a limited duration is not credible. Although Petitioner did complain of on-going subjective pain, there is no medical record which could point to an objective basis for that pain since she has not treated in four years. On January 30, 2015, Dr. Dixon wrote Dr. Abdelatif and stated that the lumbar spine MRI did not demonstrate significant pathology. He also wrote that the MRI evaluation of the cervical spine demonstrates cervical straightening and mild spondylosis without central canal or nerve compression and the EMG showed diffuse radiculitis. He explained to Petitioner that there were no surgically correctable lesions on her studies. (PX5) On February 19, 2015, Dr. Chunduri indicated no further injections or interventional procedures would be of significant benefit. He opined her symptoms could be treated via medications. (PX5) On April 16, 2015, Dr. Chunduri referred Petitioner back to Dr. Dixon to again determine the necessity of surgical intervention. (PX5) On August 10, 2015, Dr. Dixon confirmed the results of the May 8, 2015, myelogram and CT scan he ordered did not change his opinion regarding surgery. He discussed with Petitioner in great detail that the findings of the MRI, EMG and myelogram all suggest that there is no role for surgical intervention in her care. (PX5) There was no surgical recommendation, nor was she considered to be a candidate for injection treatment or further intervention by Dr. Chunduri before he released her at maximum medical improvement on October 15, 2015. (PX5) One month later, Petitioner returned on November 12, 2015, and Dr. Chunduri confirmed that Petitioner was not a candidate for surgery. His Plan included another lumbar spine MRI and recommended medications. (PX5) Petitioner testified she has not seen any other doctors for treatment purposes since she saw Dr. Chunduri on November 12, 2015. (T. 34-35) Petitioner also testified that she sometimes takes Tylenol and other pills but she "forgot the name." She also takes teas. (T. 43-44) The Commission assigns this factor significant weight in determining the level of disability based upon the treating medical records.

Based on the Section 8.1b(b) factors and the record taken as a whole, the Commission finds Petitioner sustained permanent partial disability to the extent of 3% man as a whole (15 weeks) at $286.00 per week (minimum PPD rate with two dependents).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on December 11, 2019, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $286.00 per week for a period of 15 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use of 3% of a man as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services to David Cavazos, for services performed May 21, 22, 23, 24, 27, 28, 2014, pursuant to the fee schedule, as provided in Section 8(a) and Section 8.2 of the Act. No further medical benefits are awarded.

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, including but not limited to credit of $14,452.39 for TTD paid, 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.

October 18, 2021

KAD/bsd
O082421
42

/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
NOTICE OF ARBITRATOR DECISION

TORRES, BLANCA Case# **14WC022256**
Employee/Petitioner

LABOR NETWORK
Employer/Respondent

On 12/11/2019, 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 1.52% 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:

2553 McHARGUE & JONES LLC
DANIEL R KLOSOWSKI
123 W MADISON ST 18TH FL
CHICAGO, IL 60602

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

Blanca Torres
Employee/Petitioner
v.
Labor Network
Employer/Respondent

Case # **14** WC **22256**

Consolidated cases: ______

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Thomas L. Ciecko**, Arbitrator of the Commission, in the city of **Chicago**, on **September 26, 2019 and October 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. [ ] 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 [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. [ ] Other ______

FINDINGS

On **May 1, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being ***is not,*** other than a soft tissue back sprain, causally related to the accident.

In the year preceding the injury, Petitioner earned $**13,602.10**; the average weekly wage was $**357.95**.

On the date of accident, Petitioner was **35** years of age, ***single*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**14,452.39** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**14,452.39**.

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

ORDER

Medical benefits

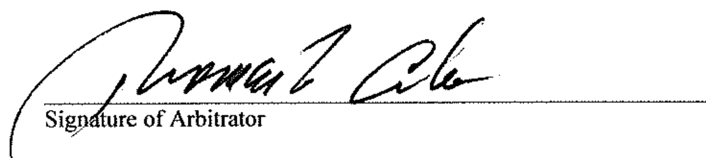
Respondent shall pay reasonable and necessary medical services to David Cavazos, for services performed May 21, 22, 23,24,27, 28, 2014, pursuant to the fee schedule, as provided in Section 8a of the Act. No further medical benefits are awarded.

Permanent partial disability

Respondent shall pay Petitioner permanent partial disability benefits of $286.00 per week for 25 weeks as this Arbitrator finds Petitioner sustained permanent partial disability to the extent of 5% loss of a man as a whole.

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

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



Signature of Arbitrator

Date

DEC 1 1 2019

Blanca Torres v. Labor Network, No. 14 WC 22256

Preface

The parties proceeded to hearing September 26, 2019, recessed and resumed October 4, 2019, for the introduction of exhibits in compliance with Supreme Court Rule 138, on a Request for Hearing indicating the following issues in dispute: whether Petitioner's current condition of ill-being is causally connected to an injury sustained May 1, 2014; whether Respondent is liable for unpaid medical bills; whether Petitioner is entitled to temporary total disability and maintenance; and what is the nature and extent of the injury. A transcript of the hearing on September 26, 2019, was ordered. Petitioner testified via an interpreter. Donald Scott, a private investigator, testified. Petitioner offered no medical testimony. Dr. Brian Cole and Dr. Jesse Butler testified for Respondent via evidence deposition. Blanca Torres v. Labor Network, No. 14 WC 22256 Transcript of Evidence on Arbitration at 4; Arbitrator's Exhibit 1.

Finding of Fact

Blanca Torres (Petitioner), a 35 year old female, testified that on May 1, 2014, she was working for Labor Network (Respondent) in a bread company. She said she fell on oil on the floor on the way back from a bathroom break. She said she fell on her left side, feeling pain in her hip and back. She said she finished her shift, went home and took Tylenol. She said on May 5, 2014, the company sent her to U.S. HealthWorks. Torres at 12-13, 15-16, 17, 18.

The written records of U.S. HealthWorks indicate Petitioner was seen twice. On May 5, 2014, she appeared in no acute distress, had full range of motion and motor strength, and had an unremarkable physical. The x-rays of Petitioner's neck, low back and left hip were negative. She was diagnosed with sprain in the lumbar region, sprain of the neck, and a contusion of her left hip. She was restricted to sitting work. On May 12, 2014, she was prescribed two weeks of physical therapy. Petitioner's Exhibit 19.

Petitioner testified she transitioned care to Dr. David Cavazos. This was not a referral from another medical provider, nor was there an explanation for the sudden appearance of a chiropractor, a nonmedical doctor. Torres at 21.

The written records of Cavazos indicate Petitioner was first seen May 21, 2014. Petitioner treated with Cavazos to October 28, 2014. His notes are essentially repetitive jargon, subjective complaints purportedly from Petitioner, and treatment offering no help at all. His assessment of Petitioner was lumbar, cervical sprain/strain and a contusion on the left hip. Cavazos placed Petitioner off work because "her condition would prevent her from being as productive as she needs to be." There is no indication he knew what her level of production was, or why he acted this way, in spite of the treatment at US HealthWorks. His records contain a May 21, 2014, x-ray of Petitioner's lumbar spine noting biomechanical alterations, apparently a right lumbar tilt. Petitioner's Exhibit 1.

Petitioner testified Cavazos referred her to Dr. David Schafer. We do not specifically know why. Torres at 23. The written records of Dr. David Shafer indicate he first saw Petitioner July 17, 2014. He indicated Petitioner saw Cavazos for a second opinion. That is improbable.

Not surprisingly, Shafer noted Petitioner's pain had not improved with treatment by Cavazos. Schafer assessed Petitioner with cervical pain radiculopathy; kyphosis [exaggerated forward rounding of the back, weakness in the spinal bones]; lumbar radiculopathy. Schafer said Petitioner was medically unable to work. A month later, Schafer referred Petitioner to pain management for injections. Petitioner never saw him again. Petitioner's Exhibit 2.

Petitioner testified Schafer sent her to Dr. Ossama Abdellatif. Torres at 24. The written records of ProClinics indicate Abdullatif saw Petitioner from August 26, 2014, through December 23, 2014. The history taken August 26, 2014, is at odds with testimony in this case as well as other records. Abdellatif radically expanded Petitioner's complaints, and placed her off work due to "pain and procedures." He treated Petitioner as a human pin cushion, giving her over a dozen injections. While Petitioner testified the injections didn't help, Abdellatif noted, "...despite continuing pain she states positive satisfaction from treatment done up to date [October 2, 2014] and will [*sic*] like to continue for further improvement..." Torres at 47; Petitioner's Exhibit 3. Abdellatif's records appear incomplete, with pages missing, contain unpunctuated gibberish, and contain dubious statements such as "the procedure was discussed in detail (in easy and comprehensible manner) with the responsible parties...." Abdellatif's off work notes are suspect. Petitioner's Exhibit 3.

Simultaneously to seeing Abdellatif, Petitioner saw Dr. Mark Sokolowski on November 5, 2014. His notes indicate no primary care physician, no information on the last day Petitioner worked, a blank health history, but contain a business card from Petitioner's attorney. Sokolowski expanded the nature of Petitioner's complaint, and in complete contravention of Petitioner's testimony, wrote, "She made a considerable effort to perform her modified duty as she was assigned a variety of different positions, but her symptoms ultimately became unbearable." Despite the previous failure of injections, Sokolowski recommended more injections. Petitioner's Exhibit 4; Torres at 57.

In a continuation of inexplicable doctor swapping, Petitioner testified Abdellatif referred her to Dr. Geoffrey Dixon, who referred her to Dr. Krishna Chunduri. Chunduri sent Petitioner back to Dixon. Torres at 29-31.

The written records of Illinois Orthopedic Network indicate Petitioner saw physicians there from January 30, 2015, through November 12, 2015. What can be gleaned from Dr. Dixon and Dr. Chunduri, is that Dr. Chunduri determined Petitioner has no surgical condition for which surgery would be a benefit, and did not feel further interventional procedures would be of significant benefit. Dr. Dixon found no role for surgical intervention in Petitioner's case. While Dixon noted Petitioner could possible have a rhizotomy, Chunduri said rhizotomy would not give significant improvement. Chunduri prescribed medication for Petitioner despite Petitioner telling him they do not work well. Chunduri placed Petitioner at MMI October 15, 2015, four years ago. Dixon referred Petitioner for an FCE. Petitioner's Exhibit 5.

Petitioner testified she had an FCE in September 2015. The records of ATI Physical Therapy indicate an FCE on September 8, 2015. The examiner noted a valid representation of the present physical capabilities, but referred to her as a male. Despite not having a job description for Petitioner, the examiner claimed to use one from the U.S. Department of Labor's

Dictionary of Occupational Titles. They did not indicate what the occupation was that they used. Most activities were terminated due to pain in the neck and lower back. The testers observed Petitioner grimacing, groaning, sighing, shaking, crying, and holding her breath. They noted Petitioner saying she was in pain. The testers Petitioner's capabilities fell within the DOT stated level; however, her capabilities fell below Petitioner's self-stated level. The testers misidentified the Federal agency. ATI concluded Petitioner's functional capabilities most consistent with the light physical demand level. Petitioner's Exhibit 6.

Petitioner testified she had not had medical treatment in four years, since November 2015, and had not worked for over five years, since May 2014. Torres at 34, 38.

Surveillance was conducted on Petitioner by Donald Scott on January 11, 16, and 18, 2018. She was observed driving, walking, bending while clearing snow, carrying bags and shopping. Torres at 65-78; Respondent's Exhibit 3.

Dr. Brian Cole, an orthopedic surgeon, testified he was tasked to perform a utilization review for treatment on Petitioner. He testified to reviewing the records of Cavazos, Chunduri, Dixon, Abdellatif, and Shaefer. He found no justification for referral to Drs. Shaefer and Dixon, and no justification for the chiropractic treatment the past six visits. Much of the medications and injections were unjustified. Respondent's Exhibit 1 at 8, 11, 12, 13-16, 19; Respondent's Exhibit 1, Exhibit 2.

Petitioner submitted to an independent medical examination by Dr. Jesse Butler. Butler, a board certified orthopedic spine surgeon and certified independent medical examiner, testified he evaluated Petitioner on March 14, 2018, and prepared a report. He took a history from Petitioner and noted her most recent treatment was almost four years ago and she used over the counter medication. He performed a physical examination, reviewed Petitioner's radiology records, medical records and her FCE. He noted normal cervical and lumbar MRIs and questioned the FCE, testifying such was typically prescribed after a surgical procedure with extended time out of work, or following a course of therapy or conditioning. Butler's diagnosis was a remote history of cervical and lumbar strain, healing in six months. Petitioner's imaging studies were normal. At that point, said Butler, there were no work related issues affecting Petitioner's cervical or lumbar spine. He did not feel additional care was reasonable or necessary or related to the work event. Butler had never seen an FCE ordered on a patient with normal imaging of cervical and lumbar spine. He said it hade no sense to access functional capacity with no structural issues. He testified there was no objective basis for Petitioner's work limitations. Butler testified the injections by Abdellatif were not reasonable or necessary based on Petitioner's normal MRI. He said Abdellatif's practice of injections was consistently atypical for the standard of care. Butler testified it was not possible for Petitioner to have continued complaints four years later from a soft tissue injury. Butler said he reviewed the surveillance video and found an absence of pain behavior and consistent with Petitioner's behavior when he examined her, and inconsistent with Petitioner's reporting a significant amount of interference in activities of daily living. He thought the video was supportive of Petitioner not needing an FCE or any restrictions. Respondent's Exhibit 2 at 7, 9, 11, 14, 16, 20, 22-23, 23-24, 24-25, 25-26, 36-37, 35, 28, 29, 13, 30. Dr. Butler found no causal relationship between Petitioner's current

condition and what Petitioner says happened at work May 1, 2014. Respondent's Exhibit 2 at Exhibit 2.

Conclusions of Law

Disputed issue **F** is, is Petitioner's current condition of ill-being causally related to the injury. An injured employee bears the burden of proof to establish the elements of her right to compensation, including the existence of a causal connection between her condition of ill-being and her employment. Navistar International Transportation Corporation v. Industrial Commission (Diaz), 315 Ill. App. 3d 1197, 1202-1205 (2002). A claimant must prove that some act or phase of her employment was a causative factor in the ensuing injury. Whether a causal connection exists is a question of fact. Vogel v. Illinois Worker's Compensation Commission, 354 Ill. App. 3d 780, 786 (2005).

The evidence in this case indicates that Petitioner did suffer, at most, a lumbar and cervical sprain, as a result of the fall. I rely on the records of U.S. HealthWorks and the testimony of Dr. Jesse Butler, as well as the diagnostic testing of Petitioner. Petitioner's Exhibit 19; Respondent's Exhibit 2. There was no medical testimony offered on behalf of Petitioner. There was what can be described as doctor swapping and no small amount of conflicting and unnecessary medical visits. The records alone of Petitioner's parade of doctors and chiropractors are not conclusive proof of the medical matters stated in those records. 820 ILCS 305/16. Also, Petitioner testified she had not had any medical treatment in about four years.

I find as a conclusion of law Petitioner's current condition of ill-being, other than lumbar and cervical strain, not causally connected to the fall.

Disputed issue **J** is whether Respondent is liable for unpaid medical bills. An employer shall pay according to a fee schedule or negotiated rate, all necessary first aid, medical services, and hospital services incurred, reasonably required to cure or relieve from the effects of an accidental injury. 820 ILCS 305/8a.

I find, based on the testimony of Dr. Cole and Dr. Butler, as well as an examination of the records and bills submitted on behalf of Petitioner, Respondent is liable for the first six visits to Cavazos, May 21, 2014, May 22, 2014, May 23, 2014, May 24, 2014, May 27, 2014, and May 28, 2014. Respondent is not liable for any further services. There is no credible evidence any of the services of the multitude of medical providers was reasonably required to cure or relieve Petitioner, and arguably had a negative impact, real or perceived, on the rehabilitation of Petitioner.

Disputed issue **K** is whether Petitioner is entitled to temporary total disability from May 27, 2014, through October 15, 2015, and maintenance from October 16, 2015, through September 26, 2019. A claimant is temporarily totally disabled from the time an injury incapacitates her from work until such time as she is recovered or restored as the permanent character of her injury will permit. The dispositive inquiry is whether the claimant's condition has stabilized, that is reached maximum medical improvement. Considerations are given to a release to return to work, medical testimony, and evidence concerning the injury and extent of

the injury. Interstate Scaffolding, Inc. v. Worker's Compensation Commission (Urban), 385 Ill. App. 3d 1040, 1043 (2008).

Here U.S. HealthWorks released Petitioner back to work with restrictions to sitting work on May 12, 2014. Petitioner testified she returned to work doing light duty. She never testified she could not continue her light duty that was provided by Respondent. The only medical testimony on this was offered by Dr. Butler, who testified Petitioner's cervical and lumbar strain normally resolves in six months as a maximum time frame. I find the notes of Cavazos not credible and unpersuasive on this issue.

I find as a conclusion of law Petitioner is not entitled to a period of temporary total disability.

I find the period of maintenance requested is far outside the period of time Petitioner's soft tissue injury would have healed and is denied.

Disputed issue **L** is, what is the nature and extent of the injury. Petitioner sustained a soft tissue back sprain. Here permanent partial disability is established using the criteria found in 820 ILCS 305/8.1b. As to the level of permanent partial disability, this Arbitrator finds as follows.

With regard to subsection (i) of Section 8.1b(b), this Arbitrator notes no permanent partial disability impairment report and/or opinion was submitted into evidence. Because of this, I give this factor no weight in determining the level of disability.

Regarding subsection (ii) of Section 8.1b(b), the occupation of the employee, she was a laborer in a bakery. She testified she went back to work with sitting restrictions. I give this factor some weight in determining the level of disability.

Regarding subsection (iii) of Section 8.1b(b), this Arbitrator notes Petitioner was 35 years old at the time of the accident. I give this factor no weight in determining the level of disability because this was a soft tissue injury of limited duration.

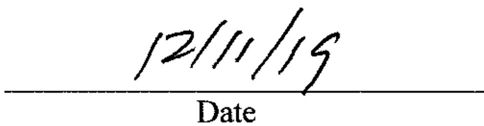
With regard to subsection (iv) of Section 8.1(b), the Petitioner's future earnings, there is no evidence Petitioner's future earnings capacity was adversely affected by the accident. She went back to light duty. There was no testimony on wages. I give this factor no weight in determining the level of disability.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by treating medical records, I note Petitioner has not treated in nearly four years. As Dr. Butler testified, it is not possible for Petitioner to have continued complaints four years later from a soft tissue injury. I give this factor no weight in determining the level of disability.

Based on the above factors and the record taken as a whole, this Arbitrator finds

Petitioner sustained permanent partial disability to the extent of 5% man as a whole (25 weeks) at $286.00 per week (minimum PPD rate with two dependents).

Arbitrator


Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC038754
Case Name	HOLIDAY, TAMMY J v. CITY OF CHICAGO
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0521
Number of Pages of Decision	29
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	John Powers
Respondent Attorney	Lucy Huang

DATE FILED: 10/18/2021

/s/*Kathryn Doerries, Commissioner*

Signature

21IWCC0521

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 Choose reason	
		X 5 factor analysis, modify order section re stip of maint. period, & correct scrivener's error	
		☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TAMMY HOLIDAY,

Petitioner,

vs. NO: 13 WC 38754

CITY OF CHICAGO,
DEPARTMENT OF STREETS AND SANITATION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, maintenance, permanent partial disability, wage differential benefits, and penalties and attorney 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, herein, affirms the Arbitrator's decision in its entirety, but modifies the Order section, corrects a scrivener's error, and modifies the decision to apply the five-factor analysis for permanency determination.

The Commission, herein, modifies the Order section to reflect the parties' stipulation to the maintenance period of October 31, 2015 through February 15, 2019 (172 weeks).

The Commission, herein, corrects a scrivener's error in the Arbitrator's decision, page 13, paragraph two, to change the word "credible" to "credibility".

The Commission notes that the Arbitrator did not perform a Section 8.1b(b) analysis, as the Act requires, for determination of permanent partial disability for accidental injuries occurring after September 1, 2011. The Commission, therefore, performs an analysis under Section 8.1b(b) as follows:

1) There was no impairment rating performed so this factor is given no weight.
2) Petitioner was no longer performing her occupation as a sanitation laborer for Respondent. This factor is given little weight.
3) Petitioner was 44 years old and still has a moderate amount of potential work life expectancy remaining. This factor is given some weight.
4) Petitioner was not earning the same as she did prior to the accident as she was no longer working for Respondent, but there was no credible evidence presented of an impairment of future earning capacity as a result of the accident. In addition, Petitioner provided sub-optimal effort in her course of physical therapy and in her job search. Petitioner was currently working in a temporary position which she obtained just prior to hearing. Petitioner did not put forth a good faith effort in trying to secure suitable employment. This factor is given little weight.
5) Petitioner suffered a right little finger subluxation of the PIP joint, and right-hand contusion injury from the work accident when the can struck her right little finger. Petitioner underwent multiple surgeries to address the condition of her right little finger. On December 16, 2013, she underwent a debridement and capsulectomy and on June 23, 2014, she underwent a fusion and bone graft. Petitioner underwent a third surgery on March 23, 2015, to remove the hardware from her finger. Petitioner was released to return to work on November 3, 2015, with a 25-pound lifting restriction regarding her right-hand duty work. Petitioner testified that currently she still has pain in her right little finger. The pain is in her whole hand; like arthritis, it throbs and aches. Petitioner testified that the temporary job she was working was within her restrictions. Petitioner stated the finger will not go straight. The Arbitrator viewed it and noted the finger flared up and, when resting her right hand on the table, it looked like her little finger was like a mountain or bridge that peaked in the middle. He noted it also looked slightly flared out away from the rest of the fingers. The Arbitrator noted the crookedness of the little finger. As to activities of daily living, Petitioner stated she cannot grip when it comes to performing activities like sweeping. Petitioner testified that she can pretty much handle big things, but the little things are hard as her hand is already aching. Petitioner testified it feels really good when she opens her hand; it is more comfortable that way. When bending or anything, that is just hard to do. This factor is given significant weight.

In reviewing the totality of the evidence and applying the five factors as enumerated above, the Commission finds that the Arbitrator's award of 60% loss of use of the right small finger and 20% loss of use of the right hand is fully supported by the evidence.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on October 30, 2019, is hereby modified for the reasons stated herein, and otherwise affirmed

and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $712.55 per week for a period of 54.2 total weeks, as provided in §8(e)(5) and§8(e)(9) of the Act, for the reason that the injuries sustained caused the 60% loss of use of Petitioner's right small finger (13.2 weeks) and 20% loss of use of Petitioner's right hand (41 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.

October 18, 2021

o-8/24/21
KAD/jsf

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0521

HOLIDAY, TAMMY
Employee/Petitioner

Case# **13WC038754**

CITY OF CHICAGO
Employer/Respondent

On 10/30/2019, 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:

1067 ANKIN LAW OFFICE LLC
JILL WAGNER
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

0010 CITY OF CHICAGO DEPT OF LAW
LUCY HUANG
30 N LASALLE ST SUITE 800
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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Tammy Holliday
Employee/Petitioner
v.
City of Chicago
Employer/Respondent

Case # **13** WC **38754**

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 July 16, 2018. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On May 2, 2013, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**68,654.53**; the average weekly wage was $**1,320.28**.

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

Respondent shall be given a credit of $**114,428.60** for TTD, $**0** for TPD, $**149,637.40** for maintenance, and $**0** for other benefits, for a total credit of $**264,066.00**.

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

ORDER

Petitioner's request for the maintenance benefits for the period from February 16, 2019 through June 5, 2019 is hereby denied.

Respondent shall pay Petitioner permanent partial disability benefits of $712.55/week for 54.2 weeks because he sustained a 60% loss of a right small finger and 20% loss of use of the right hand, as provided in Section 8(e) of the Act.

No penalties are warranted.

Respondent shall pay Petitioner compensation that has accrued from **May 3, 2013** through **October 30, 2015**, 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

10-29-19
Date

OCT 3 0 2019

Tammy Holliday v. City of Chicago
13 WC 38754

FINDINGS OF FACT

It is stipulated to by the parties that on May 2, 2013, that Ms. Tammy Holliday ("Petitioner") dislocated her right small (pinky) finger in the course and scope of her employment with the City of Chicago ("Respondent"), Dept. of Streets & Sanitation. Her job title was a Sanitation Laborer and she stated that a cart fell off the lift, striking her hand and finger while loading and unloading a garbage truck. At the time of the occurrence, she earned $33.00 per hour.

On May 3, Petitioner did not go to work for unrelated reasons. May 4th and 5th were Saturday and Sunday, the weekend. Petitioner did not seek treatment for the accident until the following Monday. No accident report is in the record.

Petitioner's initial medical treatment was on May 6, 2013 at U.S Health Works where she received an injection of 1% lidocaine and traction was applied to finger in an attempt at reset the dislocation. It was unsuccessful. As result, she was placed off work and referred to Dr. Srdjan Ostric, an orthopedic surgeon, for further treatment (PX #2).

Dr. Ostric diagnosed Petitioner with right small finger dislocation and recommended surgery. Over seven months later, on December 16, 2013, a debridement of the PIP joint and capsulectomy right small finger was finally performed. Due to Petitioner's complaints of ongoing right pinky finger pain, Dr. Ostric recommended a fusion surgery (PX #4).

On May 14, 2014, Petitioner attended an independent medical examination with Dr. John Fernandez at the request of Respondent. Dr. Fernandez agreed with Dr. Ostric's recommendation for a small finger proximal joint fusion and stated that it was unlikely that she would return to her heavy work (RX #4).

On June 23, 2014, Petitioner underwent a fusion with bone graft of right small finger PIP joint.

Petitioner later underwent a removal of buried hardware from the right small finger on March 23, 2015. (PX #5)

Postoperatively, Petitioner underwent physical therapy and work conditioning (PX #4). Petitioner's physical therapy focused on improving her pinch and grip strength. (PX #3) However, the physical therapist noted repeated instances of "low effort" and "poor activity

tolerance." For instance, she was unable to lift 5 lbs. to shoulder level. Her right shoulder range of motion was limited. She was observed to have "poor endurance and strength." (PX #3) She demonstrated low "effort and sub-maximal effort" on many occasions. This included tasks like stair climbing. She was observed to have "poor cardiovascular endurance and general deconditioning." (PX #3)

On April 3, 2015, Dr. Ostric wrote that the Petitioner "will probably be on permanent restrictions from sarcoid (lung). (A sarcoid is the growth of tiny collections of inflammatory cells in different parts of the body. The growths most commonly occur in the lungs, lymph nodes, eyes and skin. – Mayo Clinic). He also stated that limitations will be present due to the hand/finger as well." (PX #5) Later, on May 5, 2015, Dr. Ostric clarified that the "Sarcoid is still an issue for the RTW full duty, not related to finger injury." (PX #5)

On June 4, 2015, Dr. Ostric clarified further by stating, "There is persistent stiffness in the small finger which will be permanent. She also has a severe sarcoid. For this reason, I think RTW full duty will not be possible, she will need to be reassigned. Finger injury affects 5-10 percent function of right hand. Near full duty is possible in context of hand injury alone. Continue therapy – focus on strengthening. Expect MMI next visit." (PX #5)

On July 7, 2015, Dr. Ostric wrote that Petitioner will have minimal limitations with her small finger. Sarcoid is still the biggest problem. He intended on sending the Petitioner back to work. (PX #5) Petitioner was discharged by Dr. Ostric on July 28, 2015, but he also wrote a prescription for more work conditioning. Petitioner was still off work and collecting TTD benefits.

On August 26, 2015, Petitioner sought a second opinion with Dr. Martin Greenberg who noted that Petitioner had a clinically united PIP joint. X-rays of the right small finger revealed a solidly united fusion. He took over supervision of Petitioner's work conditioning and stated that a Fowler procedure may help with joint flexion. (PX #4)

Petitioner initiated her fourth session of work rehabilitation on September 10, 2015 at Community First Medical Center. (PX #5) Those records note that Petitioner was unable to perform sustained and forceful gripping, pushing, pulling with her left hand. (The Arbitrator notes this is a right pinky finger and right-hand claim.) In any event, Petitioner's grip strength for her right hand was the following: gross grasp 10 lbs. – 3 jaw chuck pinch 4 lbs. – Lateral

pinch 7 lbs. (PX #5) Petitioner could only walk 250 yards due to deconditioning. She was noted to be extremely deconditioned. The occupational therapist wrote that she gave a limited effort. Petitioner did not come to the initial evaluation with a full job duties report, they were given subjectively by the Petitioner. (Id.)

On September 14, 2015 the physical therapist noted that Petitioner was deconditioned both with her upper and lower extremities and was noted "to require assistance…to stand from a chair and pick a cone off the floor." (PX #5) She was often tardy to treatment sessions and took frequent rest breaks and required constant encouragement. During a six-minute walk test, Petitioner was only able to cover 283 yards. On September 28, 2015, the occupational therapist wrote, "due to unrelated issues….it is the treating therapist's opinion that the patient may not be able to meet the current demands of her full duty job." (PX #5) Dr. Greenberg ordered three more weeks of therapy.

Petitioner's last day of occupational therapy was originally scheduled to be on October 20, 2015. The physical therapist wrote: "she has not met any of her return to work levels and does not appear to be progressing towards the levels needed to return. She continues to be limited due to unrelated issues and demonstrates slow progress during work conditioning….she may not be able to meet the current demands of her job." (PX #5) Dr. Greenberg though she might return to her prior job if there was dramatic improvement and ordered more therapy (Id.)

On November 10, 2015, the therapist wrote, "she remains restricted due to unrelated conditions." Her six-minute walk test was covered 550 yards. They recommended discharge. (PX #5)

On November 11, 2015, Dr. Greenberg found that Petitioner had reached maximum medical improvement. The doctor discharged her and stated that she could not lift more than 25 pounds with her right hand (PX #4). He stated that her job description required her to lift 50 pounds. She was referred to vocational rehabilitation. (PX #4)

Despite being discharged, the Petitioner returned to see Dr. Greenberg on April 15, 2016, where he again offered the Fowler procedure. On April 18, 2017, he stated she was uninterested in another surgery and she was using Aleve for mild discomfort of the finger.

Vocamotive was hired to perform vocational rehabilitation services for Petitioner. The record reflects that Petitioner underwent vocational services from December 2017 through August 2018. (PX #6, RX #1, RX #2) Ultimately, Petitioner was deemed to be noncompliant.

Examples of the petitioner's noncompliance with vocational rehabilitation include the following. On December 8, 2017, Petitioner attended the initial Vocational Evaluation and stated that "she did not think she would be able to lift over 5 lbs. as part of a job." Further, "she could only occasionally bend, stoop, squat, and kneel." She reported that "she becomes out of breath easily and struggles to climb stairs or walk at a quick pace." Finally, "she experiences pain in her right shoulder and wrist due to arthritis." Ms. Kopitzke, the evaluator, noted that Petitioner had "no limitations to standing, walking, bending stooping, squatting, kneeling, climbing stairs or walking." (PX #6) Petitioner stated that she wanted to work with the City, as she did not think any other employer would tolerate her attendance issues. She admitted generally missing one day of work per week for her sarcoidosis. (PX #6) She would use her FMLA for this condition (Tr. 29). Initially, the consultant thought Petitioner could earn from $11.00 to $15.00 per hour on a full-time basis. (RX #1) They agreed to target jobs like security guard, office helper, housekeeping cleaner, cafeteria attendant and parking lot attendant.

On February 28, 2018, Petitioner was advised by her vocational rehabilitation counselor that she was seven days behind schedule and needed to catch up with the program schedule (RX #1).

On March 30, 2018, Petitioner stated that she no longer wanted to apply for a security position. Instead, she would like to return to work with the City of Chicago. Petitioner wanted to work outdoors and did not like being inside an office. Later, Petitioner contradicted herself by stating that she wanted to work in a clerical position (RX #1)

On April 12, 2018, Petitioner stated, "I don't want to do security. I know I have to do these jobs, but I really don't want just security jobs." Petitioner reported she was interested in a Watchman and a Bridge Operator position with the City of Chicago. Later, Petitioner reported she did not like sitting in one place for a long period of time (RX #1). Later that day, Petitioner told Vocamotive that she would not be able to attend her next office appointment on April 17, 2018, which was a Tuesday (RX #1).

On April 13, 2018, Dr. Greenberg noted that the pinky finger was not painful. The Petitioner visited him and requested that her restriction be amended to reflect that she could only perform 2-handed lifting of 15 pounds. Dr. Greenberg complied and filled out her City of Chicago paperwork to reflect her new permanent work restrictions, stating she could not lift more than 15 lbs. with two hands. This included from floor to waist and overhead. (PX #4) Petitioner wrote that she was unable to lift the required 75-100 pounds that her job required. (PX #4)

On April 18, 2018, Petitioner reported she was having difficulty with an application at Universal Security. Assistance was provided. Petitioner indicated availability on weekdays only. Petitioner was advised that she needed to be more flexible about her work schedule to prospective employers (RX #1).

On April 24, 2018, a Tuesday, Petitioner reported she would not make it for her meeting with the vocational counselor on this date. She stated, "My sarcoidosis is acting up." She did not know when she would be able to make up the missed day (RX. #1).

In the Analysis section of the Progress Report dated April 30, 2018, it was noted that Petitioner had been re-advised that she had to have open availability and apply for all jobs for which she was qualified. It was noted that Petitioner was not completing field calls as instructed (RX #1).

On May 1, 2018, (Tuesday) it was noted that Petitioner had not visited American Security Services regarding an available security officer position. She had been advised to do so on April 17, 2018 (Tuesday). Later that day, Petitioner stated, "I don't feel well, I won't make it in. I should be able to come in Wednesday and Thursday, but I have to play it by ear." (RX #1)

On May 2, 2018, a voice message was received from Petitioner reporting that she would be unable to attend her appointment on this date due to illness (RX #1).

On May 3, 2018, Petitioner was assisted with completing an online application for Metro Security. Petitioner reported she was having trouble with an online application for Service Corporation International for a Field Operation Support Assistant in Evergreen Park. Petitioner stated, "I really don't want to do this application for this position because it mentions me working too close with a funeral home." (RX #1)

On May 11, 2018, Vocamotive left a voice message for Petitioner confirming that she would be attending a hiring event with Central States SER. A second voice message was left for Petitioner requesting her to call Vocamotive regarding her job search on this date. Petitioner never replied to Vocamotive or bothered to provide an update (RX #1).

On May 15, 2018, it was noted Petitioner was reminded three times to ensure she had included the correct job title for her cover letters (RX #1).

On May 17, 2018, It was noted that Petitioner failed to attend a Job Fair with Central States SER. Petitioner reported she did not attend the Job Fair as it was Mother's Day weekend. Petitioner reported that she was out getting her hair done and did not receive the message until 1:00 or 1:30 p.m. on that date. Petitioner stated that she could not be expected to drop what she was doing, not on Mother's Day weekend (RX #1). Petitioner also stated that she did not want to take a job from any other employer than the City (RX #1).

Petitioner was advised to complete a field visit with American Security; however, Petitioner reported that she was not interested in security work. Further stating that she could not do the security job as she could not stand for long periods of time or walk up and down stairs. She was reminded that security positions were available within her restrictions. (RX #1)

On May 23, 2018, Petitioner failed to respond to voice mail messages left by Vocamotive (RX #1).

On May 29, 2018, Petitioner's cover letters were reviewed and edited for a receptionist/office assistant with Golden Home Cabinetry in Elk Grove Village, and for an airport security guard with Prime Flight Aviation Services in Chicago. The original application included only one reference; further, she did not include a phone number nor email address to contact the sole reference. She stated that she was unable to work a "full shift (8 hours) of walking/standing with or without reasonable accommodation". It was noted she used "tammyholliday" as her username instead of the recommended "tammy26holliday@gmail.com". She did not include her full address; this was added to her profile. She indicated she was not willing to travel; this was changed to indicate "25% of the time". She indicated "$30.00" as her minimum salary expectation; this was changed to "$10.00". She did not include her security training, PERC card information, or Vocamotive training; these were included in the edit She indicated she was only available for "Day" shifts; this was changed to include nights and weekends. She was advised to indicate "NA" if still

employed; she indicated "still employed"; this was changed to "NA" (RX #1).

Petitioner received a rejection letter from Guardian Security Services. Upon review, Petitioner had submitted a general resume, not her security-specific resume (RX #1). Petitioner failed to competently fill out an employment application with Rosin Optical Co. by sending an unedited cover letter. Further, she entered her high school three separate times for high school, college, and trade school. She indicated "None" when asked to summarize any special skills or qualifications. <u>She spelled the word "Chicago" incorrectly</u> in the employment history. She did not indicate her dates of employment nor the company phone number. She indicated "Laborer Collectv Garbage" as her "Title/Duties" (RX #1).

According to the June 3, 2018 Vocamotive Report, Petitioner persistently completed employment applications incorrectly by requesting wages inconsistent with her background and the available position: she attached incorrect letters to the applications. Petitioner limited her availability to work and misstated her restrictions by reporting that she was unable to stand for an 8-hour shift. Petitioner was often unavailable to communicate with the vocational counselor and failed to check in with her daily to report her job search. She returned phone calls inconsistently. It is further noted that she did not attend a Career Fair on a Friday as she reported not being given enough notice and that she was having her hair done for the Mother's Day weekend. She was advised that she was to be available from 8:00 a.m. to 5:00 p.m. on business days for job search. It was noted that Petitioner did not complete assignments promptly (RX #1).

On June 5, 2018 (Tuesday) the Petitioner informed Vocamotive "that she had a flare up with her sarcoidosis and would be unable to attend her appointment." (RX #1)

On June 6, 2018, two voice messages were left with Petitioner regarding her appointment on this date. Petitioner did not attend her appointment, nor did she call back. It was noted she did not complete any job search from June 1 through June 6, 2018. She reported no field visits. She reported she completed applications for "a few" of the staffing agencies; however, she was unable to remember which ones. Her e-mail was reviewed to identify which staffing agencies she had applied; however, there were no confirmation documents (RX #1). Petitioner reported she did not see that the American Heritage job lead advised her to attend a Job Fair on June 4, 5, or 6, 2018 as she did not open the job lead until afterwards. She was

advised she needed to be reviewing her itinerary items carefully and, on the date, assigned (RX #1).

On June 11, 2018, Petitioner's e-mail box was reviewed. She received an email from Diamond Mitchell with Paramount Staffing advising her she did not provide a valid contact phone number. A voice message was left for Petitioner regarding her job search on this date. Petitioner failed to return the call (RX #1).

On June 12, 2018 (Tuesday) Petitioner left a voice mail message stating that she was unable to attend her Vocamotive appointment. Later, she stated she was "unable to hold food down" and she was "nauseous." (RX #1)

On June 14, 2018, Petitioner's e-mail was viewed, and it was noted she had received a request from Alternative Staffing to come in-person to complete a paper application and possibly an interview. The email was from 3 days prior and she had not yet opened it. She was advised of the email she received from Lilliana Macias with Alternative Staffing inviting her to complete an employment application. Petitioner stated, "I would go to hell before I take a temp-to-hire job". She reported she would complete the visit; however, she would not accept a temp-to-hire position. (RX #1)

On June 18, 2018, Petitioner's email was reviewed at 1:20 p.m. It was noted she had not opened any emails since June 14, 2018 (RX #1). Petitioner still had not visited Alternative Staffing. She reported she did not remember until she had already returned home from City Hall. She reported she would visit the Alternative Staffing on June 19 or 20, 2018 (RX #1).

On June 22, 2018, Petitioner's application for a Breakfast Bar Attendant with La Quinta Inn & Suites in Oakbrook Terrace was reviewed. It was noted she used "Tammyholliday" as her username instead of her e-mail address. She indicated "1500.0" as her desired hourly pay rate. She indicated she was unavailable to work Sundays, overnights, or Tuesday afternoons. She did not include a cover letter. (RX #1). Petitioner's application for a Guest Room Attendant with White Lodging in Chicago was reviewed. It was noted she did not provide any information other than her contact information and attaching her résumé. She failed to include her employment history, education, achievements, skills, and references (RX #1).

On June 26, 2018 (Tuesday) the Petitioner was unable to attend her client staffing appointment because her children booked a trip for her without her knowing about it.

On June 28, 2018, a voice message was left for Petitioner regarding her appointment on this date. A call was received from Petitioner reporting she overslept. She reported she would be able to arrive to her appointment on this date around 11:00 am. She arrived at the appointment at 10:50 am. She reported her grandson's mother was in the hospital and she needed to watch him. She left her appointment at her scheduled time of 3:00 p.m. It was noted she did not complete any job search from June 25 through June 27, 2018 as she was out of town (RX #1).

On July 2, 2018, a voice message was left for Petitioner regarding her appointment on July 3, 2018. She reported she had family in town and was unable to attend an appointment on July 5, 2018. She was advised to maintain her originally scheduled appointment on July 3, 2018. She was advised she needed to inform Vocamotive of any request for time off, regardless if it was a scheduled day in the office. She was advised she was expected to be job searching independently on July 5, 2018 (RX #1).

On July 3, 2018, (Tuesday) a call was placed to Petitioner at 1:15 p.m. to inquire as to why she was not at the Vocamotive office. She reported she was going to be at Vocamotive on July 5, 2018. She was advised that it was the understanding of Vocamotive staff that she could not attend that date due to having family in town. She reported she did have family in town; however, she would just see them after her appointment. She reported she was going to go to Brookfield Zoo on this date; however, her daughter was in an accident. It was noted that Petitioner did not request time off and should be looking for work on a full-time basis (RX #1).

An Analysis for the July 3, 2019 Progress Report was created. It was noted that although Petitioner had been advised of the expectations for job search verbally and in writing, she did not look for work daily, as agreed. For example, during the job search week of June 1 to June 7, 2018, she only reported 10 contacts, all of which were done at the Vocamotive office on June 7, 2018. She had missed appointments secondary to flare-ups due to sarcoidosis, illness, family issues and pain. She was late to an appointment due to oversleeping. She inconsistently communicated with Vocamotive staff. She did not phone in daily to report her progress. Additionally, Petitioner did not always return phone calls. She did not follow-up on items outlined on her itinerary in a timely manner. She missed a job fair with American Heritage. She did not review e-mails in a timely manner. When checking her e-mail account, it had been observed that she would go days without opening e-mails (RX #1).

On July 5, 2018, Petitioner reported she did not complete job search on July 2nd or 3rd, 2018. She reported on July 2, 2018 she visited City Hall to return her job logs, on July 3, 2018 she went to the Brookfield Zoo with her family (RX #1).

On July 9, 2018, a call was received from Petitioner reporting that she completed her itinerary items for this date. She was asked if she completed the field visit which was on her itinerary which was e-mailed to her on July 6, 2018. She did not. When asked why not? She did not know. Petitioner did not check her e-mail on July 6, 2018. She was reminded that she needed to check her e-mail every day (RX #1).

On July 10, 2018, (Tuesday) a call was received from Petitioner reporting that she would be unable to attend her appointment on this date due to her sarcoidosis. Petitioner's e-mail was reviewed, and she had received a confirmation email from Remington Hotels. Her application was reviewed. It was noted she indicated her desired rate of pay as $20.00 per hour. She indicated City of Chicago was not her current employer. She input City of Chicago, Department of Streets and Sanitation in all capitals. She only included one reference and did not properly capitalize the individual's name. She did not include a cover letter. She did not properly capitalize her name when she electronically signed the application. It was noted she had an e-mail in her trash folder from Lilliana Macias with Alternative Staffing, Inc. who invited Petitioner to visit the company and complete a job application in person. It was noted she had multiple old e-mails from Vocamotive staff in her trash folder, including e-mails which contained her itinerary and cover letters (RX #1).

On July 11, 2018, a voice message was left for Petitioner regarding her job search on this date. She did not return the call (RX #1).

On July 12, 2018, a voice message was left for Petitioner regarding her job search from July 11, 2018 and her make-up appointment. Petitioner reported she did not complete job search on July 11, 2018 due to her sarcoidosis (RX #1).

On July 12, 2018, because Petitioner had repeatedly failed to take her job search seriously, Ms. Stafseth sent a reminder letter to Petitioner to remind her of the expectations associated with vocational rehabilitation (RX #3).

Ms. Stafseth indicated that based on Petitioner's job search contacts, it did not reflect a full-time diligent job search. Ms. Stafseth stated that Petitioner's job search was expected to be completed Monday through Friday, not just on days scheduled at the Vocamotive office. Ms.

Stafseth also stated that Petitioner's weekly job search reflected a minimal amount of field visits. Petitioner was expected to make field visits on a weekly basis; however, she had failed to do so. Petitioner was assigned a field visit for a hiring event taking place on July 6, 2018; however, Petitioner did not attend the event. Petitioner stated that she was unaware of the hiring event due to not checking her e-mail. Petitioner was informed that she was responsible for checking her e-mail daily in order to ensure that opportunities were not missed. Petitioner was informed that she would need to review her e-mails at least twice per day, once in the morning and once in the afternoon (RX #3).

Ms. Stafseth also indicated that she was concerned of the quality of Petitioner's completed job applications. It was notes that Petitioner's job applications contained inappropriate information, poor spelling and grammatical errors. Petitioner did not maintain daily communication with Vocamotive. The staff had left several messages which were not returned (RX #3).

Ms. Stafseth stated that it was Petitioner's responsibility to look for job on a full-time basis. Ms. Stafseth further indicated that if Petitioner was not willing to commit to the vocational rehabilitation process, a recommendation would be made that services no longer be provided (RX #3).

On July 31, 2018, Dr. Greenberg prescribed a work conditioning program to determine her functional abilities and stated that he wanted to see her afterwards (PX #4). Meanwhile, Respondent approved yet another session of work conditioning. The follow up appointment with Dr. Greenberg never occurred.

On August 7, 2018, (Tuesday) Petitioner attended her final appointment with Vocamotive. Upon arrival, she stated, "I'm not staying". She reported she was "Done" and that she was returning her equipment (RX #1). She stated that that she would eventually return to work.

On that same day, a surveillance footage of Petitioner was taken. It showed that Petitioner was walking, smoking, pushing a shopping cart, carrying multiple plastic grocery bags, loading cases of water into a vehicle, and driving. She appeared to perform all activities in a painless, fluid and unrestricted manner (RX #1)

On August 20, 2018, Petitioner began work conditioning at Concentra. At her initial assessment, Petitioner reported <u>no pain</u>. Petitioner grip strength in her right hand (injured)

exceeded her grip strength in her left one. Dr. Greenberg had prescribed the work conditioning three weeks earlier. (PX #4)

By November 2, 2018, Petitioner had attended 20 work conditioning sessions at Concentra. Her lifting, gripping, push/pull and carrying ability had improved dramatically. For instance, she exceeded her gripping goal. She was able to lift 45 pounds, which exceeded the goal of 35 pounds. She could carry 35 pounds which was a 90% achievement. The therapist recommended more physical therapy, but also stated that gains were close to being maxed out. Overall lifting weakness persisted in the shoulders, which is unrelated to this workers' compensation claim. (PX #2)

As stated earlier, there is no indication in the record that Dr. Greenberg reviewed the Petitioner's dramatic gains. (PX #4)

On February 16, 2019, Petitioner's maintenance benefits were suspended due to her noncompliance with vocational services (RX #8).

At the hearing, Petitioner testified that she has been working as a Laborer for Respondent for 19 years (Tr. 8). Petitioner testified that she still experiences throbbing pain in her right pinky finger (Tr.29). Petitioner also testified that she has difficulties with gripping little things with her right hand due to the pain in her right pinky finger (Tr.32). Petitioner reported that she has started a new job doing quality control work with a staffing agency on June 6, 2019 (Tr. 26-27). Petitioner stated that she is paid $11 per hour and she works 50 hours a week for this job. Petitioner reported that she is working overtime for this job, and she is working 10 hours per day (Tr. 26). Petitioner also reported that this is a temporary position (Tr. 27). She reported that the company is moving to Mexico and this job is not going to last much longer (Tr. 27).

On cross-examination, Petitioner testified she attended the MMI Orientation on September 26, 2018; however, she does not remember that she received the MMI orientation package on that day (Tr. 35). Petitioner reported that she applied from 25 to 30 jobs per week when she was enrolled in the rehabilitation program with Vocamotive (Tr. 37). Petitioner denying telling Vocamotive staff of standing and walking restrictions (Tr. 39-40). Petitioner claimed to complete field calls as instructed, and checked in on daily basis to report her job search when working remotely. She claimed to return calls from Vocamotive (Tr. 40-41). Petitioner also stated that she was looking for work during the week from June 1, 2018 through June 7, 2018 and she did not miss an appointment due to oversleeping (Tr. 41). Petitioner also stated that she completed job

search on July 2, July 3, and July 4, 2018 (Tr. 41). She also indicated that she completed all the required tasks that Vocamotive had asked her to do (Tr. 41) Petitioner also testified that she spends approximately from three to four hours per day to apply for jobs (Tr. 34-44).

Currently, Petitioner works at a temp service in Carol Stream, doing quality control inspecting car parts (Tr. 25-6). She stated the position is light duty and she earns $11.00 per hour for 40 hours of work per week (Tr. 26, PX #10).

CONCLUSIONS OF LAW

An injury is compensable under the Illinois Workers' Compensation Act only if it arises out of and in the course of employment. *Panagos v. Industrial Commission, 177 Ill.App.3d 12, 524 N.E.2d 1018 (1988)* The burden is upon the party seeking an award to prove by the preponderance of the credible evidence the elements of his claim. *Peoria County Nursing Home v. Industrial Commission, 115 Ill.2d 524, 505 N.E.2d 1026 (1987)* The burden is also upon the employee to prove that his injuries are causally related to the employment. *New Guard v. Industrial Commission, 58 Ill.2d 164, 317 N.E.2d 524 (1974)* Critical to the determination of the aforementioned is the petitioner's credibility. When determining the issues at hand, the Arbitrator must carefully weigh all of the evidence presented.

When determining the issues at hand the Arbitrator must carefully weigh all the evidence presented. This includes the credibility and testimony of Petitioner, who was the only witness in the case at hand.

This Arbitrator finds Petitioner lacks credible for the following reasons. First, she gave a sub-maximal effort in physical therapy. This was corroborated by more than one therapist at different locations and times. Second, she did not give a good-faith effort in vocational rehabilitation. This included misstating her work and nonwork-related limitations to prospective employers and doing a ludicrously poor job at filling out employment applications to sabotage her chances of employment. Incredibly, this included her spelling the word "Chicago" incorrectly on an employment application. Third, the Petitioner damaged her credibility by calling in sick for sarcoidosis flare ups on a disproportionate number of Tuesdays. It seems that she exaggerated this medical condition as well and not just for sympathy, but for financial gain. Petitioner claimed to work 40 hour work week with City, but this couldn't have been the case if

she was calling in sick once a week, by her own account. It would be interesting to inspect the Petitioner's attendance records with the City before the accident. One wonders how many Tuesdays the Petitioner missed from work. In any event, the fourth credibility damaging incident is when she manipulated her permanent restrictions by requesting additional ones from Dr. Greenberg for no apparent reason. Finally, she exaggerated her job duties with the City to her treating doctors. (75 lbs. vs. 100 lbs. vs. 50 lbs). The aforementioned cannot be ignored when weighing the evidence submitted against Petitioner's testimony.

Benefits have been denied in instances when Petitioner's credibility was suspect and the contemporaneous histories conflicted with and/or failed to corroborate Petitioner's testimony. Petitioner's chronic exaggerations must be considered when issuing her award in this matter. Furthermore, this Arbitrator adopts the Vocamotive reports as true and correct over Petitioner's testimony, as they are corroborated by other physical therapy and work conditioning observations showing low or no effort given in physical therapy or a coordinated job search.

In regards to (F), "Is the Petitioner's current condition of ill-being related to the injury?", the Arbitrator finds:

The Arbitrator finds that the petitioner has proven by the preponderance of the credible evidence that Petitioner's dislocated small right finger and subsequent fusion is causally related to her work accident of May 2, 2013.

In regards to (L), "Is the Petitioner entitled to temporary total disability benefits from February 16, 2019 to June 5, 2019?" the Arbitrator finds:

Typically an employee's entitlement to maintenance begins when her medical condition has stabilized, she has reached maximum medical improvement and the period of vocational rehabilitation has begun. It is a benefit separate from TTD, but paid at the same rate. Maintenance falls under section 8(a) of the Act in conjunction with vocational rehabilitation. To be entitled to maintenance the petitioner must make a good faith effort in her job search and vocational rehabilitation program.

The Supreme Court has held that, it is the petitioner's obligation to make "good-faith efforts to cooperate in the rehabilitation effort." *Archer Daniels Midland Co. v. Industrial Commission,*

138 ILL.2D 107, 561 N.E.2D 623, 149 Ill.Dec.253 (1990). Even more, the Commission has held that when the petitioner lacks the intent to return to work… the employee is not entitled to benefits and was not permanently and totally disabled. Schoon v. Industrial Commission, 259 Ill.App.3d 587, 630 N.E.2D 1341, 197 Ill. Dec 217 (3d Dist. 1994). In *Johnson v City of Chicago* (*17 IWCC 0035, 13 WC 9875; Commission Decision was reviewed and decision entered at Circuit Court Level in 17 L 50173, with Commission Decision upheld)* the IWCC denied *Johnson* his maintenance because "he demonstrated a lack of good faith". Petitioner's who fail to act in good faith are not entitled to maintenance benefits. In the case at hand, the petitioner is held to the same standard.

Petitioner failed to participate in a diligent and good faith job search. Therefore, her claim for maintenance benefits must be denied.

Multiple examples of non-compliance and sabotage on Petitioner's part were detailed earlier in this brief, and further supported in Respondent's Exhibit 1-3, the vocational reports and letters.

When there is a lack of "good-faith" cooperation with vocational rehabilitation efforts, the termination of benefits is justified. *Hayden v Industrial Commission, 214 Ill. App.3d 749, 575 NE2d 99, 158 Ill.Dec 305(1st Dist. 1991)* It is the petitioner's obligation to make "good-faith efforts to cooperate in the rehabilitation effort". *Archer Daniels Midland Co. v Induastrial Commission, 138 Ill2d 107, 561, NE2d 623, 149 Ill.Dec 253 (1990)*

Petitioner failed to prove that she diligently participated in a bona fide search for employment. She is obligated to make good-faith effort to cooperate in her rehabilitation effort. The evidence presented overwhelmingly establishes that she did not. As such, she is not entitled to maintenance benefits for the period from February 16, 2019 through June 5, 2019.

In regards to (L), "What is the nature and extent of Petitioner's injury?", the Arbitrator finds:

Petitioner Is Not Entitled
To A Wage Differential Award

The Supreme Court has held that, it is the petitioner's obligation to make "good-faith efforts to cooperate in the rehabilitation effort". *Archer Daniels Midland Co. v Industrial Commission, 138 Ill2d 107, 561, NE2d 623, 149 Ill.Dec 253 (1990)* The good faith duty was expanded more recently under *Marzullo,* which found that the petitioner is not entitled to a wage differential, that it is not merely a processes of an award "premised upon a simple arithmetical calculation, but instead the petitioner must establish that he cooperated in his rehabilitation process and reached the highest level of available employment". The *Marzullo* court stressed that the petitioner must not only establish an entitlement to the wage differential but a bona fide effort to return to suitable employment. *Kenneth Marzullo v City of Chicago, 15 WC 24679; 18 IWCC 379. Marzullo* is not the only case where a waged differential was denied. *Aaron Conway v City of Chicago (15 IWCC 810)* is another. In that matter, the petitioner also failed to conduct a good faith effort with respect to his job search. The Commission found that *Conway* failed to establish that he had an impairment of earnings and denied his request for a wage differential.

It is clear that Petitioner made no effort, let alone a good-faith effort, to find any suitable employment. Through her own behavior Petitioner undermined her vocational rehabilitation program and limited her employment prospects. The litany of excuses about why she did not complete the required assignments during the vocational rehabilitation period was never-ending. Problems with her health, personal problems, family issues, holidays, personal inconveniences and concerns showed up too frequently in the vocational progress reports. Multiple examples of non-compliance and sabotage on Petitioner's part were detailed earlier in this brief, and further supported in Respondent's Exhibit 1-3, the vocational reports and letters.

Although Petitioner had been advised of the expectations for job search verbally and in writing by Vocamotive, she did not look for work each day of the week. For example, during the job search week of June 1 to June 7, 2018, she only reported 10 contacts, all of which were done at the Vocamotive office on June 7, 2018. She had missed appointments secondary to flare-ups due to sarcoidosis, illness, family issues and pain. She was late to an appointment due to oversleeping. She did not communicate well with Vocamotive staff. She did not call in daily to report her progress. This was outlined in the Welcome to Job Search letter and has been reiterated at time of meetings with Petitioner.

Additionally, Petitioner did not always return phone calls. She did not follow up on items outlined on her itinerary in a timely manner. She missed a job fair with American Heritage

secondary to opening the lead after the date of the job fair. She did not review emails in a timely manner. When checking her email account, it has been observed that she would go days without opening emails. A review of Petitioner's job search contacts did not reflect a full-time diligent job search. Petitioner's weekly job search reflected a minimal amount of field visits. Petitioner was expected to make field visits on a weekly basis. Field visits have been assigned, however, the record indicated that these have been overlooked. Petitioner was assigned a field visit for a hiring event taking place on July 6, 2018; however, Petitioner did not attend the event. Petitioner stated that she was unaware of the hiring event due to not checking her email. Petitioner was informed that she was responsible for checking her email on a daily basis in order to ensure that opportunities were not missed. Furthermore, Petitioner did not complete job applications appropriately.

Based on Petitioner's actions documented in these vocational reports, she gave the impression that she did not take her job search seriously. Petitioner forgot that looking for gainful employment was her full-time job.

The *Marzullo* court stressed that the petitioner must not only establish an entitlement to the wage differential but a bona fide effort to return to suitable employment. *Kenneth Marzullo v City of Chicago, 15 WC 24679; 18 IWCC 379. In Marzullo*, the Commission clearly stated neither Section 8(d)1 of the Act nor the Commission Rule 9110.10, setting forth the requirements for vocational rehabilitation, 50 Ill. Admin. Code, Section 9110.10, formerly Section 7110.10 create the illusion that the entitlement to a wage differential award is premised upon a simple arithmetical calculation. Rather the Act and Rule require that the parties cooperate in the rehabilitation of the Petitioner, such that he is able to reach the highest level of available employment.

The evidence overwhelmingly showed that Petitioner did everything in her power to thwart her vocational rehabilitation program. Her behavior demonstrated a clear and convincing lack of good faith. The Arbitrator notes that Petitioner is relying on Petitioner's Exhibit 9 in determining her wage differential. It is a union letter dated which indicates that as of July 12, 2019 her earnings would have been $37.76. The Arbitrator further notes that Petitioner was able to obtain a position with a staffing agency in Carol Stream doing quality control work. Petitioner reported she was hired on June 6, 2019. She reported that she is able to work 50 hours per week, and she is earning $11.00 per hour. She has been working at this place for approximately one

month at the time of the hearing. Furthermore, Petitioner also reported that this job is temporary because the company is moving to Mexico. Because Petitioner's current job is temporary and her lack of effort to find permanent position, Respondent is prejudiced in any attempt to determine the wage differential, leaving it to pure speculation. There is no way to know how high Petitioner's earnings may have gone had she put forth a diligent job search.

Petitioner had many opportunities to find permanent position which would have allowed her to establish an impairment of earnings. Instead, she chose to sabotage the vocational rehabilitation process in an effort to parlay her injury into an easier, more lucrative job with the City of Chicago. Finally, the evidence does not support that Petitioner suffered a loss of trade due to her work injury.

Petitioner Is Not Entitled To A Man As A Whole Award

It is unclear to the Arbitrator if Petitioner suffered a disability that prevented her from returning to her usual and customary position with Respondent. According to Dr. Greenberg, Petitioner's right small finger suffered a partial psuedoarthosis. (PX #4) The medical definition of pseudarthrosis is commonly used to describe a lack of fusion that occurs after an attempted arthrodesis or fusion. In contrast, Petitioner's small finger PIP joint is fused and stable. There is no evidence of failed fusion in the records. As such, Dr. Greenberg's description of Petitioner's condition seems like an exaggeration. Further, Petitioner's "permanent restrictions" kept increasing over time. For instance, on November 11, 2015, Dr. Greenberg found that Petitioner had reached maximum medical improvement, discharged her and stated that could not lift more than 25 pounds with her right hand. (PX #4) Nearly three years later, on April 18, 2017, the Petitioner walked into Greenberg's office and requested new restrictions, stating that she could not lift more than 15 pounds with two hands. He did so for no apparent reason and despite the Petitioner stating that her finger was pain free! (PX #4) Later, on November 2, 2018 after completing work hardening, Petitioner was able to lift 45 pounds, carry 35 pounds and her grip strength in her injured hand exceeded her uninjured left! (PX #2) Petitioner's residual lifting limitations appear to be related to her shoulders, which are unrelated to this claim and pre-existing. Others felt that her limitations were from sarcoidosis, which seemed exaggerated as well. Further, it is unclear from the record what physical abilities the Petitioner had prior to the accident. There is no document in the record that lists her job requirements, and the ones

mentioned are inconsistent (50 lbs. vs. 100 lbs. vs. 45 lbs.). It is certain, however, that prior to the accident, Petitioner was no "industrial athlete." On May 6, 2013, the Petitioner was 44 years old, stood 5'4" and weighed 177 pounds giving her an estimated body mass index ("BMI") of 30, which is, by any medical definition, obese. She suffered from hypertension, chronic bronchitis and sarcoidosis, although it is unclear how severe. While it may have been described as such by an orthopedic doctor who never treated her for the condition, it is unclear from the record how bad it really was. She smoked cigarettes, although denied it to her doctors. Further, Petitioner admittedly missed one day of work per week, so she was not a full-time employee, despite being paid as such. As such, it is highly improbably that Petitioner regularly lifted 75-100 pounds regularly at work as stated in her request for accommodation paperwork on April 13, 2018. (PX #4) Further, one wonders if it likely that Petitioner could regularly lift half that amount before the accident. It is also unclear to the Arbitrator how, from a biomechanical standpoint, a small finger injury can permanently dramatically affect one's lifting ability. Instead, it would seem more likely that such an injury would primarily affect grip strength. Indeed, you can see the focus on grip strength in the initial physical therapy records in 2013. Five years later, on August 20, 2018, Petitioner's right grip strength in her injured hand, exceeded her left one! (PX #2) The final report on November 2, 2018 shows that Petitioner achieved gripping, lifting, push/pull, ambulation goals. She was only 10% impaired for carrying. She could carry 35 pounds for 50 feet. She was still making gains. (PX #2) It does not appear that Dr. Greenberg ever reviewed the Petitioner's final work conditioning results. Petitioner was capable of more than he thought.

As a result of the aforementioned, the Arbitrator isn't convinced of Petitioner's permanent restrictions. The injury is to the least significant finger on the hand. Petitioner did not put in a good-faith effort in physical therapy nor vocational rehabilitation. She was not candid with her doctors, nor the court. This lack of candor went on for years while she collected workers' compensation benefits. Dr. Greenberg's opinion is of little weight as the result of the above, plus he seemed willing to increase the Petitioner's restrictions for no good reason. Instead, the record is muddied with material inconsistencies, omissions, and exaggerations. Petitioner's current restrictions are more likely the result of her shoulders or sarcoidosis; it's difficult to be certain. However, after looking closely at the entire record, it seems to the Arbitrator that Petitioner

could have buddy-taped her small finger and gone back to her old job. As a result, Petitioner is entitled to have and to receive from the respondent 54.2 weeks of permanent partial disability at a weekly rate of $712.55 because she is entitled to 60% loss of use of the right little finger and 20% loss of use of hand.

In regards to (M), "Should penalties or fees be imposed upon Respondent?" the Arbitrator finds:

Section 19(k) of the Act authorizes the assessment of a penalty if the petitioner establishes that the respondent is guilty of unreasonable or vexatious conduct, which does not present a real controversy but are merely frivolous or further delay. *820 ILCS, 305/19.* Penalties under Section 19(k) are discretionary rather than mandatory. *Smith v. Industrial Commission, 170 Ill. App. 3d 626, 525 N.E. 2d 81 (1988).* Section 19(l) of the Act provides, in part, for additional compensation when the respondent "shall without good and just cause fail, neglect, refuse or unreasonably delay the payment of weekly compensation benefits due to an injured employee during the period of temporary total disability". *820 ILCS, 305/19(l).* Findings of the same behavior by the respondent also allows the Commission to "assess all or any part of the attorney's fees and cost against the respondent. *820 ILCS, 305/16.*

The purpose of the aforementioned sections of the Act is to "expedite the compensation of industrial injured workers and penalize an employer who unreasonably or in bad faith, delays or withholds compensation due an employee." *Avon Products v. Industrial Commission, 82 Ill. 2d 297, 412, N.E. 2d 468 (1980).* However, this is not intended to inhibit contests of liability or appeals by employers who honestly believe an employee not entitled to compensation." *Id.* An employer is entitled to challenge liability when the challenge is based upon a reasonable belief that compensation would not be appropriate under the Act. Therefore, a good faith challenge of liability will not warrant the assessment of penalties against the employer. *Id.*

Reasonableness is the foremost test for determining whether penalties are appropriate. These sections were created to prevent the bad faith, unreasonable delay or nonpayment in the payment of benefits to injured employees. Where there is a reasonable controversy, which results in the withholding of benefits, the Illinois Courts have refused to assess penalties. To do so would be to deprive the employer's rights to pursue a challenge based upon a reasonable belief as well as to deny their right to an appeal. *O'Neal Brothers Construction Company v.*

Industrial Commission, 93 Ill.2d 30, 442 N.E.2d 895 (1982) Doing so "would be substantially burdened were penalties to be imposed on all employers who appeal and lose", as well as unjust. *Id.*

Petitioner filed a penalty petition because the petitioner's maintenance benefits were suspended on February 16, 2019 (Px. 7; Rx. 8). Respondent has argued Respondent is entitled to challenge liability of Petitioner's entitlement to weekly benefits, and the challenge here was in good faith as the Petitioner did not comply with vocational services and she did not conduct a diligent job search.

In this case, Respondent suspended the Petitioner's maintenance benefits for her noncompliance with vocational services. As discussed above, Ms. Stafseth indicated that Petitioner did not conduct a full-time diligent job search. Although Petitioner had been advised of the expectations for job search verbally and in writing, she did not look for work each day of the week. She had missed appointments secondary to flare-ups due to Sarcoidosis, illness, family issues and pain. She was late to an appointment due to oversleeping. She did not communicate well with Vocamotive staff. She did not call in daily to report her progress. Petitioner did not always return phone calls. She did not follow up on items outlined on her itinerary in a timely manner. She missed career events. She did not make field calls. She did not review emails in a timely manner. When checking her email account, it had been observed that she would go days without opening emails. Additionally, Petitioner submitted several job applications with inappropriate information and grammatical errors.

Petitioner failed to meet her burden in establishing that there was an unreasonable delay in her benefits.

What is interesting here is that Petitioner's job search was not sufficient to entitle her to weekly benefits for the period February 16, 2019 through June 5, 2019. It was not diligent nor in good faith. Petitioner turned in job logs for the period from April 9, 2019 through June 5, 2019 (PX #8). A great deal of her alleged job search for this period was conducted on line. Petitioner told the vocational counselor that she did not have a home computer. She failed to provide confirmation sheets of the applications. Furthermore, beside the job logs for the period from April 9, 2019 through June 5, 2019, no other job logs were submitted into evidence by Petitioner.

Respondent is entitled to challenge liability of Petitioner's entitlement to weekly benefits. It has been established that the challenge here was in good faith as Petitioner did not comply with vocational services, and her job search was questionable. It has been established that it was not a bona fide job search. Therefore, Petitioner is not in a position to make a challenge for penalties. She has not established that Respondent acted unreasonably or vexatious. Her request for penalties and fees is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	11WC004242
Case Name	TENNORT, CAROLYN M v. ANN KILEY CENTER
Consolidated Cases	14WC008312
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0522
Number of Pages of Decision	12
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Adam Scholl
Respondent Attorney	Adam McCall

DATE FILED: 10/20/2021

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CAROLYN TENNORT,
Petitioner,

vs. NO: 11 WC 4242

ANN KILEY CENTER,
Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, temporary total disability benefits and permanent partial disability 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, but makes a clarification as outlined below.

The Commission corrects the Scrivener's error in the Caption of the cover page and corrects the Respondent's name to read: "Ann Kiley Center" rather than "Ann Kelly Center".

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 29, 2019 is hereby affirmed and adopted.

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

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

October 20, 2021

/s/ *Maria E. Portela*

MEP/dmm
O: 8/24/21
49

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION **21IWCC0522**
NOTICE OF ARBITRATOR DECISION

TENNORT, CAROLYN
Employee/Petitioner

Case# **11WC004242**
14WC008312

ANN KELLY CENTER
Employer/Respondent

On 4/29/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.40% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2356 DONALD W FOHRMAN & ASSOCIATES
ADAM J SCHOLL
101 W GRAND AVE SUITE 500
CHICAGO, IL 60654

6143 ASSISTANT ATTORNEY GENERAL
KRISTIN A LEASIA
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

APR 29 2019

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

21IWCC0522

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

- ☐ 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

Carolyn Tennort
Employee/Petitioner

v.

Ann Kiley Center
Employer/Respondent

Case # **11** WC **4242**

Consolidated cases: **14 WC 8312**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica A. Hegarty**, Arbitrator of the Commission, in the city of **Waukegan**, on **12/17/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **5/7/2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**43,604.60**; the average weekly wage was $**838.55**.

On the date of accident, Petitioner was **45** 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 $**52,710.49** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

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

ORDER

- Respondent shall pay reasonable and necessary medical services to Petitioner, pursuant to the medical fee schedule, of $1,232.00 as provided in Sections 8(a) and 8.2 of the Act.

- Petitioner is entitled to TTD from 5/12/10 through 8/9/12, a period of 118 and 5/7 weeks. Respondent shall be given a credit of $52,710.49 for temporary total disability benefits that have been paid. Respondent shall pay $12,855.34 in TTD owed to Petitioner.

- The Arbitrator will address the nature & extent of Petitioner's cervical injuries in the Addendum/Decision for the consolidated case, 14 WC 8312.

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

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

Signature of Arbitrator

4/29/19
Date

APR 29 2019

STATE OF ILLINOIS)
)
COUNTY OF LAKE)

ILLINOIS WORKERS' COMPENSATION COMMISSION

CAROLYN TENNORT,)
Petitioner,)
) **11 WC 4242** (consolidated with)
v.) 14 WC 8312
)
ANN KILEY CENTER,)
Respondent.)

ADDENDUM TO THE DECISION OF THE ARBITRATOR

FINDINGS OF FACT

Petitioner has two consolidated cases, 11 WC 4242 and 14 WC 8312 that proceeded to hearing on December 17, 2018, in Waukegan, Illinois. (Arb. 1 & 2) The Arbitrator will issue separate decisions for each case.

Regarding the case at bar, 11 WC 4242, Respondent stipulated that Petitioner was employed at the Ann Kiley Center, a residential mental health center on May 7, 2010, when she sustained accidental injuries that arose out of and in the course of her employment. (Arb. 1)

Respondent disputes causal connection, unpaid medical bills and the nature and extent of the injury. (Id.)

Accident Prior to May 7, 2010

Prior to the accident at issue, Petitioner was involved in a work-related injury in 2008 while assisting a resident in a bathtub. Petitioner began treating with Dr. Jonathan Citow, a neurosurgeon, at the Center for Spine and Neurosurgery. On February 13, 2009, MRI of her cervical spine revealed mild left neuroforaminal stenosis at C4-C5 and C5-C6 resulting from facet joint arthropathy and a small, broad-based protrusion at C5-C6 which contacted the ventral spinal cord. (Resp. Ex. 6). Petitioner treated conservatively and on June 5, 2009, reported significant improvement and very little neck pain or radicular symptoms to Dr. Citow who placed her at MMI and released her to full duty work. Petitioner was last seen by Dr. Citow regarding the incident on July 22, 2009, when she reported intermittent neck stiffness but no radicular symptoms. (Id. at p. 10 -13)

Petitioner testified she had no significant issues with her neck between July 22, 2009, and May 7, 2010.

May 7, 2010, work-related accident (11 WC 4242, the case at bar)

The parties agree that on May 7, 2010, Petitioner was at work when Respondent's facility ran a fire drill and evacuation exercise. The lights went out, and a loud, piercing alarm sounded. While Petitioner assisted the residents outside, one individual became afraid and combative and began hitting Petitioner about her head, arms, and back. Petitioner was required to restrain the resident until the resident was calm enough to be returned to the living quarters. The whole incident occurred over a 20 to 30-minute period, with the actual attack lasting for approximately 15 minutes.

After the incident, Petitioner noted her neck, arms and shoulder were hurting with numbness and tingling in her hand.

On May 12 and May 13, 2010, Petitioner presented to Northwestern Lake Forest Occupational Health reporting a recurrence of bilateral cervical radiculopathy. (PX2, p.29) Petitioner was provided work restrictions by the attending physician and referred to Dr. Citow. (Id. at 28)

On May 19, 2010, Dr. Citow recommended a cervical MRI when Petitioner presented with a history of neck pain extending to both shoulders following an assault at work.

Petitioner underwent a cervical and lumbar MRI on May 25, 2010. Dr. Citow reviewed the exams a few days later noting the cervical MRI showed disc protrusions at C4-5 and C5-6 with some pressure on the spinal cord. The lumbar MRI demonstrated L3-4 and L4-5 spondylolisthesis and moderate stenosis. (PX6, p.16)

On June 28, 2010, an L4-5 epidural injection was administered to Petitioner by Dr. Juan Alzate, Dr. Citow's partner. On July 12, 2010, Dr. Alzate performed a left-sided C5-6 facet injection. Petitioner returned to Dr. Citow on July 30, 2010, with continued neck pain and some back symptoms. (PX6, p.19) Dr. Citow recommended Petitioner receive a cervical epidural injection. On August 18, 2010, that injection was administered to Petitioner at Northwestern Lake Forest Hospital. (Id. at 33)

On September 22, 2010, Petitioner followed-up with Dr. Citow with complaints of continued neck pain extending through her left upper extremity towards the wrist with numbness, weakness, and paresthesia. (Id. at 21) Dr. Citow recommended a C5-6 anterior cervical discectomy and fusion which he performed on January 13, 2011.

At her follow-up appointment on February 4, 2011, [illegible] with no radicular symptoms. (Id. at 23) Following six weeks of physical therapy, the Petitioner reported persistent achiness in her neck and arms. (Id. at 25) Dr. Citow instructed Petitioner to begin a work hardening program. (Id.)

At her April 29, 2011, appointment, Petitioner reported worsening of her neck symptoms from work hardening. (Id. at 27) A cervical MRI was performed on May 25, 2010, and, upon his review, Dr. Citow noted a well-healed fusion with no problems. (PX7, p.73) A functional capacity evaluation was recommended. (Id.)

Following the June 23, 2011, FCE, Petitioner followed-up Dr. Citow on July 29, 2011, when she reported less neck pain with no radicular symptoms. Dr. Citow reviewed the FCE results and instituted a permanent 50 lb. lifting limitation. (PX7, p.75) He also noted that the Petitioner was at maximum medical improvement. (Id.)

As Respondent could not immediately accommodate the Petitioner's work restrictions, Petitioner's return to work was delayed. Petitioner did return to work in August 2012, performing office work and errands.

Petitioner testified she had no issues that required medical treatment until October 2, 2012.

14 WC 8312 (the consolidated case)

Respondent stipulated that Petitioner sustained a work-related accident on October 2, 2012. (Arb. 2) Petitioner was attending a mandatory CPR training class that required her to lift a CPR mannequin. The dummy was too heavy for her, and she was unable to lift it up. She was also instructed to assist another individual, but due to her back and neck hurting, was unable to position herself property for the assist. As she attempted the assist, she fell to the floor. Finally, she practiced chest compressions and while performing such, heard and felt a "pop" in the back of her neck.

She returned to Dr. Citow on October 24, 2012, with a history of an October 2, 2012 incident while participating in CPR training where she heard a pop in her neck followed by bothersome neck pain. (Id. at p.76) Petitioner also reported to Dr. Citow that she had right knee tightness. Dr. Citow ordered a cervical MRI, prescribed Celebrex and recommended an orthopedic evaluation of the right knee. (Id.) He also imposed light duty restrictions. (Id. at 199, 120) Dr. Citow reviewed the MRI on November 7, 2012, noting a well-healed fusion with mild decreased disc heights from C3-5. (Id. at 77)

Petitioner testified that on or about November 24, 2012, her employer notified her they could not accommodate her work restrictions. Respondent began paying her temporary total disability after that date.

Petitioner returned to Dr. Citow on December 21, 2012, complaining of severe neck pain extending through the left upper extremity to the hand and the right upper extremity to the elbow. (Id. at 78) Petitioner indicated she did not wish to proceed with injections or surgery. Dr. Citow prescribed medications of Skelaxin and Norco and imposed a light duty restriction of no lifting greater than 20 lbs.

On December 27, 2012, Petitioner presented to Dr. Tomas Nemickas of Illinois Bone & Joint Institute concerning her right knee. Petitioner reported to Dr. Nemickas that she injured her right knee while participating in a CPR training class. (PX9, p.14) After examining the Petitioner, Dr. Nemickas diagnosed a probable occult internal derangement of the right knee. (Id. at p.15) He prescribed an MRI of the right knee and provided a restriction of no kneeling and squatting and less than 25 lbs. of lifting, carrying, pushing and pulling. (Id.)

Petitioner returned to Dr. Citow on July 5, 2013, with persistent neck pain extending to the left upper extremity to the hand and the right upper extremity to the elbow. (PX6, p.79) Dr. Citow prescribed medications and advised her to continue the same restrictions. (Id.)

On August 16, 2013, Dr. Nemickas noted the Petitioner's complaints of persistent right knee pain. She also complained of left hip pain due to associative activity restriction and modification. (PX9, p.7) Dr. Nemickas diagnosed an occult internal derangement of the right knee. As to the hip, he did not find any pathology and attributed her left hip pain to lumbar radicular pain. (Id. p.8-9) Dr. Nemickas prescribed MRIs of the right knee and lumbar spine.

On August 19, 2013, Petitioner initiated medical care with Dr. Anatoly Arber, a pain management physician. The Petitioner complained of persistent pain in the lower back, neck, and the left upper and lower extremity. (PX5, p.17) Dr. Arber ordered an MRI of the lumbar spine and scheduled Petitioner for possible cervical steroid injection for pain control. (Id.) Dr. Arber performed a cervical epidural injection occurred on September 13, 2013. (Id. at 14)

On September 27, 2013, a right knee MRI revealed abnormalities of the posterior horn and body of the medial meniscus and the anterior horn of the lateral meniscus. (Id. at 26) The MRI of the lumbar spine revealed degenerative changes. (Id. at 28)

Dr. Nemickas reviewed the MRI of the right knee with Petitioner on October 2, 2013. Based on her clinical exam and the MRI results, Dr. Nemickas recommended a right knee arthroscopy and partial medial meniscectomy. (PX9, p.6) Petitioner informed Dr. Nemickas that she wished to proceed.
On November 13, 2013, Petitioner returned to Dr. Citow with complaints of persistent neck pain extending down the left arm to her hand and down her right arm to the elbow. (PX7, p.80) Dr. Citow recommended Petitioner continue medications of Vicodin, Lotrel, Flexeril, and Motrin. (PX7, p.80)

On February 21, 2014, Dr. Citow noted the Petitioner's complaints of pain in her neck, lower back, bilateral hips, and knee. (Id. at 81) Dr. Citow recommended updated MRIs of the cervical and lumbar spine and both knees. He advised her to continue with the same restrictions. (Id.)

Since her February 2014 appointment with Dr. Citow, Petitioner has not had any further medical care with any specialist. Care under the direction of her primary physician is ongoing.

Petitioner's workers' compensation benefits ended on January 15, 2014. The 20-pound lifting restriction, imposed by Dr. Citow for her neck and back issue, is still in effect. A 25-pound lifting restriction, imposed by Dr. Nemickas due to Petitioner's right knee symptoms, is also still in effect.

Petitioner testified that currently, it is difficult for her to get out of bed in the morning. She feels frequent pain in her neck and down her body, including in her arms, hands, and hips. She experiences difficulty with doing laundry and dishes due to the lifting motion required by each chore. She has trouble making the bed. She is unable to engage in house cleaning and finds that it is hard to drive due to the neck pain.

Petitioner uses a cane due to the pain in her right knee. Petitioner's primary care physician instructed her to use the knee brace, which Petitioner wears most of the time. The brace holds her knee in place and generally provides stabilization. She also uses a shower chair and takes Motrin.

Petitioner has not worked in any capacity since her second injury. She tried to return to work at the Ann Kiley Center and provided reasonable accommodation paperwork to her supervisor. Petitioner was informed, however, that the facility was unable to accommodate her new restrictions and could not return her to work.

Petitioner applied for other employment positions at state-run assisted living facilities but did not receive any job offers. On cross-examination, Petitioner clarified that as she was still technically a state employee at this time, she only applied to employment positions with the state that could potentially provide reasonable accommodations for her restrictions.

As of August 1, 2018, Petitioner is retired and is no longer a state employee. She is receiving retirement benefits.

Upon questioning during cross-examination, Petitioner stated that she had not had any other injuries to the affected body parts since her 2012 incident.

CONCLUSIONS OF LAW
11 WC 4242

In support of the Arbitrator's Decision relating to (F) Is Petitioner's current condition of ill-being causally related to the injury of May 7, 2010, the Arbitrator finds the following:

Dr. Citow testified that when Petitioner concluded her medical care in 2009, she was back at baseline with minimal neck pain and had no radicular symptoms. (PX8, p.23) After the work-related accident on May 7, 2010, Petitioner presented with neck pain and radicular arm symptoms. (Id. at 24) Dr. Citow treated Petitioner from May 19, 2010, through July 29, 2011. In his opinion, the work injury on May 7, 2010 exacerbated her pre-existing spondylosis. (Id.) He further opined that the surgery performed on January 13, 2011, was reasonable and necessary to treat her symptoms. (Id. at 25)

Respondent relies on the opinions of Dr. Kern Singh concerning Petitioner's cervical spine. It was his opinion that the Petitioner sustained a cervical strain from the May 7, 2010 injury but the C4-5 and C5 disk degeneration was pre-existing in nature and unchanged by the work-related event pursuant to the post-accident MRI that did not reveal any structural change or acute findings. (Id. at 17). On cross-examination, Dr. Singh recognized that Petitioner returned to full duty work and did not treat for ten months between July of 2009 and her accident date of May 7, 2010. (Id. at 23) He acknowledged that a person who is asymptomatic then becomes symptomatic could be a factor in determining a causal relationship. (Id. at 24)

Dr. Singh further opined that Petitioner's cervical fusion was not necessitated by the work-related injury. (Id. at 26). Dr. Singh's primary contention in support of this opinion was that the Petitioner's symptoms were unchanged pre and post surgery. (Id. at 27) The Arbitrator notes Dr. Citow's July 29, 2011 chart in which the Petitioner reported less pain and no radicular symptoms. (PX7, p.75).

The Arbitrator finds the opinions of Dr. Citow more persuasive than those of Dr. Singh. It is clear that Petitioner had recovered from her earlier 2008 injury and as of June 5, 2009, reported significant improvement with very little neck pain or radicular symptoms. Dr. Citow placed her at MMI and released her to full duty work. Petitioner's testimony that she had no significant issues with her neck between July 22, 2009, and May 7, 2010, is uncontradicted. After the May 7, 2010, attack, she exhibited increased neck pain and radicular symptoms which never ceased until after she underwent the cervical fusion on January 13, 2011. After six months of rehabilitation, she reported less neck pain and no radicular symptoms and was capable of returning to work with a 50 lbs. lifting limitation. These facts, as well as the opinions of Dr. Citow, dispel Dr. Singh's impression that Petitioner suffered a mere cervical strain.

Based on the preceding, the Arbitrator finds the Petitioner's present condition of ill-being in her neck is causally related to the work injury incurred on May 7, 2010.

Regarding Petitioner's lumbar region, the Arbitrator finds that the Petitioner demonstrated that she sustained a mild injury to her lumbar spine in 2010, which was not evident in prior imaging. A May 2010 MRI of the lumbar spine revealed L3-L5 spondylolisthesis and moderate stenosis, (Pet. Ex. 7), which was also evident in the September 27, 2013, lumbar MRI. (Pet. Ex. 9). Petitioner treated the lumbar spine issue with an epidural steroid injection in 2010. (Pet. Ex. 7). Petitioner's medical records do not indicate any further treatment for the lumbar spine. At February and December 2014 appointments with Dr. Citow, he noted the continued diagnosis of lumbar spondylosis, but that her range of motion was normal. (Pet. Ex. 7).

Were the medical service provided to Petitioner reasonable and necessary?
Has Respondent paid all appropriate charges for all
reasonable and necessary medical services?
The Arbitrator finds the following:

Petitioner presented a medical bill from Athletico in the amount of $1,232.00. (PX1) The medical bill pertains to physical therapy ordered by Dr. Citow for the dates of service of March 4, 2011, March 7, 2011, March 11, 2011, March 14, 2011, and March 16, 2011. The therapy corresponds to Dr. Citow's office note of February 4, 2011, in which he instructs Petitioner to start physical therapy. (PX6,p.23)

The Arbitrator finds that therapy ordered by Dr. Citow to be reasonable and necessary following her surgery of January 13, 2011, and finds Respondent liable subject to Section 8.2 of the Act.

TTD

The parties stipulated that the Petitioner was temporary total disabled from May 12, 2010, through August 9, 2012, 118 and 5/7 weeks and the Respondent paid $52,710.49 in TTD. (Arb. 1) At Petitioner's TTD rate of $559.03, the TTD owed for that period equals $65,565.83, leaving a difference of $12,855.34.

Based on the preceding, the Arbitrator finds Respondent is liable for the difference owed of $12,855.34.

In support of the Arbitrator's Decision relating to *(L)*
***What is the Nature and Extent of* the injuries? The Arbitrator finds the following:**

The Arbitrator will issue findings on this issue in the Addendum/Decision for the consolidated case, 14 WC 8312.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC008312
Case Name	TENNORT, CAROLYN v. ANN KILEY CENTER
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0523
Number of Pages of Decision	17
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Adam Scholl
Respondent Attorney	Adam McCall

DATE FILED: 10/20/2021

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CAROLYN TENNORT,

Petitioner,

vs. NO: 14 WC 8312

ANN KILEY CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, 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.

The Commission affirms the Arbitrator's decision finding that Petitioner's cervical spine condition is causally related to injuries sustained in the workplace accidents on May 7, 2010 and October 2, 2012, and denial of causal connection regarding injuries to the right knee. The Commission further affirms the medical expenses awarded by the Arbitrator. However, the Commission modifies the Arbitrator's award from 50% loss of a person as a whole to 30% loss of a person as a whole for the reasons set forth below.

The Commission notes that the award for temporary total disability benefits and medical expenses are addressed in consolidated case 11 WC 4242.

Although Petitioner also injured her cervical spine in the May 7, 2010 accident in consolidated case 11 WC 4242, the Arbitrator addressed permanency in the instant case, as does the Commission.

Petitioner completed her first report of injury on May 12, 2010 alleging she was assaulted by a resident during a blackout/fire drill. She complained of bruises, pain to her upper back, arms, chest, neck, as well as vaginal bleeding and cramps. (Rx9) She presented to Lake Forest Occupational Health that same date with complaints of pain across her upper back and in both arms. (Px2) On May 13, 2010 she presented for a follow up from the ER wherein she complained of radicular pain. (Px2) She was diagnosed with recurrent bilateral cervical radiculopathy. (Px2)

Petitioner previously underwent an MRI on February 13, 2009 as a result of a 2008 injury. That MRI showed, among other things, a broad-based central disc protrusion at C5-6 which contacts the ventral spinal cord. (Rx6) A repeat MRI on May 25, 2010 showed a broad-based central disc protrusion at C5-6 with mild to moderate central stenosis with mild indentation of the anterior cervical cord and mild biforaminal stenosis. (Px6, Rx6) A lumbar spine MRI of the same date showed minimal grade I spondylolisthesis of L4 on L5 combined with a disc bulge and an L3-4 disc bulge. (Px6, Rx6) On May 28, 2010, Dr. Citow reviewed the cervical and lumbar MRIs and noted the cervical MRI showed some pressure on the spinal cord. (Px6)

Petitioner underwent injections to the lumbar spine on June 28, 2010 and the cervical spine on July 12, 2010. (Px6) On July 30, 2010, Petitioner followed up with Dr. Citow and reported she had not improved. (Px6) However, Dr. Citow did note normal motor strength and sensation and that Petitioner's range of motion was limited secondary to pain. (Px6) Petitioner underwent an additional cervical spine injection on August 18, 2010. (Px2) On September 22, 2010 after a determination was made that Petitioner had failed conservative measures, Dr. Citow recommended a C5-6 anterior cervical discectomy and fusion. (Px6)

On January 13, 2011, Petitioner underwent surgery consisting of a cervical fusion. (Px6) On February 4, 2011, Dr. Citow recommended physical therapy as part of her post-operative treatment. (Px6) Petitioner followed up with Dr. Citow on March 18, 2011 and was still complaining of pain in her neck and arms. Dr. Citow recommended Petitioner continue off of work and that she undergo 4 weeks of work hardening. (Px6) Petitioner was discharged from work hardening on April 26, 2011 where it was noted she did not demonstrate the capabilities and tolerances to perform all of the essential job functions, but that she was displaying submaximal effort and lack of follow through with body mechanics cueing. (Px4)

On April 29, 2011 Petitioner followed up with Dr. Citow and was complaining of significant pain. She was kept off work pending an MRI and FCE. (Px6) Petitioner's MRI of June 2, 2011 was noted to show a well-healed fusion and no other problems. (Px7, Rx6) Petitioner underwent an FCE on June 23, 2011 which showed she met the medium physical demand level. (Px7, Rx8) Dr. Citow felt her FCE highlighted multiple inconsistencies, but released her at a 50-pound lifting restriction. (Px7) Dr. Citow placed her at MMI as of July 29, 2011. (Px7) Petitioner attempted to return to work for Respondent, but Respondent was unable to accommodate her restriction. On August 10, 2012, Petitioner was able to return to work with accommodations. (T. 25)

Petitioner alleges a second work accident on October 2, 2012 wherein she alleges that she

aggravated her cervical condition while undergoing mandatory CPR training. Petitioner returned to Dr. Citow regarding her ongoing neck pain but did not wish to pursue injections. Based on a normal MRI result, Dr. Citow released Petitioner to light-duty work effective December 21, 2012, and imposed a 20-pound lifting restriction. On December 5, 2014, Dr. Citow authored a causation report which was unrebutted by Respondent. In his note, he continued her light duty restrictions, but opined she could work. Petitioner has not returned to Dr. Citow since 2014.

Petitioner's 2010 injury occurred before the 2011 amendments to the Illinois Workers' Compensation Act, but as her second injury occurred after the amendments to the Act, an 8.1b(b) analysis is required in determining permanency. The Commission finds the Arbitrator's award is modified down to 30% loss of person as a whole for her cervical spine injury.

(i) No impairment rating was performed, so this factor is given no weight.

(ii) Petitioner worked as a mental health technician. This position is at a medium heavy-duty demand level. This factor should be given greater weight.

(iii) Petitioner was 45 years old at the time of the first accident and 48 at the time of the second accident. Petitioner had been a mental health technician for 25 years. This factor should be given moderate weight.

(iv) There was no evidence presented that Petitioner's earning capacity was impacted by her injury other than the fact that Petitioner did not receive benefits after January 14, 2014, and ultimately Petitioner retired on August 1, 2018. There was no loss of trade. Additionally, no medical expert testified or opined that Petitioner could not return to her job as a mental health technician or residential assistant at the mental health center. There was no evidence in the record that vocational rehabilitation had been requested or undertaken. This factor should be given greater weight.

(v) Petitioner's injury and treatment were corroborated by the evidence, testimony, and treating physicians' opinions. The evidence that the C5-6 fusion was causally related to the May 7, 2010 injury was persuasive. However, despite this extensive surgery and attendant care, following physical therapy, work hardening, and an FCE, Petitioner was released back to work with a 50-pound lifting restriction. Additionally, the evidence supports that this restriction was accommodated prior to Petitioner's second injury. Following the second injury, Petitioner again complained of significant cervical pain and underwent epidural injections. She was ultimately released MMI with permanent restrictions of a 20-pound lifting restriction. Petitioner has not sought any follow up medical care regarding her cervical condition since 2014. Finally, all of Dr. Citow's medical records note that Petitioner has normal strength and sensation. This factor should be given significant weight.

Based on the fact that the diagnostic and medical evidence supports that Petitioner's fusion was successful, she was released to return to work, there was no evidence of loss of trade, and she has not sought medical treatment since 2014, the Commission reduces the award for permanency from 50% loss of person as a whole to 30% loss of person as a whole.

Finally, the Commission corrects the Scrivener's error in the Caption of the cover page

and corrects the Respondent's name to read: "Ann Kiley Center" rather than "Ann Kelly Center".

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $557.78 per week for a period of 150 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 30% loss of the person as a whole.

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

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

October 20, 2021

/s/ *Maria E. Portela*

MEP/dmm
O: 8/24/21
49

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION **21IWCC0523**
NOTICE OF ARBITRATOR DECISION

TENNORT, CAROLYN
Employee/Petitioner

Case# **14WC008312**

11WC004242

ANN KELLY CENTER
Employer/Respondent

On 4/29/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.40% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2356 DONALD W FOHRMAN & ASSOCIATES
ADAM J SCHOLL
101 W GRAND AVE SUITE 500
CHICAGO, IL 60654

6143 ASSISTANT ATTORNEY GENERAL
KRISTIN A LEASIA
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SPRINGFIELD, IL 62794-9208

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

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

APR 29 2019

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

21IWCC0523

STATE OF ILLINOIS)
)SS.
COUNTY OF Lake)

- [ ] 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

Carolyn Tennort
Employee/Petitioner

v.

Ann Kiley Center
Employer/Respondent

Case # **14** WC **8312**

Consolidated cases: **11 WC 4242**

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 **Waukegan**, on **12/17/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **10/2/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being with respect to her cervical spine ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$48,340.76**; the average weekly wage was **$929.63**.

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

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

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

Respondent shall be given a credit of **$37,009.50** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, the Arbitrator notes Respondent the credit given in the consolidated matter (11 WC 4242) of **$52,710.49** for a total credit of **$89,719.99.**

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

ORDER

PERMANENT PARTIAL DISABILITY

Respondent shall pay the Petitioner permanent partial disability benefits of **$557.78**/week for **250 weeks**, as provided in Section 8(d)2 of the Act, because the injuries sustained caused the **50% loss** of the person as a whole as provided in Section 8(d)2 of the Act. See the attached Addendum for the Arbitrator's analysis.

The Arbitrator finds that Petitioner's right knee condition is not causally related to the accident at issue.

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

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

Signature of Arbitrator

4/29/19
Date

CArbDec p. 2

APR 29 2019

STATE OF ILLINOIS)
)
COUNTY OF LAKE)

ILLINOIS WORKERS' COMPENSATION COMMISSION

CAROLYN TENNORT,)
Petitioner,)
) **14 WC 8312** (consolidated with)
v.) 11 WC 4242
)
ANN KILEY CENTER,)
Respondent.)

ADDENDUM TO THE DECISION OF THE ARBITRATOR

FINDINGS OF FACT

Petitioner has two consolidated cases, 11 WC 4242 and 14 WC 8312 that proceeded to hearing on December 17, 2018, in Waukegan, Illinois. (Arb. 1 & 2) The Arbitrator will issue separate decisions for each case.

Regarding the case at bar, 14 WC 8312, Respondent stipulated that Petitioner was employed at the Ann Kiley Center, a residential mental health center on October 2, 2012, when she sustained accidental injuries that arose out of and in the course of her employment as a Mental Health Technician. (Arb. 2) Respondent also stipulated that Petitioner is entitled to TTD from November 24, 2012, through January 15, 2014. (Id.)

Respondent disputes causal connection and the nature and extent of the injury. (Id.)

2008 Accident

Petitioner was injured in a 2008 work-related injury while assisting a resident in a bathtub. She began treating with Dr. Jonathan Citow, a neurosurgeon, at the Center for Spine and Neurosurgery. On February 13, 2009, a cervical MRI revealed mild left neuroforaminal stenosis at C4-C5 and C5-C6 resulting from facet joint arthropathy and a small, broad-based protrusion at C5-C6 which contacted the ventral spinal cord. (Resp. Ex. 6). Petitioner treated conservatively and on June 5, 2009, reported significant improvement and very little neck pain or radicular symptoms to Dr. Citow who placed her at MMI and released her to full duty work. Petitioner was last seen by Dr. Citow on July 22, 2009, when she reported intermittent neck stiffness but no radicular symptoms. (Id. at p. 10 -13)

Petitioner testified she had no significant issues with her neck between July 22, 2009, and May 7, 2010.

May 7, 2010, 11 WC 4242 (consolidated case)

On May 7, 2010, Respondent's facility ran a fire drill and evacuation exercise. The lights went out, and a loud, piercing alarm sounded. While Petitioner was assisting residents outside, one individual became afraid and combative and began hitting Petitioner about her head, arms, and back. Petitioner was required to restrain the resident until the resident was calm enough to be returned to the living quarters. The whole incident occurred over a 20 to 30-minute long time period, with the actual attack lasting for approximately 15 minutes.

After the incident, the Petitioner's neck began hurting, as did her arms, shoulders, and lower back. Petitioner experienced numbness and tingling in her hands and a shooting pain that went to her feet.

On May 12 and May 13, 2010, Petitioner presented to Northwestern Lake Forest Occupational Health reporting a recurrence of bilateral cervical radiculopathy. (PX2, p.29) Petitioner was provided work restrictions by the attending physician and referred to Dr. Citow. (Id. at 28)

On May 19, 2010, Dr. Citow noted the Petitioner's complaints of neck pain extending to both her shoulders following an assault at work. (PX6,p.14) Dr. Citow recommended a cervical MRI. (Id.)

Petitioner underwent a cervical and lumbar MRI on May 25, 2010. Dr. Citow reviewed the exams a few days later noting the cervical MRI showed disc protrusions at C4-5 and C5-6 with some pressure on the spinal cord. The lumbar MRI demonstrated L3-4 and L4-5 spondylolisthesis and moderate stenosis. (PX6, p.16)

On June 28, 2010, an L4-5 epidural injection was administered to Petitioner by Dr. Juan Alzate, Dr. Citow's partner. On July 12, 2010, Dr. Alzate performed a left-sided C5-6 facet injection. Petitioner returned to Dr. Citow on July 30, 2010, with continued neck pain and some back symptoms. (PX6, p.19) Dr. Citow recommended Petitioner receive a cervical epidural injection. On August 18, 2010, that injection was administered to Petitioner at Northwestern Lake Forest Hospital. (Id. at 33)

On September 22, 2010, Petitioner followed-up with Dr. Citow with complaints of continued neck pain extending through her left upper extremity towards the wrist with numbness, weakness, and paresthesia. (Id. at 21)

Dr. Citow recommended a C5-6 anterior cervical discectomy and fusion which he performed on January 13, 2011.

On February 4, 2011, Dr. Citow noted Petitioner's report of mild neck pain with no radicular symptoms. (Id. at 23) Following six weeks of physical therapy, the Petitioner reported persistent achiness in her neck and arms. (Id. at 25) Dr. Citow instructed Petitioner to begin a work hardening program. (Id.)

On April 29, 2011, the Petitioner reported worsening of her neck symptoms from work hardening. (Id. at 27) A cervical MRI was performed on May 25, 2010, and, upon his review, Dr. Citow noted a well-healed fusion with no problems. (PX7, p.73) A functional capacity evaluation was recommended. (Id.)

On July 29, 2011, Dr. Citow noted Petitioner reported less neck pain with no radicular symptoms. After reviewing Petitioner's FCE, Dr. Citow instituted a permanent 50 lb. lifting limitation. (PX7, p.75) He also noted that the Petitioner was at maximum medical improvement. (Id.)

As Respondent could not immediately accommodate the Petitioner's work restrictions, Petitioner's return to work was delayed. Petitioner did return to work in August 2012, where she performed office work, completed paperwork, and ran errands.

Petitioner testified she had no issues that required medical treatment until October 2, 2012.

14 WC 8312 (The case at bar)

Respondent stipulated that Petitioner sustained a work-related accident on October 2, 2012. (Arb. 2) Petitioner was attending a mandatory CPR training class that required her to lift a CPR mannequin. The dummy was too heavy for her, and she was unable to lift it up. She was also instructed to assist another individual, but due to her back and neck hurting, she was unable to position herself property for the assist. As she attempted the

assist, she fell to the floor. Finally, she practiced chest compressions and while performing such, heard and felt a "pop" in the back of her neck.

She returned to Dr. Citow on October 24, 2012, with a history of an October 2, 2012 incident while participating in CPR training where she heard a pop in her neck followed by bothersome neck pain. (Id. at p.76) Petitioner also reported to Dr. Citow that she had right knee tightness. Dr. Citow ordered an MRI of the cervical spine, prescribed Celebrex and recommended an orthopedic evaluation of the right knee. (Id.) He also imposed light duty restrictions. (Id. at 199, 120) Dr. Citow reviewed the MRI on November 7, 2012, noting a well-healed fusion with mild decreased disc heights from C3-5. (Id. at 77)

Petitioner testified that on or about November 24, 2012, her employer notified her they could not accommodate her work restrictions. Respondent began paying her temporary total disability after that date.

Petitioner returned to Dr. Citow on December 21, 2012, complaining of severe neck pain extending through the left upper extremity to the hand and the right upper extremity to the elbow. (Id. at 78) Petitioner indicated she did not wish to proceed with injections or surgery. Dr. Citow prescribed medications of Skelaxin and Norco and imposed a light duty restriction of no lifting greater than 20 lbs.

On December 27, 2012, Petitioner presented to Dr. Tomas Nemickas of Illinois Bone & Joint Institute concerning her right knee. Petitioner reported to Dr. Nemickas that she injured her right knee while participating in a CPR training class. (PX9, p.14) After examining the Petitioner, Dr. Nemickas diagnosed a probable occult internal derangement of the right knee. (Id. at p.15) He prescribed an MRI of the right knee and provided a restriction of no kneeling and squatting and less than 25 lbs. of lifting, carrying, pushing and pulling. (Id.)

Petitioner returned to Dr. Citow on July 5, 2013, with persistent neck pain extending to the left upper extremity to the hand and the right upper extremity to the elbow. (PX6, p.79) Dr. Citow prescribed medications and advised her to continue the same restrictions. (Id.)

On August 16, 2013, Dr. Nemickas noted the Petitioner's complaints of persistent right knee pain. She also complained of left hip pain due to associative activity restriction and modification. (PX9, p.7) Dr. Nemickas diagnosed an occult internal derangement of the right knee. As to the hip, he did not find any pathology and attributed her left hip pain to lumbar radicular pain. (Id. p.8-9) Dr. Nemickas prescribed MRIs of the right knee and lumbar spine.

On August 19, 2013, Petitioner initiated medical care with Dr. Anatoly Arber, a pain management physician. The Petitioner complained of persistent pain in the lower back, neck, and the left upper and lower extremity. (PX5, p.17) Dr. Arber ordered an MRI of the lumbar spine and scheduled Petitioner for possible cervical steroid injection for pain control. (Id.) Dr. Arber performed a cervical epidural injection occurred on September 13, 2013. (Id. at 14)

On September 27, 2013, a right knee MRI revealed abnormalities of the posterior horn and body of the medial meniscus and the anterior horn of the lateral meniscus. (Id. at 26) The MRI of the lumbar spine revealed degenerative changes. (Id. at 28)

Dr. Nemickas reviewed the MRI of the right knee with Petitioner on October 2, 2013. Based on her clinical exam and the MRI results, Dr. Nemickas recommended a right knee arthroscopy and partial medial meniscectomy. (PX9, p.6) Petitioner informed Dr. Nemickas that she wished to proceed.

On November 13, 2013, Petitioner returned to Dr. Citow with complaints of persistent neck pain extending down the left arm to her hand and down her right arm to the elbow. (PX7, p.80) Dr. Citow recommended Petitioner continue medications of Vicodin, Lotrel, Flexeril, and Motrin. (PX7, p.80)

On February 21, 2014, Dr. Citow noted the Petitioner's complaints of pain in her neck, lower back, both hips, and knee. (Id. at 81) Dr. Citow recommended updated MRIs of the cervical and lumbar spine and both knees. He advised her to continue with the same restrictions. (Id.)

Since her February 2014 appointment with Dr. Citow, Petitioner has not had any further medical care with any specialist for her injury. Care under the direction of her primary care physician is ongoing.

Petitioner's workers' compensation benefits ended on January 15, 2014. The 20-pound lifting restriction, imposed by Dr. Citow for her neck and back issue, is still in effect. A 25-pound lifting restriction, imposed by Dr. Nemickas due to Petitioner's right knee symptoms, is also still in effect.

Petitioner testified that currently, it is difficult for her to get out of bed in the morning. She feels frequent pain in her neck and down her body, including in her arms, hands, and hips. She experiences difficulty with doing laundry and dishes due to the lifting motion required by each chore. She has trouble making the bed. She is unable to engage in house cleaning and finds that it is hard to drive due to the neck pain.

Petitioner uses a cane due to the pain in her right knee. Petitioner's primary care physician instructed her to use the knee brace, which Petitioner wears most of the time. The brace holds her knee in place and generally provides stabilization. She also uses a shower chair, and takes Motrin.

Petitioner has not worked in any capacity since her second injury. She tried to return to work at the Ann Kiley Center and provided reasonable accommodation paperwork to her supervisor. Petitioner was informed, however, that the facility was unable to accommodate her new restrictions and could not return her to work. Petitioner tried unsuccessfully to return several times. Petitioner applied for other employment positions at state-run assisted living facilities but did not receive any job offers. On cross-examination, Petitioner clarified that as she was still technically a state employee at this time, so she only applied to employment positions with the state. She applied to light duty positions that could potentially provide reasonable accommodations for her restrictions.

As of August 1, 2018, Petitioner is retired and is no longer a state employee. She is receiving retirement benefits.

Upon questioning during cross-examination, Petitioner stated she has not had any other injuries to the affected body parts since her 2012 incident.

CONCLUSIONS OF LAW

In support of the Arbitrator's Decision relating to (F) Is Petitioner's current condition of ill-being causally related to the accident on October 2, 2012, the Arbitrator finds the following:

Cervical condition

In the Addendum/Decision pertaining to the consolidated case, 11 WC 4242, the Arbitrator found that Petitioner had sustained her burden with respect to causal connection regarding her May 7, 2010 accident. The Arbitrator also found Petitioner's medical care, including the C5-6 anterior cervical discectomy and fusion performed by Dr. Citow on January 13, 2011, to be reasonable and necessary.

Following her surgery, Petitioner followed up with Dr. Citow on February 4, 2011, reporting mild neck pain but no radicular symptoms. She completed six weeks of physical therapy, and on April 29, 2011, reported worsening of her neck symptoms from work hardening. A cervical MRI was performed on May 25, 2010, and,

upon his review, Dr. Citow noted a well-healed fusion with no problems. On July 29, 2011, Dr. Citow noted Petitioner reported less neck pain with no radicular symptoms. After reviewing Petitioner's FCE, Dr. Citow instituted a permanent 50 lb. lifting limitation. (PX7, p.75) He also noted that the Petitioner was at maximum medical improvement. (Id.)

Petitioner returned to work for Respondent in August 2012, performing office work. She testified she had no issues that required medical treatment until the accident at issue on October 2, 2012.

Dr. Citow testified that he rendered medical care to Petitioner from October 2012 through February 21, 2014. His working diagnosis during that period was adjacent level cervical spondylosis. (Id.) Dr. Citow opined that the Petitioner's diagnosis was causally related to the injury of October 2, 2012. (Id. at 26) He felt that the October 2, 2012 incident exacerbated her pre-existing condition. (Id.)

The Arbitrator notes Dr. Kern Singh examined Petitioner on July 18, 2012, pursuant to Respondent's Section 12 request regarding her May 2010 accident in the consolidated matter but in the case at bar did not provide a contradicting opinion or evidence concerning causation. (Resp. Ex.5; Arb. Addendum/Decision 11 WC 4242).

Based on the medical records and the opinions of Dr. Citow, the Arbitrator finds a causal relationship between Petitioner's condition of ill-being of her cervical spine and the work accident of October 2, 2012

Knee condition

Petitioner's treatment records, as well as significant gaps in treatment, belie finding a causal connection.

Petitioner first treated for the 2012 injury at Northwestern Lake Forest Hospital on October 5, 2012 – three days following the accident. (Resp. Ex. 6). Petitioner presented with complaints of a straining injury to both arms and neck as a result of doing compression exercises during the CPR class. (Resp. Ex. 6). She made no mention of any knee symptoms or accident history to support the existence of a knee problem.

On October 24, 2012, Dr. Citow noted a history of an October 2, 2012 incident while participating in CPR training where she heard a pop in her neck followed by bothersome neck pain. (Id. at p.76) Petitioner also reported to Dr. Citow that she had right knee "tightness" but did not relate that condition to the work-related accident.

On December 27, 2012, Dr. Nemickas noted a history of "cycling" from standing to kneeling in a CPR class when she felt a tearing sensation in her right knee. This history varies significantly from the history noted at Lake Forest Hospital only a few days after the event, which made no mention of "cycling," tearing sensations, or any issues with her right knee. (Pet. Ex. 9; Resp. Ex. 6).

In January of 2013 Dr. Nemickas noted complaints related to Petitioner's bilateral upper extremities but made no mention of issues or treatment related to her right knee. (Pet. Ex. 9). Petitioner followed up with an MRI and appointment for her right knee issues in September and early October of 2013, at which point the doctor recommend that Petitioner undergo knee procedures. (Pet. Ex. 9). The only other appointment to address her alleged knee condition occurred as part of a general follow-up with Dr. Citow in February of 2014. (Pet. Ex. 7).

During her IME with Dr. Mash in 2015 to address her knee condition, Petitioner provided Dr. Mash with a history of injury at odds with what she had told her treaters in the past. (Resp. Exs. 1, 2). Petitioner stated that she suffered her knee injury during the 2010 incident, sustaining a "twisting" injury as a result of being attacked during that occurrence. (Resp. Ex. 1, 2). As is evident from the Petitioner's medical records, and noted by Dr. Mash in his report, no knee injury was ever reported or treated after the 2010 incident. The first treatment for Petitioner's right knee occurred in December 2012, after the second claimed accident. As such, Dr. Mash noted that there would be no causal connection between the 2010 accident and Petitioner's right

knee issues. (Resp. Exs. 1, 2). In terms of the actual cause of said knee issues, after reviewing Petitioner's medical records and conducting a physical exam, Dr. Mash opined that Petitioner suffered from osteoarthritis of the knee with possible tears that were not related to either the 2010 or 2012 accidents. (Resp. Exs. 1, 2). The MRI of her knee that Petitioner underwent in September 2013 supports this conclusion, as it notes the presence of osteoarthritis. (Resp. Exs. 1, 2). The MRI also revealed morphological abnormalities in the knee that the recording doctor thought could either be physiologic to the patient or the result of meniscal tears. (Resp. Exs. 1, 2).

The Arbitrator finds that the Petitioner has failed to sustain her burden regarding her right knee.

Medical Bills

To the extent that there are any unpaid medical bills related to Petitioner's cervical condition for treatment following the accident at issue, the Arbitrator finds Respondent is liable for these charges.

The Arbitrator finds that Respondent is not liable for any outstanding bills or charges related to Petitioner's right knee condition as she has failed to demonstrate a connection between the condition of such and the workplace accident at issue.

In support of the Arbitrator's Decision relating to *(L)* *What is the Nature and Extent of* the injuries? The Arbitrator finds the following:

The Arbitrator will address both the consolidated matter, 11 WC 4242 and the case at bar.

Petitioner's first accident, 11 WC 4242, occurred before September 1, 2011, while 14 WC 8312, occurred after September 1, 2011. Because part of Petitioner's consolidated case occurred after the September 1, 2011 date, and because the Arbitrator finds the factor test both useful and instructive in evaluating Petitioner's claims, the Arbitrator will apply the enumerated criteria to assess the nature and extent of Petitioner's injury to her cervical spine in their entirety.

Regarding criterion (i), no AMA Impairment Rating was rendered; therefore, this factor can be given no weight in determining the nature and extent of the Petitioner's disability.

Regarding criterion (ii), at the time of both accidents, Petitioner worked as a Mental Health Technician III at the Ann Kiley Center. After undergoing cervical fusion surgery and rehabilitation, a medium duty restriction and a 50 lbs. limitation was imposed by Dr. Citow on July 29, 2011. She then incurred the injury on October 2, 2012 that exacerbated and worsened her pre-existing condition causing Dr. Citow to impose a new permanent lifting restrictions of 20 lbs. Respondent was unable to accommodate Petitioner's restrictions and she was unable to find other employment. The Arbitrator places significant weight on this factor.

Regarding criterion (iii), at the time of the 2010 accident, Petitioner was 45 years old. At the time of the 2012 accident, Petitioner was 48 years old. Because of her age and permanent restrictions, the Arbitrator gives this factor some weight.

Regarding criterion (iv), Petitioner's future earnings capacity, the Arbitrator notes Petitioner's permanent restrictions could not be accommodated by Respondent as of November 23, 2012. Petitioner has sought other positions with the State of Illinois without success. As a consequence, she went into early retirement and is currently receiving retirement benefits. The Arbitrator, therefore, gives significant weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the following:

- On July 12, 2010, Dr. Alzate performed a left-sided C5-6 facet injection. Petitioner returned to Dr. Citow on July 30, 2010 with continued neck pain and some back symptoms. Dr. Citow recommended Petitioner receive a cervical epidural injection. On August 18, 2010, that injection was administered to Petitioner at Northwestern Lake Forest Hospital;

- Petitioner underwent a C5-6 anterior cervical discectomy and fusion on January 13, 2011;

- On July 29, 2011, after reviewing Petitioner's FCE, Dr. Citow instituted a permanent 50 lb. lifting limitation;

- Following the 14 WC 8312 accident, MRI was performed and reviewed by Dr. Citow who noted a well-healed fusion with mild decreased disc heights from C3-5;

- Dr. Citow on December 21, 2012, noted Petitioner's complaints of severe neck pain extending through the left upper extremity to the hand and the right upper extremity to the elbow. Petitioner indicated she did not wish to proceed with injections or surgery. Dr. Citow prescribed medications of Skelaxin and Norco and imposed a light duty restriction of no lifting greater than 20 lbs.;

- Petitioner returned to Dr. Citow on July 5, 2013, with persistent neck pain extending to the left upper extremity to the hand and the right upper extremity to the elbow. Dr. Citow prescribed medications and advised her to continue the same restrictions;

- On August 19, 2013, Petitioner initiated medical care with Dr. Anatoly Arber, a pain management physician. Petitioner complained of persistent pain in the lower back, neck, and the left upper and lower extremity. Dr. Arber performed a cervical epidural injection occurred on September 13, 2013;

- On November 13, 2013, Petitioner returned to Dr. Citow with complaints of persistent neck pain extending down the left arm to her hand and down her right arm to the elbow. Dr. Citow recommended Petitioner continue medications of Vicodin, Lotrel, Flexeril, and Motrin;

- On February 21, 2014, Dr. Citow noted the Petitioner's complaints of pain in her neck, lower back, both hips, and knee. (Id. at 81) He advised her to continue with the same restrictions. Since her February 2014 appointment with Dr. Citow, Petitioner has not had any further medical care with any specialist for her injury. Care under the direction of her primary care physician is ongoing;

- The 20-pound lifting restriction, imposed by Dr. Citow for her neck and back issue, is still in effect;

- Petitioner testified that currently, it is difficult for her to get out of bed in the morning. She feels frequent pain in her neck and down her body, including in her arms, hands, and hips. She experiences difficulty with doing laundry and dishes due to the lifting motion required by each chore. She has trouble making the bed. She is unable to engage in house cleaning, and finds that it is hard to drive due to the neck pain.

The Arbitrator assigns a significant amount of weight to this factor finding the treating medical records corroborative of Petitioner's testimony.

Based on the above analysis, the Arbitrator finds that the Petitioner sustained permanent partial disability to the extent of **50% disability to the person as a whole**. Respondent shall pay to Petitioner 250 weeks of permanent partial disability benefits.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC004465
Case Name	AVILA, DAVID v. AUTHENTIC BRANDS OF IL/ BUONA BEEF
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0524
Number of Pages of Decision	27
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Brenton Schmitz
Respondent Attorney	Lindsey Beukema

DATE FILED: 10/20/2021

/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

DAVID AVILA,

Petitioner,

vs. NO: 19 WC 4465

AUTHENTIC BRANDS OF IL /
BUONA BEEF,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of medical expenses 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).

Respondent obtained four utilization review (UR) reports for various medical treatments Petitioner received. Instead of addressing the various "non-certified" treatments individually, the Arbitrator wrote (in a footnote):

> As compared to the medical documentation and opinions in evidence, the opinions contained in the utilization reviews submitted by Respondent in Resp. Ex. 1 are insufficient to overcome the Arbitrator's finding that the treatments provided to Petitioner have been reasonable and necessary from the date of accident through the date of trial. *Dec. 9 at FN7*.

We find that this was a misstatement of the law because it is not Respondent's burden to overcome the Arbitrator's findings. Rather, it is the Petitioner's burden to prove the reasonableness and necessity of the care. Section 8.7 of the Act states:

(i) Upon receipt of written notice that the employer or the employer's agent or insurer wishes to invoke the utilization review process, **the provider of medical, surgical, or hospital services shall submit to the utilization review**, following accredited procedural guidelines.

> **(1)** The **provider shall make reasonable efforts to provide timely and complete reports of clinical information needed to support a request for treatment. If the provider fails to make such reasonable efforts, the charges for the treatment or service may not be compensable nor collectible** by the provider or claimant from the employer, the employer's agent, or the employee. The reporting obligations of providers shall not be unreasonable or unduly burdensome.
>
> **(2)** Written notice of utilization review decisions, including the clinical rationale for certification or non-certification and references to applicable standards of care or evidence-based medical guidelines, shall be furnished to the provider and employee.
>
> **(3)** An employer may only deny payment of or refuse to authorize payment of medical services rendered or proposed to be rendered on the grounds that the extent and scope of medical treatment is excessive and unnecessary in compliance with an accredited utilization review program under this Section.
>
> **(4)** When a payment for medical services has been denied or not authorized by an employer or when authorization for medical services is denied pursuant to utilization review, **the employee has the burden of proof to show by a preponderance of the evidence that a variance from the standards of care used by the person or entity performing the utilization review** pursuant to subsection (a) is reasonably required to cure or relieve the effects of his or her injury.
>
> **(5)** The medical professional responsible for review in the final stage of utilization review or appeal must be available in this State for interview or deposition; or must be available for deposition by telephone, video conference, or other remote electronic means. A medical professional who works or resides in this State or outside of this State may comply with this requirement by making himself or herself available for an interview or deposition in person or by making himself or herself available by telephone, video conference, or other remote electronic means. The remote interview or deposition shall be conducted in a fair, open, and cost-effective manner. The expense of interview and the deposition method shall be paid by the employer. The deponent shall be in the presence of the officer administering the oath and recording the deposition, unless otherwise agreed by the parties. Any exhibits or other demonstrative evidence to be presented to the deponent by any party at the deposition shall be provided to the officer administering the oath and all other parties within a reasonable period of time prior to the deposition. Nothing shall prohibit any party from being with the deponent during the deposition, at that party's expense; provided, however, that a party attending a deposition shall give written notice of that party's intention to appear at the deposition to all other parties within a reasonable time prior to the deposition.

An admissible review shall be considered by the Commission, along with all other evidence and in the same manner as all other evidence, and must be addressed along

> **with all other evidence in the determination of the reasonableness and necessity of the medical bills or treatment**. Nothing in this Section shall be construed to diminish the rights of employees to reasonable and necessary medical treatment or employee choice of health care provider under Section 8(a) [820 ILCS 305/8] or the rights of employers to medical examinations under Section 12 [820 ILCS 305/12].

820 ILCS 305/8.7 (LexisNexis, Lexis Advance through P.A. 102-36 of the 2021 Session of the 102nd Legislature) (Emphases added).

Based on the above, we believe the Arbitrator should have addressed the UR reports in more detail to explain whether Petitioner proved that a "variance of the standards of care…is reasonably required to cure or relieve the effects" of his injuries. The Arbitrator awarded the following bills:

Concentra	$78.87
La Clinica	$44,117.57
IL Orthopedic Network	$3,189.47
Midwest Specialty Pharmacy	$14,327.26
G&U Orthopedic	$12,912.60
Metro Anesthesia Consultants	$6,027.43
Trysis Medical Group (partial)	$13,600.00
Archer Open MRI	$5,850.00
Berwyn Diagnostic Imaging	$1,950.00
Elmhurst Ortho Surgical	$1,066.00

After considering Respondent's arguments and Petitioner's responses regarding each of the bills, we modify the decision as explained below.

Concentra – Px1

The Arbitrator's award for $78.87 for Concentra is hereby reversed based on the parties' stipulation that this bill was paid prior to trial.

La Clinica / Dr. Zaragoza, DC – Px3

Pre-Operative Physical Therapy

Respondent argues that the pre-operative physical therapy and chiropractic visits from September 6, 2018 through December 30, 2019 were deemed not medically necessary and only a trial of six visits were considered reasonable by the UR reviewer. We are mindful that instead of asking Dr. Zaragoza to participate in the UR process and/or provide any evidence to contradict the findings in the UR report, Petitioner simply attacks the report itself.

As for Petitioner's argument that Respondent's UR reviewer, Dr. Boileve, used an updated 2020 version of the Official Disability Guidelines (ODG) to determine the reasonableness and necessity of services performed in 2018-2019, we find Dr. Zaragoza should have addressed this matter during a peer-to-peer discussion. There is no evidence that the 2020 version differed from the guidelines that were in effect in 2018 and 2019. The UR process was instituted to reduce unnecessary

and costly treatment and it is the provider's responsibility to participate in that process to explain why the peer reviewer's analysis and determination is incorrect. Similarly, although Petitioner argues that Dr. Boileve used the guidelines for sprains and strains instead of epicondylitis, without any contrary opinion from Dr. Zaragoza that the epicondylitis guidelines are different, we would tend to find the UR opinion persuasive.

The above notwithstanding, we find Respondent's reliance on this UR report misplaced because it is contradicted by its own §12 examiner, Dr. Biafora. On December 10, 2018, Dr. Biafora opined that Petitioner's "therapy to date has also been reasonable. However, I do not believe any additional therapy directed toward the right shoulder or elbow is indicated." *Px3A at 324*. Therefore, Dr. Biafora opined that physical therapy should end as of his December 10, 2018 report, which is much longer than the six visits certified by the UR.

Therefore, we hereby award the physical therapy and chiropractic visits through December 10, 2018, based on Dr. Biafora's opinion but deny all of the other charges until Petitioner's surgery because Dr. Zaragoza failed to participate in the UR process.

Post-Operative Physical Therapy

Respondent argues that, according to the UR report, Petitioner's post-surgery rehabilitation from June 24, 2019 through December 30, 2019 was not medically necessary. However, Respondent had Petitioner examined again by Dr. Biafora and he produced another report on May 14, 2019. At that time, Dr. Biafora agreed with the recommendation for right elbow epicondylar debridement followed by a 3-month course of therapy at two sessions per week. He opined that Petitioner would then be discharged with a home exercise program. *Px3A at 324*.

Therefore, in direct contradiction of the UR report, Respondent's own Section 12 examiner, Dr. Biafora, recommended post-operative rehabilitation for 3 months at 2 sessions per week, which is roughly 24 sessions (12 weeks x 2 per week). Dr. Koutsky ordered Petitioner to start physical therapy after his surgery on June 13, 2019, which Petitioner began with Dr. Zaragoza on June 24, 2019. Therefore, we find that 24 of Petitioner's post-operative rehabilitation visits were reasonable, necessary and causally related to his work injury based on the opinion of Dr. Biafora, which we find more persuasive than the UR report.

TENS Unit

Respondent argues that the charges of $787.92 for the TENS unit billed on August 30, 2018 and October 3, 2018 were not certified by the February 21, 2010 UR report because they were not medically necessary. Based on Dr. Zaragoza's failure to participate in the UR process, we deny this bill.

Ultrasound Unit

Respondent argues that the charge of $1,800.00 for an ultrasound unit was not medically necessary according to its UR review. Again, based on Dr. Zaragoza's failure to participate in the UR process, we deny this bill.

Illinois Orthopedic Network (ION) – Px4

Respondent argues that the $3,189.47 balance from ION, which the Arbitrator awarded, exceeds the fee schedule and should be reversed. In response, Petitioner argues that the fee schedule balance due is $1,714.94 and attached analysis to his brief. We find that the Arbitrator should have awarded the *entire bill* "pursuant to the fee schedule or as otherwise negotiated," which might have avoided this problem. Nevertheless, Respondent asks that the Commission take judicial notice of the fee schedule while Petitioner submitted a fee schedule analysis with its brief. We find that, if the parties have a dispute about the fee schedule, they need to present their evidence at the hearing. They should not rely on the Commission to take "judicial notice" of the fee schedule or rely on a post-hearing analysis attached to their briefs. If a bill is awarded, then it must be paid according to §8(a) and §8.2 of the Act. If the parties disagree about the amount, and are unable to resolve it themselves, then Petitioner can file a motion for penalties and fees and the Commission can decide at that point whether Respondent acted in bad faith or was unreasonable and vexatious in its calculation of the fee schedule. Therefore, we award the entire bill contained in Px4 pursuant to §8(a) and §8.2 of the Act.

Midwest Specialty Pharmacy – Px5

Although Petitioner did not file a Petition for Review, he argues the Commission has not established a fee schedule for prescriptions filled and dispensed by a licensed pharmacy (820 ILCS 305/8.2(a-1)(1)) and asks the Commission to take judicial notice that Midwest Specialty Pharmacy is a licensed pharmacy as of April 4, 2017. We are unwilling to do so and also note that, pursuant to §8(a) of the Act, Respondent is required to pay the lesser of the negotiated rate, the actual charge or the fee schedule amount pursuant to §8.2 of the Act. The Midwest Specialty Pharmacy Patient Account Summary (Px5) includes price adjustments for the Tramadol and Meloxicam prescriptions issued on March 20, 2020. These entries indicate "Adjustment Posted – AGREEMENT DOS 3/20/20 for Settlement Adjustment." Therefore, it is possible there is a negotiated rate to which Respondent may be entitled for the other prescriptions as well, and we are unwilling to award the bills at the total amount charged. Rather, as discussed above, if the parties disagree about the amount and are unable to resolve it themselves, Petitioner can file a motion for penalties and fees and the Commission can decide at that point whether Respondent acted in bad faith or was unreasonable and vexatious in its calculation of the amount payable under §8(a) and §8.2 of the Act.

We next address Respondent's arguments regarding the various prescription dates separately as detailed below.

January 17, 2019 prescriptions by Dr. Mohiuddin

Respondent argues, among other things, that there is no evidence that the $419.55 for prescriptions by Dr. Mohiuddin on January 17, 2019 were not paid in line with the fee schedule (or previously negotiated rates) and also that the records do not mention the prescriptions contained in the bill, namely Docusate Sodium and Ondansetron. Although Petitioner may be correct regarding there being no fee schedule for prescriptions dispensed by a licensed pharmacy, he did not address Respondent's argument that the drugs on the bill do not match the drugs in Dr. Mohiuddin's records. Respondent may have made payments towards these charges, but the mere payment of a bill does not mean Respondent is liable for it. We note that *Px5 at 28* does contain an ION prescription by Dr. Mohiuddin for these drugs for nausea and constipation. Nevertheless, without mention of these

prescriptions in the actual records, we are unable to conclude by a preponderance of the evidence that they are reasonable, necessary or causally related to Petitioner's work injury. Therefore, these prescriptions are denied.

March 8, 2019 prescription by Dr. Mohiuddin

We deny the $63.56 balance due for Tizanidine on March 8, 2019, because there is no mention of Tizanidine in Dr. Mohiuddin's medical record to support this prescription.

April 19, 2019 prescriptions by Dr. Mohiuddin

We deny the $591.83 for Lyrica and $712.24 for Celecoxib dispensed on Aril 19, 2019 as Petitioner failed to prove that these were reasonable and necessary, and he did not specifically address these on Review. On April 19, 2019, Dr. Mohiuddin noted that Lyrica was not helping and that Petitioner "has failed multiple medications including gabapentin and Lyrica." We therefore find that the prescription for Lyrica on this date was not reasonable or necessary. We also find that Dr. Mohiuddin's record does not mention Celecoxib.

July 30, 2019 prescription by Dr. Mohiuddin

Similarly, we deny the Pregabalin (a/k/a Lyrica) prescription dispensed on July 30, 2019, because it is not supported by the medical records and Petitioner did not specifically address this in his brief.

August 28, 2019 and September 24, 2019 prescriptions by Dr. Mohiuddin

Despite our denial of the Pregabalin (Lyrica) prescriptions on April 19, 2019 and July 30, 2019, we find that the Pregabalin dispensed on August 28, 2019 and September 24, 2019 were reasonable and necessary based on the March 6, 2020 UR report (at #7), which certified them as medically necessary. We further note that Respondent paid these charges, presumably in accordance with the UR report.

October 18, 2019 prescriptions by Dr. Koutsky

Regarding the October 18, 2019 prescriptions totaling for Tramadol, Omeprazole, Meloxicam, Cyclobenzaprine and Diclofenac Sodium 3% gel, we find that Dr. Koutsky's October 17, 2019 records do mention that Petitioner requested refills on some of his medications including Tramadol and he was given a prescription for pain. *Px4 at 19*. Two pages later, at *Px4 at 21*, a Patient Status Form indicates that Dr. Koutsky prescribed medications of "NSAIDS, MR, Tram." In addition, *Px5 at 42* contains the October 17, 2019 "Facsimile Prescription Order" from Dr. Koutsky that lists the following five prescriptions dispensed by Midwest Specialty on October 18, 2019 as prescribed by Dr. Koutsky:

Tramadol: We find that Dr. Koutsky specifically mentioned refilling the Tramadol and hereby award this bill. We also note that the March 6, 2020 UR report (at #4) certified this as medically necessary.

Omeprazole-Bicarb: Since there is no mention of this in the treating records, we deny this charge. We also note that the March 6, 2020 UR report (at #2) *non-certified* this prescription, Petitioner did not specifically argue against this point in his brief, and no provider participated in the UR process.

Meloxicam: The Commission takes judicial notice that this is an NSAID (as mentioned in Dr. Koutsky's note) and we hereby award this charge. We also note that the March 6, 2020 UR report (at #1) certified this as medically necessary.

Cyclobenzaprine: Similarly, this is a muscle relaxant ("MR" as recommended by Dr. Koutsky) and we hereby award this charge. We also note that the March 6, 2020 UR report (at #3) certified this as medically necessary.

Diclofenac Sodium 3% Gel: Although the prescription states, "apply to affected area…prn pain," we find there is insufficient evidence in the medical records to support a finding that this is reasonable, necessary and causally related to Petitioner's injury. Therefore, it is denied. We also note the March 6, 2020 UR report (at #5) *non-certified* this prescription, Petitioner did not specifically argue this point in his brief, and no provider participated in the UR process.

<u>November 21, 2019 prescriptions by Dr. Koutsky</u>

The November 21, 2019 record (Patient Status Form) of Dr. Koutsky states that he was recommending "NSAIDS, MR, Tram" and there is a corresponding prescription (*Px5 at 47*). For the reasons discussed above, we award the Tramadol, Meloxicam and Cyclobenzaprine but deny the Diclofenac Sodium 3% gel and Omeprazole. Regarding the Cyclobenzaprine, although the March 6, 2020 UR report certified this for the October 18, 2019 prescription, the UR report (at #6) *non-certified* this for November 21, 2019 because, "The quantity exceeds the guidelines and the patient was prescribed medication prior without significant improvement documented." However, the UR report also states, "abrupt discontinuation of this medication can be dangerous" and "tapering is recommended at the discretion of the treating provider." Therefore, we disagree with the UR report that this prescription was not medically necessary and award the Cyclobenzaprine for November 21, 2019.

<u>January 17, 2020 prescriptions by Dr. Koutsky</u>

We award the $103.49 for tramadol dispensed on January 17, 2020. Dr. Koutsky's January 16, 2020 record indicates that he refilled Petitioner's tramadol "for severe episodes of pain." *Px3B at 31.*

<u>G&U Orthopedics – Px6</u>

Respondent denied payment for the pneumatic compression devices, totaling $12,912.60, based on the February 21, 2020 UR, which found them unnecessary. *Rx1, 34*. The UR reviewer, Dr.

Milos, had a peer-to-peer teleconference with Dr. Koutsky on February 20, 2020, after which Dr. Milos maintained his recommendation that the pneumatic compression device be non-certified for the period of January 17, 2019 to February 16, 2019 and from July 1, 2019 to July 31, 2019.

Due to Dr. Koutsky's failure to appeal the UR decision, we hereby deny the charges for both of those periods. However, the UR report did not address the charges from June 1, 2019 to June 30, 2019. We note that the billing ledger (*Px6 at 2*) indicates that Respondent paid the June 1, 2019 bill. Since Respondent did not submit the June 1, 2019 bill for utilization review and paid the bill, we award that bill but find that there is no balance due and owing.

Metro Anesthesia – Px9

Respondent argues that $6,027.43 for anesthesia services was determined to be unnecessary by the UR. Although we are mindful that Metro Anesthesiology did not participate in the UR process as required under the Act, we find that Respondent failed to provide sufficient information to the UR reviewer. Dr. Requenez was not given any medical records and was only provided with the bill listing the charges. It is unsurprising that that these charges would be non-certified since Dr. Requenez was not even provided with the procedure and operative reports for the dates in question. In other words, Dr. Requenez did not opine that anesthesiology services were not reasonable and necessary for the dates in service but, rather, that he was unable to determine that without further records. We find that the medical records support the Metro Anesthesia bill services for May 31, 2019, but not on January 17, 2019.

The January 17, 2019 cervical epidural steroid injection procedure report from Dr. Mohiuddin lists "Anesthesia Type" as blank. The "Description" indicates that Petitioner was anesthetized with 1% lidocaine 3mL and that 10 mg of dexamethasone was "injected slowly." The Metro Anesthesia charges for that date do not correspond with the procedure that was performed and there is no documentation to support the services that were billed. We hereby deny these charges because Petitioner failed to prove that these charges were reasonable, necessary and that the services were even provided.

In contrast, the May 31, 2019 right elbow surgery was performed under general anesthesia as documented by *Px4 at 12, 28, 29*. Therefore, we award these charges pursuant to the fee schedule.

Trysis Medical Group – Px10

Respondent argues that $13,600.00 in charges have no correlating medical records and are simply a "list of prescriptions and charges." However, this exhibit is actually an itemization of drug *tests* for various substances. We note that the Arbitrator denied the February 14, 2019 charges because there were no prescriptions ordered on this date by the medical providers. Since Petitioner did not file a review on this issue, we affirm the Arbitrator's denial of those charges.

Nevertheless, we note that Respondent's UR report states that "ongoing urine drug testing and Prescription Drug Monitoring is recommended" because Petitioner was prescribed Toradol. *Rx1 at 26*. We further note that, for each date of testing, there was an individual charge of at least $200 each for about 14 different substances (amphetamines, benzodiazepines, cannabinoids, tramadol, etc.). We find the amount of these charges to be exorbitant on their face. However, many of Dr. Koutsky's

records do mention "toxicity screen discussed" and the records in *Px10* do contain ConnectDx Laboratories testing reports indicating that urine samples were collected from Petitioner on August 22, 2018, February 14, 2019, March 28, 2019, May 9, 2019, June 13, 2019 and August 29, 2019.

Therefore, we find that the drug testing awarded by the Arbitrator was reasonable and necessary based on the UR report. However, we are unable to determine whether a fee schedule exists for the CPT codes that were included on these bills. At oral arguments, Petitioner's attorney represented, as an officer of the court, that the CPT codes listed were incorrect, needed to be adjusted, and that there is, in fact, an applicable fee schedule for these drug tests. Based on this representation by Petitioner's attorney, we award these bills pursuant to the fee schedule.

Archer Open MRI – Px11

Respondent argues that the charges for the right elbow and right shoulder MRIs should be denied based on the February 21, 2020 UR report of Dr. Boileve. We note that, on August 20, 2018, Respondent's own choice of medical provider at Concentra, Dr. Ross, recommended a right shoulder MRI. Therefore, we find Dr. Ross's recommendation more persuasive than the opinion of Dr. Boileve. However, we deny the right elbow MRI because Dr. Zaragoza did not participate in the UR process.

Berwyn Diagnostics – Px12

Contrary to Respondent's arguments, this exhibit reflects a date of service of September 8, 2018, and includes the relevant CPT code (72146), the amount billed, and the patient's name. *Px12*. The stated service is "MRI Thoracic Spine" and a Health Insurance Claim Form is included in the exhibit. Records in *Px3A* confirm that, on the date in question, a thoracic MRI was performed on referral from Dr. Koutsky and was read by Dr. Sobti at Berwyn Diagnostic Imaging. We find that the radiologist's report and Health Insurance Claim Form contain substantially all of the required data elements to adjudicate the bill, which we find to be reasonable and necessary and is hereby awarded.

Elmhurst Orthopedics – Px13

Similarly, this bill contains the required data elements for "arthrocentesis aspiration" on August 22, 2018. According to Dr. Koutsky's August 22, 2018 record, he performed a right shoulder subacromial injection and right lateral epicondyle injection on that date. The operative report is in evidence. *Px2 at 7*. Dr. Koutsky billed for the professional services portion of these procedures separately (*Px2 at 4-5*) and we find that the charges for "Elmhurst Ortho Surgical *Fac*, LLC" (emphasis added) are the "*fac*ility" charges for that operative procedure.

Interest

Finally, we address Petitioner's argument that, for several of these outstanding bills, Respondent should be ordered to pay interest pursuant to §8.2(d)(3) of the Act. However, §8.2(d)(4) of the Act states:

> **If the employer or its insurer fails to pay interest within 30 days after payment of the bill as required pursuant to paragraph (3), the provider may bring an action in circuit court** for the sole purpose of seeking payment of interest pursuant to paragraph (3) against the employer or its insurer responsible for insuring the employer's liability pursuant to item (3) of subsection (a) of Section 4. The circuit court's jurisdiction shall be limited to enforcing payment of interest pursuant to paragraph (3). **Interest under paragraph (3) is only payable to the provider. An employee is not responsible for the payment of interest under this Section.** The right to interest under paragraph (3) shall not delay, diminish, restrict, or alter in any way the benefits to which the employee or his or her dependents are entitled under this Act.
>
> **The changes made to this subsection (d) by this amendatory Act of the 100th General Assembly apply to procedures, treatments, and services rendered on and after the effective date of this amendatory Act of the 100th General Assembly.**

820 ILCS 305/8.2 (LexisNexis, Lexis Advance through P.A. 102-160 of the 2021 Session of the 102nd Legislature) (Emphases added).

According to the Lexis "Amendment Notes:"

> **The 2018 amendment by P.A. 100-1117, effective November 27, 2018**, in (d), added "or its designee" in the first sentence, redesignated and rewrote the former second sentence as the second and third sentences; substituted "as the bill contains" for "as the claim contains" in (d)(1); in the first sentence of (d)(2), , substituted "If the bill" for "If the claim," added "to the provider in the form of an explanation of benefits," and deleted "to the provider" preceding "within 30 days"; added the second sentence of (d)(2); rewrote (d)(3); and **added (d)(4) and the concluding paragraph of (d).** *Id. at "Amendment Notes."*

Based on a plain reading of the Act, we find that the provider must file a claim against the employer or its insurer in circuit court and would only be able to obtain interest for services rendered on and after November 27, 2018. We note that "Interest under paragraph (3) is only payable to the provider" and "An employee is not responsible for the payment of interest under this Section." Therefore, since the provider's third-party claim for interest is not an obligation of Petitioner, we find that the Commission is not authorized to award it.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $301.97 per week for a period of 103-2/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical expenses outlined above 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 shall pay for prospective C5-6 and C6-7 anterior cervical decompression fusion with associated care as prescribed by Dr. Koutsky 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 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.

October 20, 2021 /s/ *Maria E. Portela*

SE/ /s/ *Thomas J. Tyrrell*

O: 8/24/21

49 /s/ *Deborah L. Simpson*

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

21IWCC0524

AVILA, DAVID
Employee/Petitioner

Case# **19WC004465**

AUTHENTIC BRANDS OF IL/BUONA BEEF
Employer/Respondent

On 12/9/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2553 McHARGUE & JONES LLC
MATTHEW C JONES
123 W MADISON ST 18TH FL
CHICAGO, IL 60602

0560 WIEDNER & McAULIFFE LTD
LINDSEY V BEUKEMA
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

David Avila
Employee/Petitioner

v.

Authentic Brands of IL/Buona Beef
Employer/Respondent

Case # **19** WC **4465**

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 Harris**, Arbitrator of the Commission, in the city of **Chicago**, on **July 24, 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, **August 1, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**31,200.00**; the average weekly wage was $**452.93.**

On the date of accident, Petitioner was **33** 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 $**17,902.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**17,902.00**.

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

ORDER

Temporary Total Disability

Respondent shall pay temporary total disability for the periods of August 1, 2018 through July 24, 2020, the date of trial. The total TTD period is 103 and 2/7 weeks, at a rate of $301.97, totaling $31,188.97, as provided in Section 8(b) of the Act. Respondent is entitled to a credit of $17,902.00 for TTD benefits previously paid to Petitioner.

Medical Benefits

Respondent shall pay to Petitioner, reasonable and necessary medical services, pursuant to the medical fee schedule or as otherwise negotiated: Concentra - $78.87; La Clinica - $44,117.57; Illinois Orthopedic Network - $3,189.47; Midwest Specialty Pharmacy - $14,327.26; G & U Orthopedic - $12,912.60; Metro Anesthesia Consultants - $6,027.43; Trysis Medical Group (*partial*) - $13,600.00; Archer Open MRI - $5,850.00; Berwyn Diagnostic Imaging - $1,950.00; Elmhurst Ortho Surgical - $1,066.00.

The Following Medical Bills are denied: Anci-Bill, LLC - $11,086.84; Prescription Partners - $24,026.85; and Trysis Medical Group (*partial*) $3,400.00.

Prospective Medical

The Arbitrator orders Respondent to authorize and pay the recommended C5-6 and C6-7 anterior cervical decompression fusion with associated care as prescribed by Dr. Koutsky.

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.

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

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

Signature of Arbitrator

12/2/20
Date

DEC 9 - 2020

FINDINGS OF FACT

Petitioner, David Avila ("Petitioner"), was working for Respondent, Authentic Brands of Illinois/Buona Beef ("Respondent") on August 1, 2018. (Transcript of Proceedings dated July 24, 2020 ("Trans") at 8-9). Petitioner worked as a cook at their production center. (Id. at 10). His job duties consisted of placing raw meat onto stainless steel pans. (Id.). Each pan would have two pieces of meat on it, with a cumulative weight around 80 pounds. (Id.). Petitioner would then cook the meat inside of an oven, remove the meat, and then place the trays onto racks which would then be moved into large cooling lockers. (Id. at 9-11).

Petitioner testified that on August 1, 2018, he was scheduled to work from 6:00 p.m. to 6:00 a.m. (Id. at 15-16). Around 10:00 p.m. that evening, Petitioner was clearing up space in the cooling locker, as there had been significant meat production from the previous day. (Id. at 11, 15). Due to the repeated high volume of prepared meat stored in this locker, Petitioner testified that the concrete floor of the cooling locker was constantly covered in beef juices and stock – consisting of wine, garlic, and congealed fat. (Id. at 11-12). While moving one of the racks of trays to make space in the locker, Petitioner testified that he slipped backwards and fell on the right side of his body. (Id. at 12-14). Petitioner testified that he attempted to catch his fall with his left hand but was unsuccessful, and ultimately fell on his right wrist, right arm, right elbow, and right side of his back. (Id.). Petitioner testified that he had difficulty standing as there was lard and wine all over the floor, but when he finally did so, he felt like the right side of his body was "on fire". (Id. at 17). Petitioner reported the accident to his supervisor, Jimmy. (Id).

The next morning on August 2nd, Petitioner's arm and elbow were swollen, and after speaking with his employer was sent to Concentra Healthcare for evaluation. (Id. at. 20). Petitioner reported that he fell on the right side of his body, including his right hand, right arm, right elbow, and back, and that he felt numbness in his hands as well as pain in his low back and neck. (Id. at 18). A physical examination was performed by Dr. Cynthia Ross ("Dr. Ross") which revealed limited range of motion to the right shoulder, tenderness to the radial head of the right elbow, limited range of motion to the right elbow, swelling of the right forearm, tenderness to the dorsal and radial aspects of the right wrist, limited range of motion to the right wrist, and right hand swelling. (Pet. Ex. 1 at 20). X-rays of the right elbow, wrist, shoulder and forearm were performed, which did not reveal any fractures. (Id. at 10-15, 40-48). Petitioner was diagnosed with a contusion of the right elbow, right forearm strain, right wrist strain, and right shoulder pain. (Id. at 17). Petitioner was provided with light duty restrictions, which could not be accommodated by Respondent. (Id. at 17; Trans. at 21).

On August 6, 2018, Petitioner returned to Concentra reporting his symptoms were essentially unchanged. (Pet. Ex. 1 10-16). Petitioner reported that his pain was located in the right lateral shoulder that did not radiate. (Id. at 11). He reported no neck pain and no numbness in the arm. (Id.). Petitioner also complained of right elbow pain, located in the radial aspect of the right elbow. (Id.). There was no radiation, no bruising, no decreased range of motion, and no numbness in the fingers. (Id.). It was noted that Petitioner had been adhering to work restrictions but had not scheduled physical therapy. (Id.).

Petitioner followed up with Dr. Ross at Concentra on August 13, 2018. (Id. at 6-9). During that time, Petitioner was also performing physical therapy at Concentra. (Id. at 6). He testified that he was not feeling any better with the physical therapy and that he continued to have right elbow pain, right wrist pain, and right shoulder pain. (Id. at 7). A physical examination was performed, which revealed right elbow swelling, tenderness to the lateral epicondyle of the right

elbow, and tenderness to the dorsal aspect of the right wrist. (Id. at 9). At that time, Petitioner was diagnosed with right lateral epicondylitis, right forearm strain, and right shoulder strain. (Id. at 6). Dr. Ross recommended that Petitioner continue performing physical therapy and take pain medication. (Id.).

Petitioner followed up with Dr. Ross at Concentra on August 20, 2018, and reported pain in his right lateral neck, right trapezius, and right shoulder. (Id. at 1-5). He also complained of continued right elbow pain and tingling in his right arm and hand. (Id. at 2). A physical examination was performed which indicated limited range of motion to the right shoulder, limited range of motion to the cervical spine, and 30 degrees of rotation with pain to the cervical spine. (Id. at 4). Petitioner was diagnosed with a right elbow contusion, right shoulder strain, and cervical radiculopathy. (Id. at 1). Dr. Ross recommended that Petitioner undergo a right shoulder MRI and a cervical spine MRI. (Id.).

Petitioner sought treatment from Dr. Adrian Zaragoza ("Dr. Zaragoza"), a chiropractor, at La Clinica on August 21, 2018. (Pet. Ex 3A at 12-16). Petitioner reported ongoing right elbow pain and numbness in his third, fourth, and fifth digits of his right hand. (Id.). He further reported right shoulder pain that radiated to his neck. (Id. at 12). A physical examination was performed, which revealed right elbow and right forearm swelling, right lateral epicondyle tenderness, tenderness to palpation to C0-7, tenderness to palpation to the right trapezius and elicited a positive cervical compression test, but negative Spurling's test. (Id. at 13). Dr. Zaragoza recommended that Petitioner undergo MRIs for his right shoulder and right elbow. (Id. at 14). He also recommended that Petitioner follow up with an orthopedic surgeon, Dr. Kevin Koutsky ("Dr. Koutsky"). (Id.). Dr. Zaragoza continued Petitioner's light duty restrictions initiated by Dr. Ross and continued said restrictions periodically based on the recommendations of Dr. Koutsky. (Id. at 271-283).

Petitioner's initial visit to Dr. Koutsky for an orthopedic spine referral occurred on August 22, 2018. (Id. at 333-335; Pet. Ex. 2 at 7-12). Dr. Koutsky's physical examination of Petitioner revealed mild weakness in the right shoulder abductors, decreased pinprick sensation along the lateral border of the right forearm extending to the thumb and index finger, a positive right-sided Spurling's test, tenderness to the right lateral epicondylar area, and tenderness and spasm to palpation to the paracervical muscles. (Id.). At that time, Dr. Koutsky diagnosed Petitioner with C5-6 and C6-7 radiculopathy, right shoulder impingement, and right lateral epicondylitis. (Id.). Dr. Koutsky recommended that Petitioner undergo an MRI of the right shoulder and cervical spine to rule out a rotator cuff tear or herniated disk. (Id.). He also recommended that Petitioner undergo injections to his right shoulder and right elbow, which were administered that visit. (Id.).

Petitioner underwent the recommended right shoulder, right elbow, and cervical spine MRIs on August 22, 2018, at Archer Open MRI. (Id. at 243-249). With regard the right shoulder, the radiologist[1] found no evidence of internal derangement. (Id. at 249). With regard the right elbow, the radiologist noted a small amount of fluid superficial to the posterolateral of the common extensor tendon origin, representing resolving soft tissue contusion. (Id. at 246). With regard to the cervical spine, the radiologist noted multilevel spondylosis of facet arthrosis and uncovertebral osteophytosis. (Id. at 243-244). Additionally, the radiologist noted disc bulges with superimposed posterior left paracentral herniations at C5-6 and C6-7 causing foraminal and central canal stenosis. (Id.). A T2-3 herniation was also seen on sagittal imaging and the radiologist recommended a follow-up thoracic MRI. (Pet. Ex. 2 at 14). The thoracic MRI was obtained on

[1] Dr. Vikram Sobti ("Dr. Sobti").

September 8, 2018 with the radiologist noting broad-based protrusions at T4-5, T6-7, and T7-8 contributing to central and foraminal stenosis. (Id. at 253-254).

On September 13, 2018, Petitioner returned to Dr. Koutsky, who after reviewing the August 22nd and September 8th MRIs, diagnosed C5-6 and C6-7 radiculopathy and right lateral epicondylitis. (Id. at 338-339). Dr. Koutsky recommended continuing physical therapy and administered a cervical epidural injection. (Id.). He also ordered a nerve conduction and electromyography ("EMG") of the upper extremities. (Pet. Ex. 3A at 338). Dr. Koutsky also confirmed that Petitioner had light duty restrictions; namely no use of the right upper extremity. (Id. at 338).

Petitioner underwent the EMG at Illinois Orthopedic Network on September 22, 2018. (Pet. Ex. 3A at 256-258). The EMG found evidence of a left C6-7 radiculopathy with denervation of the brachioradialis and the triceps. (Id. at 257). There was also evidence of peripheral polyneuropathy with median sensory deficits bilaterally and left median motor deficits. (Id.). There were also ulnar motor deficits at the elbow bilaterally, which was noted to potentially represent a bilateral cubital tunnel syndrome. (Id.).

Petitioner followed up with a pain management specialist, Dr. Shoeb Mohiuddin ("Dr. Mohiuddin") on September 28, 2018. (Id. at 344). Petitioner reported neck pain radiating down his right upper extremity to the right shoulder, right elbow, and right hand. (Id.). Dr. Mohiuddin reviewed Petitioner's EMG report and opined that it indicated C6-7 radiculopathy and ulnar motor deficits at the elbow. (Id.). Dr. Mohiuddin indicated that the ulnar motor deficits at the elbow could indicate cubital tunnel syndrome. (Pet. Ex. 3A at 344).

Petitioner followed up with Dr. Koutsky on October 18, 2018 and reported no improvement regarding his symptoms. (Id. at 350). Dr. Koutsky performed a physical examination which indicated mild weakness in the right shoulder abductors, numbness along the lateral border of the right forearm extending into the thumb and index finger, a positive right-sided Spurling's test, limited range of motion with paracervical muscle tenderness and spasm, and tenderness to the right lateral epicondylar area. (Id.). Dr. Koutsky also reviewed Petitioner's EMG report and concluded that Petitioner elicited C6-7 radiculopathy with denervation. (Id.). Dr. Koutsky also noted evidence of peripheral neuropathy and opined that it could be a component of cubital tunnel syndrome. (Id.). Dr. Koutsky opined that the EMG findings were consistent with the MRI finding, and further stated that if Petitioner's symptoms continued, he would be a reasonable candidate for anterior cervical decompression and fusion with instrumentation and bone graft. (Id.) Dr. Mohiuddin administered a cervical epidural injection on October 29, 2018. (Trans. at 28).

Petitioner followed up with Dr. Koutsky on November 29, 2018 at La Clinica. (Trans. at 28; Pet. Ex. 3A at 356-357). Although Dr. Koutsky noted that Petitioner felt a 30% improvement from his cervical symptoms following the epidural injection, Petitioner maintained that his symptoms continued to be disabling. (Pet. Ex. 3A at 356). Dr. Koutsky did not note any new findings on physical examination at that visit but did note that conservative care for the cervical radiculopathy and lateral epicondylitis had failed and recommended a second cervical epidural injection. (Id.). Dr. Koutsky further noted that Petitioner would be a reasonable candidate for cervical decompression and fusion should the second injection not alleviate his symptoms. (Id. at 356-357). With regard to Petitioner's elbow, Dr. Koutsky recommended a lateral epicondylar release due to his ongoing significant discomfort. (Id. at 357).

Petitioner presented to a Section 12 Independent Medical Examination ("IME") on December 6, 2018, with Dr. Sam Biafora ("Dr. Biafora") at Hand to Shoulder Associates. (Pet. Ex. 3A at 302). At that time, Petitioner reported that he was overall feeling better. (Id.). However,

he reported that he did have pain in the right side of his neck down to his hand and tightness in the lateral aspect of his right elbow. (Id.). Dr. Biafora performed a physical examination, which revealed mild tenderness to the right paracervical muscles into the right trapezius. (Id. at 303). He also noted a positive right sided equivocal Spurling's test. (Id.). Dr. Biafora diagnosed Petitioner with radiculopathy and right elbow lateral epicondylitis. (Id. at 307). Dr. Biafora opined that surgery for the lateral epicondylitis was not indicated at the time of his examination, and instead recommended a home exercise program. (Id. at 307-308). Dr. Biafora also opined that Petitioner would be capable of returning to work with twenty (20) pound pushing and pulling restrictions. (Id. at 309).

Petitioner presented to an IME on December 10, 2018, with Dr. Daniel Troy ("Dr. Troy) at Advanced Orthopedic Spine and Care to address Petitioner's cervical spine complaints. (Resp. Ex. 2, Dep. Exs. 2 and 3). At that time, Petitioner reported pain in the posterior aspect of the cervical spine and right elbow radiating to his right forearm. (Id. at Dep. Ex. 2 at 1). Dr. Troy noted some decrease in lateral rotation to the cervical spine, pain in the trapezial area going into the posterior deltoid, swelling of the right elbow, and decreased right-sided grip strength. (Id. at Ex. 3 at 8-9). Dr. Troy reviewed Petitioner's cervical, right shoulder, and right elbow MRIs, and concluded that he agreed with the radiologist's findings in each report. (Id. at 9-11). Dr. Troy diagnosed Petitioner with resolved radiculopathy to the right extremity and right elbow lateral epicondylitis. (Id. at p.12). He opined that Petitioner may have developed pain to his neck from favoring his right upper extremity. (Id.). He also opined that he had no findings of both right and left C7-T1 pain outside of Petitioner's subjective complaints. (Id). Lastly, Dr. Troy opined that Petitioner was at MMI and could return to work full duty relative to his cervical complaints. (Id. at 12-13).

On January 17, 2019, Dr. Mohiuddin administered a cervical epidural steroid injection at C7-T1. (Pet. Ex. 3A at 362). Petitioner returned to Dr. Koutsky on February 14, 2019 and reported some improvement from the second injection, but there otherwise were no changes during the physical examination. (Id. at 367-373). Dr. Koutsky continued to recommend the cervical fusion as well as right lateral epicondylar release. (Id.).

Dr. Biafora examined Petitioner again on May 2, 2019 at the request of Respondent. (Pet. Ex. 3A at 325-327). He noted that Petitioner continued to undergo therapy for his right arm and back complaints, as well as injections to the neck. (Id.). Petitioner complained of pain to his entire arm, from his neck down to the fingers, and also described continued localized pain to the right elbow. (Id.). Dr. Biafora opined that since it had now been nine months from the right elbow injury, it would be reasonable that Petitioner undergo a right elbow lateral epicondylar debridement, followed by approximately three-months of physical therapy. (Id. at 326-327). Dr. Biafora cautioned that Petitioner's prognosis was guarded in the presence of "diffuse upper extremity complaints, all of which cannot be explained by the condition of lateral epicondylitis." (Id. at 327).

Petitioner was approved for and underwent surgery for his diagnosed lateral epicondylitis on May 31, 2019. (Pet. Ex. 4 at 12). Dr. Koutsky performed a right lateral epicondylar release of the common extensor origin, decortication of the right lateral epicondyle, and excision of diseased tissue at the common extensor origin. (Id.).

On October 16, 2019, Dr. Biafora performed a third IME at the request for Respondent to examine Petitioner's right elbow condition since his right lateral epicondylar surgery four months prior. (Pet. Ex 3A at 329-332). Upon physical examination, Dr. Biafora believed that Petitioner was doing well with his treatment and recommended six (6) more weeks of physical therapy two

(2) times a week, after which Petitioner should be discharged from care to a home exercise program. (Id. at 331). Dr. Biafora opined that Petitioner's right elbow lateral epicondylitis was related to the August 1, 2018 work accident. (Id.) Lastly, Dr. Biafora anticipated that Petitioner would be at maximum medical improvement ("MMI") within 2-3 months. (Id. at 332). On January 20, 2020, Dr. Koutsky discharged petitioner to a home exercise program. (Trans. at 37).

Petitioner testified at trial that he was currently off of work pursuant to Dr. Koutsky's recommendation. (Id. at 38). He also testified that he currently experiences "hurting with throbbing pain in his neck. (Id. at 39). He testified that he has pain whenever he performs activities that require him to lower his neck, such as brushing his teeth. (Id.). With regard to his right-sided radiculopathy, he testified that he still experiences numbness and tingling in his right hand and fingers. (Id. at 40-41). Petitioner testified that he currently takes medication as needed, pursuant to Dr. Koutsky's recommendation. (Id. at 41-42). He testified that he used to take three to four pain pills throughout the day, but he currently only takes one in the morning, one in the afternoon, and one at night. (Id.). He testified that he would prefer to not take medication and wished to undergo the cervical surgery recommended by Dr. Koutsky. (Id. at 42-43).

Deposition Testimony of Dr. Kevin Koutsky[2]

The evidence deposition of Dr. Koutsky was taken on November 25, 2019. (Pet. Ex. 14). Dr. Koutsky testified that he initially diagnosed Petitioner with C5-6 and C6-7 radiculopathy based on the location of Petitioner's subjective complaints and physical examinations. (Id. at 8-9). Specifically, Dr. Koustky testified that Petitioner had numbness along the lateral border of the forearm extending to the thumb and index finger. (Id.). He specified that the lateral border of the forearm extending into the thumb is usually a C6 nerve issue and the index finger is a C7 nerve issue. (Id.). Dr. Koutsky emphasized that his initial diagnosis was confirmed by Petitioner's cervical MRI indicating a C5-6 and C6-7 radiculopathy. (Id. at 11-12). Dr. Koutsky testified that after examining Petitioner and reviewing the MRI films, he ordered an EMG of the right upper extremity to confirm whether Petitioner had nerve root irritation consistent with the physical findings as well as the MRI findings. (Id. at 12). After reviewing the EMG report, Dr. Koutsky testified that the EMG revealed evidence of C6-7 right sided radiculopathy with denervation - consistent with Petitioner's clinical presentation and MRI findings. (Id. at 13, 16). Dr. Koutsky further noted that the temporary improvement after administration of the cervical epidural injections at those levels supported his conclusion. (Id. at 14-15).

Dr. Koutsky admitted that the cervical MRI showed pathology that was largely left-sided but stated that Petitioner was not having left-sided radicular complaints on physical exam. (Id. at 15-16). When asked to address the significance of this finding, Dr. Koutsky testified that the disc protrusions were "more left than right, but he still had some pathology right." (Id. at 16). Dr. Koutsky repeated that his recommendations were based upon patient's subjective complaints (Id.). Dr. Koutsky testified that the disc protrusions at C5-6 and C6-7 were causing Petitioner's right sided complaints as there was still a right paracentral component, just not as large as the left side. (Id.)

Dr. Koutsky stated that the EMG testing being positive at C6-7 correlated with Petitioner's complaints, and that as such, his recommended discectomy at C5-6 and C6-7 would "take the pinching off the nerves". (Id. at 16-20). A subsequent stabilization would be necessary because

[2] Dr. Koutsky testified that he is a board-certified orthopedic surgeon. (Pet. Ex. 14 at 5-6; Id. at Pet. Dep. Ex. 1).

the entire disc would have to be removed, and such a removal could not be accomplished without creating instability. (Id. at 20).

Dr. Koutsky testified that Petitioner's elbow was doing "really well" and that he had reached maximum medical improvement as to the right elbow. (Id. at 22). Dr. Koutsky testified that as of November 21, 2019, Petitioner was continuing to have symptoms that radiated down from his neck to the thumb and index finger. (Id.). Dr. Koutsky testified that Petitioner had exhausted multiple courses of physical therapy as well as multiple injections. (Id.). Dr. Koutsky said that Petitioner had a "pretty classic case of cervical radiculopathy that had been refractory to conservative management." (Id.)

Deposition Testimony of Dr. Daniel Troy

The evidence deposition of Dr. Troy was taken on December 4, 2019. (Resp. Ex. 2).[3] Dr. Troy testified that he performed an IME of the Petitioner on December 10, 2018 and testified that at the time of the IME Petitioner reported no complaints of tingling or numbness into his upper extremities. (Id). Petitioner stated that the vast majority of his symptoms were from his right elbow and not from his neck, causing pain radiating down to his right forearm. (Id. at 10). Dr. Troy testified that he performed a physical examination of the cervical spine which included a negative Spurling's test. (Id. at 11). Dr. Troy also testified that he reviewed the MRI films, including the August 22, 2018 cervical MRI film and report. (Id. at 12). He also reviewed the September 22, 2018 EMG/NCV and took x-rays of the cervical spine, shoulder, and thoracic spine at the time of the exam.[4] (Id.).

As to the x-rays of the cervical spine, Dr. Troy testified that the disc space was "pretty-well maintained." (Id. at 13). As to the cervical spine MRI, Dr. Troy testified that it demonstrated pathology to the left side of the cervical spine, specifically at C5-6, but to similar degrees C6-7 on the left side. (Id.) Dr. Troy further testified that the September 22, 2018 EMG showed evidence of left C6-7 radiculopathy and that the EMG also showed evidence of bilateral carpal tunnel syndrome and possibly bilateral cubital tunnel syndrome. (Id.) Dr. Troy testified that at the time of his examination the Petitioner was relatively asymptomatic as to the cervical spine and so the findings did not correlate to the stated symptomatology. (Id. at 14)

Dr. Troy testified that he disagreed with Dr. Koutsky's recommendation for a cervical decompression and fusion because in his opinion the cervical MRIs showed no foraminal encroachment and no spinal cord compression. (Id. at 15). In addition, Dr. Troy indicated that the EMG test lacked any findings of radiculopathy, impingement or nerve root compression on the right side, but instead only radiculopathy on the left upper extremity. (Id. at 15-16). Dr. Troy testified that performing surgery on the cervical spine to take off pressure which does not exist on that nerve root "makes no sense." (Id. at 17). Dr. Troy testified that at the time of his examination, Petitioner had reached MMI as to the cervical spine and was able to return to work without restrictions with regard to his cervical and thoracic spine. (Id at 17-18)

On cross-examination, Dr. Troy was asked whether the narrowing of the right neuroforamen at C5-6 and C6-7, as noted in the radiologist report, would be sufficient to cause right-sided radicular complaints. (Id. at 19-21). Dr. Troy testified that there was some narrowing

[3] Dr. Troy is a board-certified orthopedic surgeon with subspecialty certifications in sports medicine and spinal surgery. (Resp. Ex. 2 at 5; Id. at Resp. Dep. Ex. 1).

[4] The Arbitrator notes that the x-ray images taken on December 10, 2018 by Dr. Troy were not entered into evidence.

of the foramen, but that there was no pressure on the nerve, and therefore surgery designed to remove pressure of the nerve was nonsensical. (Id. at 21). Dr. Troy opined that potential causes for Petitioner's right sided upper extremity radicular complaints could be peripheral neuropathy, carpal tunnel syndrome, as reflected in the EMG testing, but that Petitioner's symptoms were "clearly not from pressure on the nerve root in the cervical spine." (Id. at 24).

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact as applied by Conclusions of Law which immediately follow:

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

Right Elbow

The Arbitrator finds that the Petitioner's current condition of ill-being relative to his right elbow is that of right lateral epicondylitis and it is causally connected to his activities at work for the Respondent on August 1, 2018. This is based on Petitioner's testimony, as well as the credible and consistent opinions of Dr. Ross, Dr. Mohiuddin, and Dr. Koutsky. It is further based on the correlation between Petitioner's symptomatology, the various physical examinations performed by his treating physicians, and the diagnostic tests.

The Arbitrator notes that Petitioner complained of right elbow pain consistently throughout the history of this case, through his surgery and his discharge to home care. (Pet. Ex. 14 at 37). Petitioner testified that he never had any prior injuries affecting his right elbow nor was he symptomatic relative to his right elbow at any point prior to August 1, 2018. (Trans. at 44). The Arbitrator notes that Dr. Koutsky and Dr. Ross opined that Petitioner's right elbow condition was causally related to his August 1, 2018 injury. (Pet. Ex. 2 at 10). Further, both of Respondent's Section 12 examiners agreed that Petitioner's right elbow condition was causally related to the accident in question. (Pet. Ex. 3A at 322, 326). Furthermore, Dr. Biafora opined that the epicondylar release would be a reasonable and necessary procedure. (Id. at 327).[5]

As such, the Arbitrator finds that the Petitioner's current condition of ill-being relative to his right elbow is that of right lateral epicondylitis, and it is causally connected to his work for the Respondent on August 1, 2018.

Cervical Spine

The Arbitrator finds that the Petitioner's current condition of ill-being relative to his cervical spine and is causally connected to his activities at work for the Respondent on August 1, 2018. This is based on Petitioner's testimony as well as the persuasive opinions and medical records of Dr. Ross, Dr. Zaragoza, Dr. Mohiuddin, and Dr. Koutsky.

First, the Arbitrator finds the opinions of Dr. Zaragoza and Dr. Koutsky to be credible and persuasive on the issue of causation. Dr. Koutsky opined that the injury Petitioner sustained on August 1, 2018 was causally related to his current condition. (Pet. Ex. 2 at 10; Pet. Ex. 3A at 14). Dr. Koutsky also testified to the correlation between Petitioner's symptomatologic presentation,

[5] The Arbitrator notes that Respondent's insurance carrier paid for Petitioner's right lateral epicondylar release.

the consistent findings from numerous physical examinations, and Petitioner's cervical MRI and EMG results. (Pet. Ex. 14 at 16-17). Dr. Sobti noted disc bulges with superimposed posterior left paracentral herniations at C5-6 and C6-7 with foraminal and central canal stenosis. (Pet. Ex. 3A at 243-244). Respondent's Section 12 examiner, Dr. Troy, opined that Petitioner's cervical spine MRI also showed foraminal and central canal stenosis at those levels; notwithstanding his assertion that Petitioner's cervical MRI showed no evidence of nerve root irritation. (Resp. Ex. 2 at 15). Dr. Koutsky testified that nerve root irritation at C5-6 and C6-7 levels was consistent with the findings on Petitioner's cervical spine MRI, especially since the EMG test revealed evidence of C6-7 radiculopathy with denervation. (Pet. Ex. 14 at 36-37).

Second, the Arbitrator notes that Petitioner's complaints of right shoulder or right-sided neck pain with cervical radiculopathy symptoms has been consistent from the first date of medical service through the date of trial. Petitioner offered unrebutted testimony that he fell on to the concrete floor onto the right side of his body and immediately felt pain and continued to feel pain through the date of trial. (Trans. at 17).

The Arbitrator notes that the various examination findings by Petitioner's treating physicians correlate with Petitioner's symptoms. Specifically, Dr. Ross noted that Petitioner elicited sensory deficits in the dorsal part of the forearm and the index finger – symptoms which correlate with the C6 and C7 nerves. (Pet. Ex. 1 at 9). Furthermore, Dr. Koutsky and Dr. Zaragoza noted positive Spurling's tests throughout their course of treatment of Petitioner. (Pet. Ex. 3A at 13, 333-335). Dr. Biafora also found a positive Spurling's test during his examination of Petitioner. (Id. at 303).

Dr. Troy's examination and opinion of Petitioner's current condition is not credible compared to the medical records and opinions in evidence. First, Dr. Troy's physical examination noted a negative Spurling's test – a singular, consistently contrary result in nearly three years of treatment. (Resp. Ex. 2, Dep. Ex. at 9).[6] Second, Dr. Troy noted in his examination of the Petitioner that, "there was no pain directly over the spinous processes, but more in the muscular region of the upper thoracic/lower cervical region but mainly around the C7-T1 level…he did have symptomatology". (Id. at 8). This establishes that there is objective and subjective pain in that area of Petitioner's body.

Third, Dr. Troy does not dispute that at some point Petitioner was afflicted with cervical/thoracic radiculopathy, but merely that it was resolved. (Id. at 12). This conclusion is wholly contradicted in the records in evidence and Petitioner's current condition of ill-being. Lastly, Dr. Troy does not dispute that there is some narrowing the right neural foramen, but instead bases his opinion that Petitioner's herniations at C5-6/C6-7 are primarily on the left side and are causing stenosis. (Resp. Ex. 2 at 19-21). While this is consistent with the MRI report from August 22, 2018, he does not satisfactorily explain why Petitioner is in persistent subjective pain. There was no evidence presented that Petitioner was acting, malingering or masking symptoms, and it is unrefuted that Petitioner was asymptomatic prior to the August 1, 2018 work injury. Given that conservative treatment has failed, and the cervical MRI identifies the C5-7 bulges causing stenosis, Dr. Troy's opinion is conclusively less credible the Dr. Koutsky's.

The Arbitrator finds that the Petitioner's current condition of ill-being relative to his cervical spine is that of C5-6 and C6-7 radiculopathy, and it is causally connected to his work activities for the Respondent on August 1, 2018.

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[6] The Arbitrator notes that Dr. Zaragoza has found both positive and negative Spurling's tests through the course of his treatment of the Petitioner. (Pet. Ex. 3A at 13, 224).

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) as set forth fully herein.

The Arbitrator finds that the medical services provided to Petitioner from the date of the work injury through July 24, 2020 were reasonable and necessary.[7] The Arbitrator finds the following medical bills were reasonable, necessary and causally related to Petitioner's August 1, 2018 work accident, and are to be paid to Petitioner, via Petitioner's attorney's office[8], pursuant to the fee schedule or as otherwise negotiated:

1. Concentra (Pet. Ex. 1)	$78.87
2. La Clinica (Pet. Ex. 3B at 2-9)	$44,117.57
3. Illinois Orthopedic Network (Pet. Ex. 4)	$3,189.47
4. Midwest Specialty Pharmacy (Pet Ex. 5 at 1-4)	$14,327.26
5. G&U Orthopedics (Pet. Ex. 6 at 2)	$12,912.60
6. Metro Anesthesia Consultants (Pet. Ex. 9 at 2-3)[9] Pet. Ex. 3A at 362)	$6,027.43
7. Trysis Medical Group (Pet. Ex. 10)[10] (*Alleged fees related to 2/14/19 date of service is denied as described *infra*).	$13,600.00*
8. Archer Open MRI (Pet. Ex. 11)	$5,850.00
9. Berwyn Diagnostic Imaging (Pet. Ex. 12)[11]	$1,950.00
10. Elmhurst Ortho Surgical (Pet. Ex. 13) [12]	$1,066.00
Total Medical Bills Payable:	**$103,119.20**

Respondent shall receive a credit for any and all amounts previously paid pursuant to Section 8(j) of the Act.

The Arbitrator denies the following medical bills:

1. Anci-Bill, LLC (Pet. Ex. 7)	$11,086.84

The Arbitrator denies the medical bills from Anci-Bill, LLC. These bills state that they are for medication dispensed by Dr. Koutsky at COMPD00-Trisys Medical Group, LLC. (Pet. Ex. 7).

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[7] As compared to the medical documentation and opinions in evidence, the opinions contained in the utilization reviews submitted by Respondent in Resp. Ex. 1 are insufficient to overcome the Arbitrator's finding that the treatments provided to Petitioner have been reasonable and necessary from the date of accident through the date of trial.

[8] Trans. at 7.

[9] Supporting documentation: Pet. Ex. 3A at 362; Pet. Ex. 4 at 28-30.

[10] Supporting documentation: Pet. Ex. 2 at 10; Pet. Ex. 4 at 6, 11, 14, 16, 18, 21, and 24.

[11] Supporting Documentation: Pet. Ex. 2 at 4-5.

[12] Supporting Documentation: Pet. Ex. 2 at 4-5.

The Arbitrator notes that pursuant to Section 8.2(d), this bill lacks sufficient information to permit the Arbitrator (and arguably the Respondent) to adjudicate the bill. Aside from the lack of description on the face of the exhibit itself, Dr. Koutsky's medical records in Petitioner's Exhibits 4 and 5 do not have any medical entries for Exhibit 7's dates of service. There is simply no way to determine with specificity what services or medications, if any, Anci-Bill, LLC provided to the Petitioner. Additionally, Petitioner elicited no testimony from Dr. Koutsky or his practice as to their relationship with Anci-Bill, LLC.

The Arbitrator finds that Respondent would not liable for bills contained in Petitioner's Exhibit 7 as Petitioner failed to prove by a preponderance of the evidence that the services rendered were medically reasonable and necessary pursuant to Section 8(a) of the Act.

2. Prescription Partners (Pet. Ex. 8) $24,026.85

The Arbitrator denies the medical bills from Prescription Partners, LLC. These bills state that they are for medication dispensed by Dr. Koutsky at TMGL00-Trisys Medical Group, LLC. (Pet. Ex. 8). The Arbitrator finds that pursuant to Section 8.2(d), this bill lacks sufficient information to permit the Arbitrator to adjudicate the bill. Unlike the dates of service listed in Petitioner's Exhibit 7, the date ranges listed in Exhibit 8 at least match the dates of service which are documented by Dr. Koutsky in Exhibit 4. Notwithstanding, the document entered as Petitioner's Exhibit 8 lacks the data necessary to determine what prescriptions listed in Dr. Koutsky's reports comprise the amount included in the bill.

Moreover, there are six dates of services listed in Exhibit 8 which match[13] dates of services listed in Exhibit 10. (Pet. Ex. 8; Pet. Ex. 10 at 2-10). Although the Arbitrator notes on their face that they are both related to Trisys Medical Group, LLC, the amounts listed in both documents do not match. This comparison further illuminates the deficiencies of information listed in Paragraph 8. The Arbitrator finds that Respondent is not liable for the amounts contained in Petitioner's Exhibit 8 as Petitioner failed to prove by a preponderance of the evidence that these services rendered were medically reasonable and necessary pursuant to Section 8(a) of the Act.

3. Trysis Medical Group (Pet. Ex. 10 at 2-3) $3,400.00

The Arbitrator denies the medical bills from Trysis Medical Group for the date of service of February 14, 2019. The medical records submitted into evidence do not indicate that Petitioner was prescribed any medication related to this date of service. (*See* Pet Ex. 3A at 370-373; *compare with* supporting documentation listed in Fn. 10 *supra.*).

K. Is Petitioner entitled to any prospective medical care?

The Arbitrator repeats the findings set forth in support of (F) and (J) as set forth fully herein.

The Arbitrator finds that Petitioner is entitled to a C5-6 and C6-7 anterior cervical decompression fusion, and that Dr. Koutsky's testimony was credible regarding prospective

[13] 2/14/19; 3/28/19; 5/9/19; 6/13/19; 7/18/19 and 8/29/19.

medical treatment. Dr. Koutsky testified that the goal of the procedure would be to resolve Petitioner's numbness and tingling pain down his right arm. Petitioner's right-sided neck pain with radiculopathy has persisted throughout his entire course of treatment and through to the date of trial. It is clear from the medical records and testimony in evidence that Dr. Koutsky's opinion that conservative treatment has failed is accurate and that the Petitioner will continue to have significant functional limitations. Dr. Koutsky testified that if the procedure were not performed, Petitioner would have chronic pain in the neck radiating down his arm into his thumb and index finger and that it would be unlikely that Petitioner's symptoms would resolve on its own.

L. What temporary benefits are in dispute? (TDD).

The Arbitrator repeats the findings set forth in support of (F), (J) and (K) as set forth fully herein.

The Arbitrator finds that Petitioner is entitled to TTD benefits from August 1, 2018 through July 24, 2020. Petitioner was taken off work pursuant to his doctors' recommendations throughout his entire course of treatment which were causally related to his August 1, 2018 work accident. The Arbitrator finds that restrictions set forth by Petitioner's treating physicians were credible and accurate, and the testimony that they could not be accommodated by Respondent are unrebutted.

Signed: 12/2/2020

SIGNATURE OF ARBITRATOR DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	08WC017357
Case Name	LEWIS, KENNETH E v. RONALD E PAYNE DBA RONALD E PAYNE TRUCKING INC & HENIFF TRANSPORTATION SYSTEMS INC
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0525
Number of Pages of Decision	21
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Kenneth Peters
Respondent Attorney	Charlene Copeland David VanOverloop Nathan Bernard

DATE FILED: 10/20/2021

/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

Kenneth E. Lewis,

Petitioner,

vs. NO: 08 WC 017357

Ronald E. Payne Trucking, Inc.,
Heniff Transportation Systems, Inc., and
Illinois State Treasurer as Custodian of the Injured Workers' Benefit Fund,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, benefit rates, medical expenses, notice, temporary total disability, permanent partial disability, employment, liability of the IWBF 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 August 29, 2018 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

October 20, 2021

MEP/ypv
o 082421
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/s/ *Maria E. Portela*

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0525
NOTICE OF ARBITRATOR DECISION

LEWIS, KENNETH E Case# **08WC017357**
Employee/Petitioner

RONALD E PAYNE TRUCKING INC HENIFF TRANSPORTATION SYSTEMS INC AND ILLINOIS STATE TREASURER AS CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

On 8/29/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.21% 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.

0146 CRONIN PETERS & COOK PC
KENNETH D PETERS
221 N LASALLE ST SUITE 1454
CHICAGO, IL 60601

2965 KEEFE CAMPBELL BIERY & ASSOC
MATTHEW WRIGLEY
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

1505 SLAVIN & SLAVIN LLC
DAVID VanOVERLOOP
100 N LASALLE ST 25TH FL
CHICAGO, IL 60603

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Kenneth E. Lewis
Employee/Petitioner

Case # 08 WC 17357

v.

Consolidated cases: N/A

Ronald E. Payne Trucking, Inc.,
Heniff Transportation Systems, Inc., and
Illinois State Treasurer as 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 Tiffany Kay**, Arbitrator of the Commission in the city of **Chicago**, on **April 11, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **March 21, 2008,** Respondents Ronald Payne Trucking Inc. and Heniff Transportation Systems Inc. were operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondents Ronald Payne Trucking Inc. and Heniff Transportation Systems Incorporated.

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

Because Petitioner failed to prove a compensable accident by a preponderance of the evidence, the other issues as to timely notice of this accident, whether the Petitioner's current condition of ill-being was causally related to the accident, Petitioner's earnings, Petitioner's average weekly wage, the date of the accident, Petitioner's age, marital status and number of dependent children, whether Petitioner has received all reasonable and necessary medical services, and whether Respondent has paid all appropriate charges for the same is rendered moot.

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** under Section 8(j) of the Act.

ORDER

On March 21, 2008, both Respondents Ronald Payne Trucking Inc. and Heniff Transportation Systems Inc. were valid corporate entities subject to the Illinois Workers' Compensation Act.

Pursuant to §4 of the Act, both Respondents Ronald Payne Trucking Inc. and Heniff Transportation Systems Inc. have joint and several liability and are considered both employers of Petitioner Kenneth Lewis.

The Arbitrator finds Petitioner failed to prove by a preponderance of the evidence that an accident occurred arising out of and in the course of his employment with Respondent Heniff Transportation systems, Inc. and Respondent Ronald E. Payne Trucking, Incorporated.

As such, with respect to the other disputed issues (D), (E),(F), (G), (H), (I), (J), (K), (L) and (M) are moot.

Compensation is denied.

The Arbitrator finds Respondent Ronald Payne Trucking Inc. and Respondent Heniff Transportation Systems Inc. are each entitled to a credit for any benefits either has paid in this matter.

The Illinois State Treasurer as ex-officio custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This finding is hereby entered as to the Fund to the extent permitted and allowed under §4(d) of the Act. Should any recovery by the Petitioner occur, 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, including but not limited to any full award in this matter, the amounts of any medical bills paid, temporary total disability paid or permanent partial disability paid. The Employer-Respondent's obligation to reimburse the IWBF, as set forth above, in no way limits or modifies its independent and separate liability for fines and penalties set forth in the Act for its failure to be properly insured.

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

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

Signature of Arbitrator

8/28/18
Date

ICArbDec p. 2

AUG 29 2018

PROCEDURAL HISTORY

The parties proceeded to hearing on April 11, 2018, in Chicago, Illinois, before Arbitrator Tiffany Kay, with all issues in dispute, including whether Kenneth E. Lewis (hereinafter "Petitioner") was employed by Ronald E. Payne, d/b/a Payne Trucking, Inc. (hereinafter "Respondent Payne") or Heniff Transportation Systems, Inc. (hereinafter "Respondent Heniff"). (ArbX1) Both employers were named as Respondents in this matter. Additionally, Petitioner also named Zurich American Insurance Company (hereinafter "Respondent Zurich") as a Respondent in its application for adjustment of claim. On or about April 8, 2010, Petitioner amended his application for adjustment of claim adding the State Treasurer and Ex-Officio Custodian of the Injured Worker's Benefit Fund (hereinafter "Respondent IWBF") as a Respondent. (RHeniffX7) Respondent IWBF was added due to Respondent Payne not having Workers' Compensation insurance on the date of the accident, March 21, 2008. On or about April 19, 2016, Respondent Zurich was dismissed from the claim by Arbitrator Milton Black.

FINDINGS OF FACT

The parties proceeded to hearing on April 11, 2018, with all issues in dispute. (Arb.X1) All parties stipulated, on May 9, 2018, to the electronic admittance into evidence of an NCCI Proof of Coverage search by the Illinois Workers' Compensation Commission certified on January 19, 2010. (P.X19)

ARBITRATOR'S SUMMARY OF PETITIONER'S MEDICAL TREATMENT

Petitioner has a surgical history positive for arthroscopic debridement of the right shoulder which revealed grade 5 changes of the right shoulder. (P.X10) On October 24, 2002, he had subacromial decompression and then debridement with capsular release, debridement of the rotator cuff – for advanced arthritis of the right shoulder. In addition, the Petitioner had a dislocated shoulder at age 18, a Putti-Platt procedure to treat instability of his shoulder in 1974, and underwent a bristol procedure to treat persistent instability of the shoulder in 1980. (P.X10, R.HeniffX4)

Petitioner testified that as of March 2003 he had 22 years of experience driving trucks. (T.25) Petitioner drove trucks that were owned by Respondent Payne and the tankers were owned by Respondent Heniff. (T.29) On the morning of March 21, 2008, Petitioner headed to Durant, Iowa to deliver a load of caustic potash. (T.43) Once Petitioner arrived at the plant, he was required to get the supervisor to sign off on the delivery paperwork. (T.44) He then put on all of his safety equipment, proceeded to pull a 40-foot of hose out, hooked up the hoses, and decompressed the tank to unload the load. (T.44) Petitioner testified that he decompressed the tank, disconnected the air hose, put it over his shoulder and while climbing down the ladder on the side of the tank he slipped on the third stair from the bottom. (T.46) Petitioner was "dangling" while holding onto the ladder with his right arm. (T. 46) Petitioner dropped down off the ladder onto his left foot. (T.46) Petitioner approximated the drop from the bottom of the ladder to the ground to be about 6 to 7 feet. (T.48) Petitioner testified that he heard several pops in his right shoulder and his left leg and left foot started to hurt. (T.49) Petitioner testified that he did not report his accident to anyone at the Durant, Iowa facility. (T.49)

On March 31, 2008, Petitioner saw Dr. Steven Gelsomino (hereinafter "Dr. Gelsomino"), D.P.M from Diseases and Surgery of the Foot and Ankle. (P.X7) The records reflect that Petitioner complained of severe pain in his left foot, heel pain on his left foot compatible with a heel spur, and pain on the dorsolateral aspect of his left foot. (P.X7) Petitioner told Dr. Gelsomino that he had fallen off a ladder and injured his left foot on March 21, 2008. (P.X7) Dr. Gelsomino took radiographic examinations and found swelling and edema along the dorsolateral aspect of Petitioner's foot. (P.X7) No fracture was noted. Dr. Gelsamino told Petitioner to stay off

his foot, use crutches as needed and take over the counter nonsteroidal anti-inflammatory medicine for discomfort. (P.X7)

On April 4, 2008, Petitioner returned to Dr. Gelsomino for a follow-up visit. On this visit, Dr. Gelsomino gave Petitioner a temporary ortho-mechanical device and an orthotic, made to relieve the pressure off of his left foot. Petitioner was told to wear the device at all times. Petitioner complained of his foot still being very painful. Dr. Gelsomino instructed Petitioner to continue using the over the counter medications and to elevate and ice his left foot. (P.X7)

On April 14, 2008, Petitioner was examined by Dr. David Smith during an orthopedic consultation. (P.X10) Petitioner testified that he called Dr. Smith shortly after the accident because of ongoing right shoulder pain. Dr. Smith had done prior surgeries on both of Mr. Lewis' shoulders. Dr. Smith's records on April 14, 2008 contain a history of Mr. Lewis complaining of right shoulder and right elbow pain. He was status post five year and six months arthroscopic debridement on the right shoulder. Petitioner testified the pain started again around March 21, 2008 when he "slipped while he was coming down a ladder, missed a step and his right arm was pulled." Petitioner stated he had immediate pain and the pain is now constant and severe. A hand-written patient information questionnaire dated April 14, 2008 in the doctor's records documents a history of an injury on March 21, 2008 in Durant, Iowa. "Climbing down tank ladder missed 3rd step from bottom loss balance. Jerked right side of body pulling right elbow and right shoulder. Fell on left foot." (P.X10)

Dr. Smith took X-rays of the right shoulder which revealed a screw that appeared to correlate with the history of the prior Bristow procedure and some degenerative changes in the Gleno humeral joint. (P.X10) Dr. Smith recommended an MRI of Petitioner's right shoulder which revealed post-Bristow procedure, advanced DJD, rotator cuff tendinopathy, and a metallic artifact from the screw regarding previous Bristow procedure. (P.X10) Dr. Smith reviewed the Petitioner's treatment options including conservative treatment with physical therapy, injections, medications and bracing versus arthroscopic exam. (P.X10) Dr. Smith administered an ultrasound-guided injection of cortisone to the right shoulder and right elbow. Petitioner opted to proceed with arthroscopic surgery with the right shoulder. (P.X10)

On April 23, 2008, Petitioner saw Dr. Gerard M. Davison (hereinafter "Dr. Davidson"), Petitioner's primary care physician. Dr. Davidson noted that Petitioner had an appointment with Dr. Smith, a bone and joint physician, to have right shoulder arthroscopy. (P.X8) Additionally, Dr. Davidson noted that Petitioner was positive for previous shoulder surgery, previous appendectomy, radial head surgery with questionable removal, tonsillectomy and adenoidectomy, as well as nasal reconstruction. (P.X8) Dr. Davidson noted upon a physical examination that Petitioner had a decreased range of motion through his shoulder. His impression of Petitioner was that he had shoulder arthritis with previous damage done to that shoulder, hyperlipidemia and history of diverticulitis. Petitioner was scheduled for a repair with Dr. Smith and Dr. Davidson cleared him for the surgery. (P.X8)

On April 28, 2008, Petitioner returned to Dr. Gelsomino for a follow-up. Petitioner reported that the insert provided some relief, however his heel pain was worse and he needed a stronger prescription. Dr. Gelsomino gave him some Vicodin for pain. He also made an adjustment on Petitioner's orthopedic. Dr. Gelsomino also noted that there was still swelling over the dorsolateral aspect in his left foot. He noted that the Petitioner had a contused left foot. Petitioner was instructed to stay off his foot and to keep it elevated. (P.X7)

On April 30, 2008, Petitioner was seen by Dr. Mark Cohen (hereinafter "Dr. Cohen") from Midwest Orthopedics, Hand & Shoulder Center at Rush Hospital. (PX10) Petitioner provided Dr. Cohen with the history of the accident on March 21, 2008. He stated he was doing well until he had a work – related injury on March

21, 2008. Petitioner went to see Dr. Cohen due to continued problems with his elbow. Dr. Cohen noted that Petitioner had underwent a previous surgery in 1989 to remove his right radial head resection and a medial ligament reconstruction. (P.X10) The year after he underwent a medial ligament reconstruction at the Mayo Clinic. (P.X10) Petitioner complained of medial elbow pain with pain during flexion as well. In addition, Petitioner stated that he had difficulty loading the elbow creating difficulties lifting himself out of a chair. However, Petitioner reported that the pain was better since receiving a cortisone shot from Dr. Smith. Dr. Cohen recommended conservative measures considering Petitioner had surgery scheduled the next day for his shoulder. Dr. Cohen told Petitioner he could rehabilitate his elbow during his shoulder recovery. In addition, Dr. Cohen told Petitioner he did not believe he was a candidate for a total elbow replacement given his history and clinical findings.

On May 1, 2008, Dr. Smith performed an arthroscopic subacromial decompression surgery on Petitioner. (P.X10) During surgery Dr. Smith debrided a frayed glemohumeral ligament and removed loose unstable fragments and performed a synovectomy. (P.X17) Dr. Smith's preoperative diagnoses was internal derangement of right the shoulder. (P.X10)

On May 27, 2008, Petitioner returned to Dr. Gelsomino for a follow-up visit. Petitioner complained of pain in his left foot, dorsolateral, near the base of the fourth and fifth metatarsals. Dr. Gelsomino noted a "little bit" of swelling and pain on palpitation. Dr. Gelsomino noted that Petitioner needed a custom orthotic to hold his foot in a better position. Dr. Gelsomino instructed Petitioner to do passive range of motion exercises and stay off his foot. (P.X7) On July 9, 2008, Petitioner returned to Dr. Gelsomino to be casted for orthotics made from plaster impressions of both feet. The impressions were sent to a laboratory where orthotic devices were fabricated and placed into Petitioner's shoes. (P.X7) On July 14, 2008, Petitioner returned to Dr. Gelsomino and received temporary orthotics.

On July 16, 2008, Petitioner returned to Dr. Smith for a follow-up visit. During this visit Petitioner complained of right shoulder pain of 7/10. Also, discomfort with activities including lifting objects, rotating the arm and sleeping on his right side. Dr. Smith performed a cortisone injection on this visit and prescribed Physical therapy.

On September 5, 2008, Petitioner returned to Dr. Gelsomino to receive his orthotics. Dr. Gelsomino told Petitioner to continue doing his passive range of motion exercises and to take as little pain medicine as possible. Dr. Gelsomino told Petitioner to return as needed. (P.X7) On September 8, 2008, Petitioner was released to return to work with no restrictions by Dr. Phyllis Bonaminio. (PX10)

On October 21, 2008, Petitioner returned to see Dr. Smith, 3 ½ months status post subacrominal decompression and arthroscopic debridement to the glenohumeral joint to the right shoulder. Petitioner was eight-week status post cortisone injection to his right shoulder and estimated 6 weeks of relief following the injection. Petitioner complained that he attempted to return to the gym but had pain and discomfort in his shoulder with the lightweight exercises. (P.X10) Additionally, he complained of pain and discomfort with everyday activities such as placing his shirt on. Petitioner was interested in discussing resurfacing his right shoulder. Dr. Smith reviewed Petitioner's surgical history of the Putti-Platt procedure in the 1970's, the two operations on his right shoulder on October 24, 2004 and the May 1, 2008 anthroscopic debridement of the glenohumeral joint and subacromial decompression. Dr. Smith also noted that previous x-rays of the right shoulder revealed a screw that correlated to the Bristow Procedure and degenerative changes in the gleno humeral joint. Additionally, an MRI of the right shoulder, on April 4, 2008, post-Bristow procedure, advanced DJD, rotator cuff tendinopathy, metallic artifact from the screw with the Bristow procedure. (P.X10) Petitioner requested further surgical options in regards to his right shoulder. After further discussion with Dr. Smith,

Petitioner elected to proceed with right shoulder hemiarthroplasty, resurfacing, biceps tenodesis, screw removal and scar revision.

On April 15, 2009, Dr. Smith saw Petitioner for a follow-up visit. Petitioner was still in physical therapy and experiencing problems reaching behind his back. Dr. Smith found audible clicking with resistance and active range of motion. He continued to prescribe physical therapy. On July 1, 2009, Petitioner saw Dr. Smith for another follow-up visit. Petitioner had continue4d complaints of a popping sensation in the shoulder with some soreness. Dr. Smith prescribed a medrol dosepak. On August 31, 2009, Petitioner saw Dr. Smith with ongoing complaints. Dr. Smith prescribed physical therapy. Physical therapy records from Ridge Rehabilitation document physical therapy from December 17, 2008 thought August 19, 2009. (P.X 14)

On December 16, 2009, Petitioner was again seen by Dr. Smith. Petitioner complained of ongoing pain and popping. Dr. Smith restarted physical therapy. On March 5, 2010, Petitioner was seen by Dr. Smith and reported weakness with overhead activities, lifting things, and pushing and pulling activities. Dr. Smith prescribed a medrol dosepak.

On May 10, 2010, Dr. Smith performed an arthroscopic surgery on Petitioner's left shoulder that is unrelated to his accident on March 21, 2008.

On May 16, 2011, Petitioner saw Dr. John Cherf (hereinafter "Dr. Cherf") for an independent medical evaluation (hereinafter "IME"). (R.HeniffX4) Dr. Cherf drafted and addendum report dated March 18, 2014. (R.HeniffX4) Dr. Cherf was deposed on September 30, 2014 regarding his exam and findings in his report. During Petitioner's IME with Dr. Cherf, he complained of right shoulder pain as a 7 out of 10 and his right shoulder functioned at about 40 percent. Additionally, he complained of pain and weakness while moving his shoulder. Dr. Cherf described these complaints as "classic symptoms of advanced osteoarthritis." (R.HeniffX4) Dr. Cherf's physical exam revealed pain with all extremes of motion, overall good strength, weak in internal rotation, with no evidence of instability. Dr. Cherf ordered a series of 4 X-rays which revealed a type 2 acromion, degenerative changes in his AC joint, and proximal humerus resurfacing which was bone on bone. (R.HeniffX4) Dr. Cherf found that there was objective evidence to support Petitioner's complaints of pain. However, Dr. Cherf did not agree with Petitioner's past course of treatments. Dr. Cherf stated "patients with this degree of arthritis of the shoulder don't do well with arthroscopic procedures and they don't do well with partial replacements of the shoulder." (R.HeniffX4)Dr. Cherf believed the definitive and inevitable procedure for the Petitioner would be a total shoulder replacement due to his osteoarthritis and not the sprain/strain from March 21, 2008. Dr. Cherf diagnosed Petitioner in the sprain/strain category in accordance to the AMA guides. In addition, his symptoms were secondary to the advanced osteoarthritis of his shoulder and not the sprain/strain. (R.HeniffX4) Dr. Cherf opined that it would not be unreasonable for the someone in his position to have 4 weeks of physical therapy and on a home exercise program and that 12 weeks was "a pretty generous number". Dr. Cherf's opinion was that Petitioner needed no additional treatment for the sprain/strain he suffered in March 2008. Dr. Cherf noted Petitioner should not have any restrictions with regard to the alleged incident of March 21, 2008 and that Petitioner was at MMI at that time and in need of any further medical care.

On September 17, 2013, Petitioner was seen by Dr. Phillip Nigro, who recommended a revision shoulder replacement to Petitioner. (P.X11) On October 2, 2013, Dr. Nigro performed total shoulder replacement surgery on the Petitioner. On December 23, 2013, Dr. Nigro discontinued Petitioners' physical therapy.

In a deposition completed on Dr. Nigro on May 14, 2014, he opined that the accident that took place on March 21, 2008 aggravated Petitioner's preexisting conditions in his right shoulder. (P.X11) Dr. Nigro also commented that Petitioner's second surgical treatment with Dr. Smith, the hemiarthroplasty, was at least caused

or one of the contributing causes for the need of the surgery by the March 21, 2008 accident. Dr. Nigro went on to explain that the reports speaking to Petitioner's Synovitis along with the arthritis combined ultimately explain his symptoms and what led him to have the partial shoulder repair, and then later the total shoulder replacement with him. (P.X11) He recommended a 20-pound lifting restriction pertaining to Petitioner's total shoulder anthroplasty. In addition, he opined that Petitioner would not require any additional treatment when considering the work related right shoulder sprain/strain on March 21, 2008. Thus, Petitioner would have reached MMI by September 1, 2008, when considering the work-related strain/sprain of his shoulder. RHeniffX5

On June 24, 2015, Petitioner was subject to an Initial Vocational Evaluation and Labor Market Survey (LMS) by vocational counselor Lawrence Kahn, Ph.D., CRC. (R.HeniffX 5) Occupations within Petitioner's restrictions (20-pound lifting restriction provided by Dr. Nigro) were identified. (R.HeniffX 5) This report was dated May 22, 2015. (R.Heniff X5)

ARBITRATORS SUMMARY OF TESTIMONY

Petitioner testified that as of March 2003 he had 22 years of experience driving trucks. (T.25) In March 2003, Petitioner was looking for work and saw an advertisement in the Southtown Newspaper seeking a "Driver Tanker with a class A CDL with Hazmat Semi Tank" 3 years tanker experience minimum, clean MV FT local regional, Hourly day, Ron 773-551-3941." (PX1) Petitioner testified that approximately a week later, he contacted Ronald Payne (hereinafter "Respondent Payne") at the telephone number listed in the advertisement. (T.16) The two spoke by telephone for approximately 20-minutes regarding the position. (T.16) Petitioner testified that Respondent Payne told him that the job was an hourly paid job and was over the road. (T.16-17) Petitioner testified that he told Respondent Payne that he did not want to go over the road nor would he for a week at a time. (T.17) Petitioner stated that Respondent Payne told him that they could work something out. (T.17) At the conclusion of the conversation Petitioner sent Respondent Payne his resume. (T.17)

Petitioner contacted Respondent Payne about 3 weeks later regarding the job. (T.17) The conversation entailed Respondent Payne requesting that they meet in person and that Petitioner fill out a job application. (T.18) Petitioner and Respondent Payne met at 123rd and Shirley Avenue, at a yard Respondent Payne parked his trucks. (T.18) At their meeting, Petitioner and Respondent Payne discussed Petitioner's commercial driving license (hereinafter "CDL"). Additionally, they came to an "agreement" that Petitioner would be assigned his own tractor and be paid $14.50 hourly. (T.18) On that same day, Respondent Payne took the Petitioner on a driving test. (T.20) The driving test consisted of the Petitioner driving up and down the expressway, up and down Cicero and then they came back to the yard. (T.20) Petitioner testified that once they arrived back at the yard Respondent Payne asked Petitioner whether he "wanted the job" and he accepted it. (T.20)

Petitioner testified that Respondent Payne then drove him over to Heniff Transportation Systems Inc. (hereinafter "Respondent Heniff"). While there, he introduced him to some of the dispatchers, showed him around, and showed him the tank and equipment. (T.21) After Petitioner met with the dispatcher, the dispatcher set Petitioner up for a 2 ½ day orientation the following Monday with Mr. Ken Pate (hereinafter "Mr. Pate"). Mr. Pate was the safety manager at Respondent Heniff's at the time. (T.21) The orientation was held at Respondent Heniff's location. (T.22) Petitioner testified that during the orientation the representatives from Respondent Heniff explained the company rules, conducted testing and Petitioner filled out paperwork. (T.23) Petitioner testified that he filled out another job application and turned in an additional resume to Respondent Heniff representatives. Petitioner was also sent for a drug test and total physical at a third-party facility. (T.23) Subsequently, Petitioner was required to complete two days of driving in a Heniff truck with a Heniff trainer. (T. 24) The training included Petitioner driving and completing local deliveries while the trainer graded him. (T. 25) At the end of the week, Petitioner was advised that he had "passed" and started that following Monday.

(T.26) Respondent Heniff supplied Petitioner with a picture ID badge that was mandatory to wear at all times at their facility and all others. (T.42, P.18)

On the following Monday, Petitioner was told by Respondent Payne to report to 123rd and Shirley, his truck yard, to ride with him so he could teach him about light oil. (T.27) Petitioner testified that for the first two months he rode with Respondent Payne, who trained him in the transport of light oil from US Steel in Gary, Indiana to Lemont, Illinois. (T.27) Following the completion of the two-month training, Petitioner was told to report to Respondent Heniff's dispatchers who told him where to go load and unload for the next day. (T.28)

Petitioner testified that the Volvo trucks he was driving were owned by Respondent Payne and the tankers were owned by Respondent Heniff. (T.29) Petitioner had no ownership in any of the vehicles he drove. (T.42) The tractor displayed "Payne's Trucking with a tractor number and the trailer displayed Respondent Heniff's name with an associated number. (T.41) Petitioner testified that Respondent Payne did not have an office or secretary at the 123rd and Shirley truck yard but did have a mailbox. (T.29) Petitioner described the location as a large parking lot. Petitioner's daily routine consisted of him driving his personal vehicle to Respondent Payne's facility, picking up a truck owned by Respondent Payne, driving this truck to Respondent Heniff's location, attaching to the truck a trailer owned by Respondent Heniff, and then driving to a third-party company to unload the cargo contained in the trailer. (T.29, 96) Respondent Heniff required Petitioner to inspect each new trailer prior to hooking it up and starting a trip. (T.36) He was required to check the valves, check the inside of the dome, check to ensure there was no water inside the tank and check the tires. (T.37) Prior to Petitioner making any deliveries, Respondent Heniff provided him with mandatory safety equipment which included safety boots, rubber suit, rubber pants, hard hat, safety goggles, rubber gloves and a respirator and a face shield. (T.30) Petitioner testified that the equipment was required to be worn while loading and unloading the tankers. (T.31)

Petitioner testified that he continued the aforementioned employment routine from 2003 until March 21, 2008. (T.32) Petitioner exclusively worked with Respondent Heniff and Respondent Payne during this 5-year period of time. (T.32) Petitioner completed a "daily sheet" or "trip log" for Respondent Payne which consisted of an "hourly sheet from start to finish, the beginning of the day to the end of the day." (R.PayneX.1, T.32) Petitioner provided this sheet on a daily basis to Respondent Payne along with "other paperwork." (T.32) These logs provided the documentation necessary for Petitioner to be paid by Respondent Payne. (T.80) Petitioner testified in these logs he would meticulously document the time spent driving and delivering loads down to 5-minute increments. (T.80) Petitioner also provided daily log sheets to Respondent Heniff. (T.35) When Petitioner went to pick up a load in the morning from Respondent Heniff he would receive a delivery invoice. (T.35) Once the delivery was completed the customer would sign the paperwork and then Petitioner would turn it into Respondent Payne and Respondent Heniff. (T.36) Petitioner testified he would document any incidents or events which occurred outside the normal process of driving. (T.81) Petitioner kept these logs up to and including March 21, 2008. (T.80)

On March 21, 2008, Petitioner was headed out to IMTT in Lemont to load a load of caustic potash and deliver it to Durant, Iowa the following day. (T.43) Petitioner picked up the load to deliver the day before on March 20, 2008. (T.43) On the morning of March 21, 2008, around 8:00am, Petitioner headed to Durant, Iowa. (T.43) Once Petitioner arrived at the plant, he was required to get the supervisor to sign off on the delivery paperwork. (T.44) He then put on all of his safety equipment, proceeded to pull 40-foot of hose out, hooked up the hoses, and decompressed the tank to unload the load. (T.44) Petitioner decompressed the tank, he disconnected the air hose, put it over his shoulder and was climbing down the ladder on the side of the tank when he slipped on the third stair from the bottom. Petitioner testified that he was "dangling" while holding onto the ladder with his right arm. (T. 46) Petitioner dropped down off the ladder onto his left foot. (T.46)

Petitioner approximated that the drop from the bottom of the ladder to the ground to be about 6 to 7 feet. (T.48) Petitioner testified that he heard several pops in his right shoulder and his left leg and left foot started to hurt. (T.49) Petitioner testified that he did not report his accident to anyone at the Durant, Iowa facility. (T.49)

Petitioner completed the offloading process and drove back to Respondent Heniff's facility in Illinois. (T.49) Petitioner testified, although the truck had a manual transmission and gear shift, he used his left arm to shift gears the entire trip back. (T.102-103) Petitioner returned the tank and turned in his paperwork to Respondent Heniff. Mr. Colby Nichols, testified on behalf of Respondent Heniff, that he saw Petitioner on March 21, 2008 when he returned from Durant, Iowa but Petitioner did not report any injury. (T.198) Mr. Nichols testified that he did not become aware of Petitioner's accident until 3-4 weeks later. (T.198) Petitioner testified that he did inform a fellow Heniff employee named "John or Spencer" that he thought he had hurt himself in Iowa. (T.50) Petitioner testified that by telephone he reported the injury to Respondent Payne and was told to file a claim with Great American Insurance company. (T.51, 140) In contrast, Respondent Payne testified that Petitioner did not report an injury to him on March 21, 2008. (T.140) Petitioner also acknowledged that he did not document in his drivers logs any incident or an injury on March 21, 2008. (T.82) Petitioner did not fill out an accident report that day with Respondent Heniff. (T.50) Petitioner also testified that he did not seek any medical attention over the weekend. (T.50) However, Petitioner testified that his shoulder and foot got worse over the weekend. (T.50)

Petitioner testified that he called Respondent Heniff's safety manager, Mr. Leon Lupina (hereinafter "Mr. Lupina"), but received no returned calls. Around March 31, 2008, Petitioner called back to Respondent Heniff and spoke with Sue Bell who located Mr. Lupina for Petitioner. (T.52-53) Petitioner explained the incident to Mr. Lupina and requested that he fax him an accident report to fill out. Petitioner was informed to fill out the report and fax it back. Petitioner filled out the report and faxed it back. (P.X7) Petitioner testified he then received an email back, dated April 2, 2008, from Mr. Lupina stating that Petitioner was not an employee of Respondent Heniff. (T.52) The Arbitrator notes the aforementioned email was not entered into evidence.

Petitioner testified that he was paid on a weekly basis by check from Respondent Payne. (T.33) There were no taxes, payments to social security or Medicare taken out of the checks. (T.33) Petitioner testified that he was never paid by Respondent Heniff. (T.33) However, Respondent Heniff provided Petitioner with rules that if he violated he would be terminated. (T.35) These rules included the policy with driving tickets, late deliveries, refusal to work, disagreements with management, time off requests, and how to handle accidents. (T.35) Respondent Heniff's dispatch provided Petitioner with his daily delivery information. (T.39) Petitioner would call the dispatch and they would let him know how many hours he had left for the day and give him a place to go load and deliver during that time frame. (T.39) Petitioner would check in with Respondent Heniff every time he made a delivery and the tank was empty to determine where he would be going the next day. (T.39) Respondent Heniff and Respondent Payne provided maintenance for the trucks and tanker. (T40-41) Respondent Payne provided fuel for the truck with a blank check. (T.41)

Mr. Colby Nichols (hereinafter "Mr. Nichols") testified on behalf of Respondent Heniff. He is currently employed as the general manager of operations at Respondent Heniff. (T.186) Mr. Nichols has been employed with Respondent Heniff for 15 years. During 2008 he was employed as a Driver Manager / Dispatcher for Respondent Heniff and had been employed in such capacity since 2003. (T.186-7) Per Mr. Nichols' testimony Respondent Heniff's customers included chemical companies who would tender loads to be hauled in trailers owned by Respondent Heniff. (T.188) Once a load was accepted and placed in the system a driver would be contacted to plan the load and delivery. (T.188)

Mr. Nichols testified that although Respondent Heniff did employ some truck drivers whom they paid and provided health insurance, Petitioner was not one of these drivers. (T.224-25) Truck drivers such as Petitioner were employed by other companies such as Respondent Payne. Those employees would contact a dispatcher from Respondent Heniff if they wanted a delivery assignment on the following day. (T.194) Mr. Nichols testified that he knew Petitioner because he was an "independent contractor" working for Respondent Payne. (T.191) He acknowledged before being dispatched by Respondent Heniff all such truck drivers attended an orientation. (T.192)

Mr. Nichols testified that on March 20, 2008, Petitioner contacted him and requested a dispatch. (T.195) Petitioner was offered several options and he chose the Durant, Iowa delivery. (T.195-196) Mr. Nichols testified that he communicated with Petitioner on March 20, 2008 but did not become aware of his injury on March 21, 2008 until 3 to 4 weeks later. (T.197) Mr. Nichols testified he became aware of the incident when the Safety Department from Respondent Heniff approached him and others in his dispatch group and informed them there was an injury reported at the customer location. (T.198)

Mr. Nichols testified that on March 21, 2008, he saw Petitioner that afternoon when he came in to drop off his paperwork for the load he delivered in Durant, Iowa. (T.203) Mr. Nichols testified that during his encounter with Petitioner, he did not discuss any work-related injury. (T.204) Furthermore, Mr. Nichols stated that the protocol for a Payne truck driver if involved in a motor vehicle accident was to contact Respondent Payne. (T.205) He testified that he never instructed Petitioner to contact Respondent Heniff directly if there was an injury or accident. However, Respondent Heniff would need to know if there was a delay in shipment so they could contact the customer. (T.205) Mr. Nichols was unaware of Respondent Payne's particular orientation polices. (T.207)

Mr. Ronald Payne testified on behalf of Respondent Payne. Respondent Payne testified that on March 21, 2008 he was the owner of the Payne Trucking Company. (T.121) Payne Trucking was closed on January 15, 2015. (T.122) Respondent Payne testified that the basic business of Payne Trucking was leasing tractors to head up tankers. (T.122) Respondent Payne testified that Payne Trucking was in existence for about 30 years and since 1998 its existence it worked exclusively with Respondent Heniff. (T.122) When he leased a tractor to Respondent Heniff a driver that they hired, and he personally selected, would drive the truck. (T.123) Respondent Payne testified that his process to obtain drivers was to put an ad in the paper, get a resume to submit to Respondent Heniff, and they would decide whether or not it was a possible driver, and if they were, Respondent Heniff would give him an application to fill out. (T.123) Respondent Heniff would then hire the individual and put them through the safety, physicals, and drug test. (T.123) Respondent Payne testified that he could not hire anyone without Respondent Heniff's permission. (T.123) Respondent Payne testified that his role was to furnish the driver and the tractor and that he could not dictate when or where the drivers drove. (T.124) However, he could and did encourage them to take the more profitable routes. (T.174) The more profitable routes were the routes that paid more and took less time so that he could make a better profit. (T.174) He did not forbid the drivers from taking the less profitable routes but encouraged the more profitable ones. (T.174)

He further testified that the tractors and trailers adorned the name, DOT number and ICC numbers of Respondent Heniff. (T.125) Respondent Payne testified that he did not require the drivers to check in or check out with him and that they could go up to 5 days without communication with him. (T. 126) In regard to making a profit Respondent Payne would make a certain percentage off the rate the loads paid. From the money he received from the load he would pay any expenses, which included paying the drivers. (T.127) He considered the drivers he hired to be "contract employees." (T.128) He further testified that he did not believe Payne Trucking had any employees and that he did not have any workers' compensation insurance on March 21, 2008. (T.128)

Respondent Payne testified that Petitioner drove routes for Respondent Heniff and would turn in a trucking log to him and he would receive a statement from Respondent Heniff. (T.129) The statement from Respondent Heniff was what he used to pay the Petitioner. (T.129) The routes that the drivers took identified on the trucking logs and settlement statements from Respondent Heniff were not assigned by Respondent Payne but he could make suggestions.

Respondent Payne testified that the Petitioner's CDL license expired on March 22, 2008. (T.138) Respondent Payne was on vacation from March 17, 2008 until March 26, 2008. (T. 138) Respondent Heniff contacted Respondent Payne on March 25, 2008 looking for Petitioner because they said they had not heard from him since March 20, 2008. (T.139) Respondent Payne testified that he located Petitioner the next day, March 26, 2008, and Petitioner told him he had taken the week (March 24-March 28, 2008) off to study for his CDL test. (T.139) Respondent Payne testified that Petitioner did not tell him anything about his accident on March 21, 2008. He spoke with Petitioner the next day but Petitioner still did not mention anything about the accident. Respondent Payne became aware of the accident when he received notice of the status call for trial. (T.141)

Respondent Payne testified on March 17, 2008 Petitioner contacted him in order to take the day off to renew his CDL. (T.136) Respondent Payne gave Petitioner the day off and he drove Petitioner's assignment that day. (T.136) Petitioner's CDL had to be renewed every four years up to four months prior to driver's birthday that fourth year. (T. 84) Petitioner last renewed his CDL on February 23, 2004 and his CDL was set to expire on March 22, 2008. (T. 87) Petitioner knew his CDL was to expire on March 22, 2008 but did not renew it in the four months prior to March 22, 2008. (T.87) Petitioner's CDL did expire on March 22, 2008 and was not renewed until August 13, 2008. (T.87,106)

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment:

Petitioner testified at trial to facts surrounding his hiring process, his employment relationship with Respondent Heniff and Respondent Payne, his work incident, his course of medical treatment, and current condition of ill-being. The Arbitrator finds Petitioner's testimony to be questionable and his credibility an issue. Petitioner provided testimony on the aforementioned issues but left several issues unanswered with his account of his accident, his delay of reporting the accident, his delay in seeking treatment and reporting his prior injuries related to the same body part he claimed was re-injured in his work accident on March 21, 2008. Respondent Heniff and Respondent Payne provided testimonies and evidence that directly contradicted the Petitioner's testimony. The Arbitrator finds those testimonies to be consistent and credible. The Arbitrator finds Respondent's witnesses' testimonies to be more credible and adopts those as it relates to the issue of accident.

With respect to the issue of whether Respondent Payne had insurance coverage on March 21, 2008, the Arbitrator finds as follows:

All parties stipulated to the admittance, by Petitioner's counsel, P.X19, records from the National Council on Compensation Insurance, Inc. (hereinafter "NCCI") indicating the lack of policy information filed showing proof of worker's compensation insurance on March 21, 2008 for Respondent Payne. In addition, Respondent Payne testified that he did not have any workers' compensation insurance on March 21, 2008 (T.128) Based on the foregoing, the Arbitrator finds that Respondent Payne lacked workers' compensation insurance coverage on March 21, 2008.

With respect to issue (A) whether the Respondent Heniff Transportation Systems Inc. and Respondent Ronald Payne Trucking, Inc. were operating under and subject to the Illinois Worker's Compensation Act, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that on March 21, 2008, Respondent Heniff and Respondent Payne were both operating under and subject to the Illinois Workers' Compensation Act. Petitioner testified that as of March 2003 he had 22 years of experience driving trucks. (T.25 Petitioner testified that he was hired by Respondent Payne and Respondent Heniff to drive a truck owned by Respondent Payne and a trailer owned by Respondent Heniff. (T.20, 26, 29) Respondent Payne testified that Payne Trucking was in existence for about 30 years and since 1998 it has worked exclusively with Respondent Heniff. (T.122) This testimony was unrebutted at trial. Based on the foregoing, the Arbitrator finds Respondent Heniff and Respondent Payne subject to the Act pursuant to Section 3.

With respect to issue (B) whether there was an employee-employer relationship between the Respondent(s) and if so, which Respondent or both?

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner proved by a preponderance of the evidence that on March 21, 2008 an Employee-Employer Relationship existed between the Petitioner, Respondent Heniff and Respondent Payne. Specifically, the evidence and testimony presented point to a borrowing -loaning employer relationship.

The Illinois Workers' Compensation Act provides that an injured person must be an employee of the respondent-employer in order for an injured employee to have a compensable claim for an injury. In situations where an employee is loaned from one employer to another, both the loaning employer and the borrowing employer may be jointly liable. 820 ILCS 305 /1(a)4 Determination of whether an employee is actually loaned is a factual question centered on whether there has been a transfer of control or the right to exercise control from the loaning employer to the borrowing employer. *County of Tazewell v. Industrial Commission,* 193 Ill.App.3d 309, 549 N.E.2d 805, 140 Ill.Dec.154 (4th Dist. 1989).

Here, Petitioner testified in March of 2003, he was looking for work and applied to a job advertisement in the Southtown Newspaper that was placed by Respondent Payne. Petitioner contacted Respondent Payne by telephone and was told that the job was an hourly paid job and was over the road. (T.16-17) Petitioner testified that he told Respondent Payne that he did not want to go over the road nor would he for a week at a time. (T.17) Petitioner stated that Respondent Payne told him that they could work something out. (T.17) At the conclusion of the conversation Petitioner sent Respondent Payne his resume, both met in person, and Petitioner filled out a job application. (T.17,18) Petitioner and Respondent Payne came to an "agreement" that Petitioner would be assigned his own tractor and be paid $14.50 hourly. (T.18) On that same day, Respondent Payne took Petitioner on a driving test. Petitioner testified that once they arrived back at the yard Respondent Payne asked Petitioner whether he "wanted the job" and he accepted it. (T.20)

Petitioner testified that Respondent Payne then drove him over to Respondent Heniff's, where he met with the dispatcher, and was set up for a 2 ½ day orientation the following Monday at Respondent Heniff's location. (T.22) Petitioner testified that during the orientation the representatives from Respondent Heniff explained the company rules, conducted testing, and Petitioner filled out paperwork. (T.23) Mr. Nichols acknowledged in his testimony that before being dispatched by Respondent Heniff all such truck drivers attended the aforementioned orientation. (T.192) Petitioner testified that he filled out another job application and turned in an additional resume to Respondent Heniff's representatives. Mr. Nichols testified that in order for

a driver to have a CDL license, they are required to complete and pass a physical. (T.215) Petitioner had his CDL license when he applied for the position. Mr. Nichols testified that Respondent Heniff, prior to hire, required Petitioner to take another pre-employment physical at a third-party facility before he was able to drive and pull their equipment. (T.23, 215) Subsequently, Petitioner was required to complete two days of driving in a Heniff truck with a Heniff trainer. (T. 24) The training included Petitioner driving and completing local deliveries while the Heniff trainer graded him. (T. 25) At the end of the week, Petitioner was advised that he had "passed" and started that following Monday. (T.26) Respondent Heniff supplied Petitioner with a picture ID badge that was mandatory to wear at all times at their facility and all others. (T.42, P.18)

On the following Monday, Petitioner was told by Respondent Payne to report to his truck yard to ride with him so he could teach him about light oil. (T.27) Petitioner testified that for the first two months he rode with Respondent Payne, who trained him in the transport of light oil from US Steel in Gary, Indiana to Lemont, Illinois. (T.27) Following the completion of the two-month training, Petitioner was told to report to Respondent Heniff's dispatchers who told him where to go load and unload for the next day. (T.28)

Respondent Payne testified that Payne Trucking was in existence for about 30 years and since 1998 it worked exclusively with Respondent Heniff. (T.122) Respondent Payne testified that in regards to its business relationship with Respondent Heniff, he had signed an equipment lease agreement pertaining solely to the Volvo truck the Petitioner drove on March 21, 2008. (T.161) Other than the equipment lease, Respondent Payne had one other written agreement with Respondent Heniff dealing with damage to their trailers. (T.168) Specifically, if any of respondent Payne's drivers damaged up to $2500 that would be paid by Respondent Payne as a $2500 deductible. (T.168) When he leased a tractor to Respondent Heniff a driver that they hired, and he personally selected, would drive the truck. (T.123) The Arbitrator notes that neither agreement was entered into evidence.

Respondent Payne testified that his process to obtain drivers was to put an ad in the paper, get a resume to submit to Respondent Heniff, and they would decide whether or not it was a possible driver, and if they were, Respondent Heniff would give him an application to fill out. (T.123) Respondent Heniff would then hire the individual and put them through the safety, physicals, and drug test. (T.123) Respondent Payne testified that he could not hire anyone without Respondent Heniff's permission. (T.123)

Petitioner testified that the Volvo truck he was driving was owned by Respondent Payne and the tankers were owned by Respondent Heniff. (T.29) Petitioner had no ownership in any of the vehicles he drove. (T.42) Petitioner testified that Respondent Payne did not have an office or secretary at the 123rd and Shirley truck yard but did have a mailbox. (T.29) Petitioner described the location as a large parking lot. Petitioner's daily routine consisted of him driving his personal vehicle to Respondent Payne's facility, picking up a truck owned by Respondent Payne, driving this truck to Respondent Heniff's location, attaching to the truck a trailer owned by Respondent Heniff, and then driving to a third-party company to unload the cargo contained in the trailer. (T.29, 96) Respondent Heniff required Petitioner to inspect each new trailer prior to hooking it up and starting a trip. (T.36) He was required to check the valves, check the inside of the dome, check to ensure there was no water inside the tank and check the tires. (T.37) Prior to Petitioner making any deliveries, Respondent Heniff provided him with mandatory safety equipment which included safety boots, a rubber suit, rubber pants, hard hat, safety goggles, rubber gloves and a respirator and a face shield. (T.30) Petitioner testified that the equipment was required to be worn while loading and unloading the tankers. (T.31)

Petitioner testified that he continued the aforementioned employment routine from 2003 until March 21, 2008. (T.32) Petitioner exclusively worked with Respondent Heniff and Respondent Payne during this 5-year period of time. (T.32) Petitioner completed a "daily sheet" or "trip log" for Respondent Payne which consisted of an "hourly sheet from start to finish, the beginning of the day to the end of the day." (RP.1, T.32) Petitioner

provided this sheet on a daily basis to Respondent Payne along with "other paperwork." (T.32) These logs provided the documentation necessary for Petitioner to be paid by Respondent Payne. (T.80) Petitioner testified in these logs he would meticulously document the time spent driving and delivering loads down to 5-minute increments. (T.80) Petitioner also provided daily log sheets to Respondent Heniff. (T.35) When Petitioner went to pick up a load in the morning from Respondent Heniff he would receive a delivery invoice. (T.35) Once the delivery was completed the customer would sign the paperwork and then Petitioner would turn it into Respondent Payne and Respondent Heniff. (T.36) Petitioner testified he would document any incidents or events which occurred outside the normal process of driving. (T.81) Petitioner kept these logs up to and including March 21, 2008. (T.80)

Petitioner testified that he was paid on a weekly basis by check from Respondent Payne. (T.33) Petitioner testified that he was never paid by Respondent Heniff. (T.33) However, Respondent Heniff provided Petitioner with rules that if he violated he would be terminated. (T.35) These rules included the policy with driving tickets, late deliveries, refusal to work, disagreements with management, time off requests, and how to handle accidents. (T.35) Respondent Heniff's dispatch provided Petitioner with his daily delivery information. (T.39) Petitioner would call the dispatch and they would let him know how many hours he had left for the day and give him a place to go load and deliver during that time frame. (T.39) Petitioner would check in with Respondent Heniff every time he made a delivery and the tank was empty to determine where he would be going the next day. (T.39)

Respondent Payne testified that he reserved the right to fire a driver that he had hired for negligence or any other reason if he was to be liable for the employee and the truck. (T.162) Mr. Nichols testified that Respondent Heniff did not have the power to terminate the Petitioner. (T.212) However, if he flunked a drug test he would not be allowed to pull a Heniff trailer. (T.213) In addition, if the Petitioner brought back equipment that was damaged they would contact Respondent Payne. (T.214) If there was some negligent action on the part of the Petitioner, Respondent Heniff would tell Respondent Payne they no longer wanted Petitioner to pull their trailers and not contract with the driver any further. (T.214) Petitioner entered into evidence 5 identification badges. (P.X18) Out of the 5 badges, 4 of the badges identify his company affiliation as Heniff Transportation Systems Inc. (P.X18) Petitioner testified that he continued the aforementioned employment routine from 2003 until his accident in 2008. (T.32) Petitioner had no other employment during this period of time and did not work for anyone else. (T.32)

Based upon the aforementioned, the Arbitrator finds that Respondent Heniff and Respondent Payne were both employers of the Petitioner on March 21, 2008. Respondent Payne provided unrebutted testimony that he and Respondent Heniff had an equipment leasing agreement that covered the truck the Petitioner was driving on March 21, 2008 and a written agreement regarding damage to Respondent Heniff's trailers. (T.160-168) The Arbitrator notes that neither agreement was entered into evidence. Respondent Payne testified that those were the extent of written agreements he had with Respondent Heniff. (T.168) Resulting in no written agreement regarding their employee or employment relationship. In addition, from the testimony and evidence provided, Respondent Heniff had the right to direct and control the manner in which the Petitioner performed his day to day work. Therefore, the Arbitrator finds both employers are jointly liable for the Petitioner's injury on March 21, 2008 in accordance to the §1(a)4 of the Illinois Workers' Compensation Act. Thus, the Petitioner is considered an employee of both Respondents.

With respect to issue (C) whether an accident occurred that arose out of and in the course of employment with Respondent, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the Petitioner failed to prove by a preponderance of the evidence that his accident arose out of and in the course of his employment with Respondent(s). "A claimant bears the burden of proving by a preponderance of the evidence that his injury arose out of and in the course of the employment." 820 ILCS 305/2 (West 2002). Both elements must be present in order to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483, 137 Ill. Dec. 658, 546, N.E.2d 603 (1987).

Here, the Petitioner testified that an accident occurred on March 21, 2008 while he was out dropping a load at a plant in Durant, Iowa. (T.46-48) The Arbitrator notes that there was no evidence or testimony provided that there were any witnesses to this accident. Petitioner testified that after the incident occurred he did not report it to anyone at the Durant, Iowa facility. (T.49) Petitioner testified that he completed the offloading process then drove back the truck to Respondent Heniff's facility to return the tank and turn in his daily logs and paperwork. (T.102-103) Petitioner testified that prior to the accident he had worked with Respondent Heniff and Respondent Payne for a 5-year period. (T.32) During this period he completed the "daily sheets" or "trip logs" that included an "hourly sheet from start to finish, the beginning of the day to the end of the day." (RP.1, T.32) Petitioner provided this sheet on a daily basis to Respondent Payne along with "other paperwork." (T.32) These logs provided the documentation necessary for Petitioner to be paid by Respondent Payne. (T.80) Petitioner testified in these logs he would meticulously document the time spent driving and delivering loads down to 5-minute increments. (T.80) Yet, Petitioner testified that he failed to report the accident in these meticulous logs. (T.82, R.PayneX3) The Arbitrator notes that the Petitioner failed to provide an explanation as to why he failed to include this vital information in his logs.

Mr. Nichols testified that he saw Petitioner on March 21, 2008 when he returned to Respondent Heniff to return the trailer and turn in his logs and paperwork. (T.198) However, Mr. Nichols testified that Petitioner failed to report any accident to him. (T.198) Petitioner testified that he did inform a fellow Heniff employee that day but testified he was unsure of the identity of the individual. (T.50) He testified that he told the individual that he had hurt himself in Iowa. (T.50) The Arbitrator notes that the Petitioner failed to provide testimony or additional evidence at trial from this individual to corroborate this conversation. Petitioner testified that he called Respondent Payne to report his injury and was told by Respondent Payne to file a claim with Great American Insurance company. (T.51, 140) In contrast, Respondent Payne testified that this conversation did not occur. (T.140) Petitioner also testified that he did not fill out an accident report on March 21, 2008 with Respondent Heniff. (T.50) Petitioner testified that he did not seek any medical attention over the weekend following the accident despite his testimony that his foot got worse. (T.50)

Petitioner testified that he called Respondent Heniff on several occasions but received no return calls. No testimony or explanation was provided as to why no other measures were taken by Petitioner to contact Respondent Heniff before March 31, 2008. On March 31, 2008, Petitioner testified he was able to contact Respondent Heniff and spoke with Mr. Leon Lupina (hereinafter "Mr. Lupina"). (T.52-53) At the time, Mr. Lupina was Respondent Heniff's safety manager. Petitioner testified that he explained the incident to Mr. Lupina and requested that he fax him an accident report to fill out. Petitioner testified he was informed to fill out the report and fax it back. Petitioner filled out a report and faxed it back to Respondent Heniff. (P.X7) Petitioner entered into evidence the accident report that was sent to Respondent Heniff. (P.X7) The Arbitrator examined the report and notes that the report fails to mention anything specific about the Petitioner's injuries to his foot and/or shoulder. (P.X7)

Despite Petitioner's testimony that the pain in his shoulder and foot got worse over the weekend following his injury, he testified that he did not seek medical attention until March 31, 2008 (T.50) Petitioner testified and the medical records corroborate, that Petitioner saw Dr. Gelsamino from Diseases and Surgery of the Foot and Ankle. (P.X7) The Arbitrator notes after review of the medical records submitted into evidence from this visit, the history provided to Dr. Gelsamino stated "patient states that he had fallen off a ladder and injured his left foot on 3-21-2008. At that time the patient states he was able to manage to get himself off his foot and came to me on 3-21-2008." The Arbitrator notes that there was no mention of the predominant injuries Petitioner claimed occurred with his shoulder. (P.X7) On April 4, 2008, Petitioner testified and the medical records corroborate that Petitioner returned to see Dr. Gelsamino regarding his foot. (P.X7) The Arbitrator notes that these records are also void of any mention of the purported injuries to Petitioner's shoulder but did mention pain in his left foot. (P.X7)

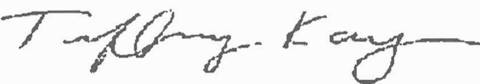
On April 14, 2008, Petitioner was examined by Dr. Smith during an orthopedic consultation for his shoulder. (P.X10) Petitioner testified that he had no treatment to his shoulder until this April 14, 2008 appointment with Dr. Smith. (T.88) Petitioner testified that he called Dr. Smith shortly after the accident because of ongoing right shoulder pain. The Arbitrator notes that there was no evidence or testimony introduced at trial to corroborate this testimony. Dr. Dr. Smith noted that Petitioner was complaining of pain in his right shoulder and elbow. Petitioner complained to Dr. Smith that following his accident on March 21, 2008 he had immediate pain and the pain was now [date of visit] constant and severe. (P.X10)

The Illinois Supreme Court has held that a claimant's testimony standing alone may be accepted for the purposes of determining whether an accident occurred. However, that testimony must be proved credible. *Caterpillar Tractors v. Indus. Comm'n*, 414 N.E.2d 740 (1980). Corroborated testimony will support an award for benefits only if consideration of all facts and circumstances support the decision. *Id., also See Gallentine v. Indus. Comm'n.*, 559 N.E.2d 526, 528 (1990). The Arbitrator finds that Petitioner's testimony is uncorroborated by his medical records and evidence and do not support the stated mechanism of injury. In addition, all of Petitioner's medical records disclose his prior history of injuries and surgeries to the same right shoulder prior to his current alleged accident on March 21, 2008.

The Arbitrator concludes that Petitioner failed to prove by a preponderance of the evidence that an accident occurred that arose out of and in the course of his employment with Respondents Payne and Heniff. All claims for compensation are hereby denied.

With respect to issues (D), (E),(F), (G), (H), (I), (J), (K), (L) and (M) the Arbitrator finds as follows:

As a finding has been made that the Petitioner's accident did not arise out of and in the course of his employment with Respondents, the other disputed issues are moot.



8/28/18

Signature of Arbitrator

Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	10WC036349
Case Name	SALEK, KYLE v. CITY OF ELMHURST
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0526
Number of Pages of Decision	10
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Thomas Duda
Respondent Attorney	John Fassola

DATE FILED: 10/20/2021

/s/Deborah Simpson, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KYLE SALEK,

Petitioner,

vs. NO: 10 WC 36349

CITY OIF ELMHURST,

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 the nature and extent of Petitioner's 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.

Petitioner is a firefighter and EMT for Respondent. He was diagnosed with stage 3 colon cancer. At arbitration Respondent stipulated to accident and causation to that condition. On April 15, 2010, Dr. Bentrem performed "laparoscopic left partial colectomy with anastomosis, takedown of splenic flexure" for colon cancer. Petitioner had chemotherapy for 6 months after the surgery which was completed on October 14, 2010. Petitioner returned to work full duty as firefighter/EMT and the record also indicates that he performs outside work removing tree stumps. Petitioner continued to treat with Dr. Hantel, an oncologist, through August 15, 2017. At that time Petitioner reported good appetite, fine energy level, normal bowel movements, and no new complaints. His current medication was only baby aspirin. Dr. Hantel estimated the risk of recurrence of colon cancer at less than 1% and released Petitioner from treatment.

Petitioner testified that currently he experienced stomach pains/cramps, increased bowel movements, and diarrhea. He took an anti-spasm medication when he had symptoms. He did not have such symptoms prior to his cancer diagnosis. In addition, he would need follow up colonoscopies every three to five years.

The Arbitrator awarded Petitioner 50 weeks of permanent partial disability benefits representing loss of 10% of the person-as-a-whole. In so doing, she noted that Petitioner received a clean bill of health on August 15, 2017 with only a 1% chance of recurrence. However, Petitioner did complain of periodic bouts of cramping and diarrhea.

Petitioner argues the permanent partial disability award is "thoroughly inadequate." He cites a Commission case of a firefighter in which the Commission reversed the Decision of the Arbitrator, found accident/causation to renal cancer, and awarded him 100 weeks permanent partial disability benefits representing loss of 20% of the person-as-a-whole. He had the kidney removed, needed no chemotherapy/radiation, and recovered well.

Respondent argues the permanent partial disability award is adequate. It distinguishes the case cited by Petitioner by noting that the claimant there had an organ removed and had greater chance of future disability. It also cited a Commission case concerning a firefighter in which the Commission reversed the Decision of the Arbitrator and found no accident or causation to the claimant's prostate cancer. Respondent stresses that the Arbitrator had originally awarded Petitioner 10% of the person-as-a-whole in that case. The claimant there was able to return to work without restrictions but testified to episodic incontinence and a degree of sexual dysfunction.

The Commission has found no case in which the condition of colon cancer was addressed in a Worker's Compensation context. The Commission also notes that the designated date of accident, April 7, 2010, is prior to the effective date of §8.1b of the Act, which requires the Commission to address specific statutory factors in arriving at a permanent partial disability award.

The Commission agrees with the analysis of the Arbitrator noting that Petitioner was able to return to his previous occupation as firefighter/EMT which involves heavy labor. The Commission also notes that Petitioner is currently able to work part-time removing tree stumps, which is also a heavy labor job. However, the Arbitrator also noted that Petitioner received a clean bill of health on August 15, 2017 with only a 1% chance of recurrence. In this context, the Commission notes that Petitioner had serious surgery in which a substantial portion of his colon was removed. We agree with Petitioner that despite the low odds for recurrence estimated by his treating doctor, he still has to deal with the possibility of recurrence and is subject to regular testing for the rest of his life. Considering Petitioner's young age, 35 at the time of the diagnosis, he will likely have to deal with that possibility for a long time. He also testified to some ongoing issues associated with his work-related condition. In looking at the entire record before us, the Commission considers a permanent partial disability award of 75 weeks, representing loss of the use of 15% of the person-as-a-whole, appropriate in this claim. Accordingly, the Commission modifies the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 30, 2019, is hereby modified as noted above and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner pay Petitioner the sum of $664.72 for a period of 75 weeks as provided in §8(d)2 of the Act because the injuries sustained caused loss of 15% of the person-as-a-whole.

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.

October 20, 2021

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

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

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

DLS/dw
O-9/29/21
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ILLINOIS WORKERS' COMPENSATION COMMISSION **21IWCC0526**
NOTICE OF ARBITRATOR DECISION

SALEK, KYLE P
Employee/Petitioner

Case# **10WC036349**

CITY OF ELMHURST
Employer/Respondent

On 4/30/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.39% 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:

0728 LAW OFFICES OF THOMAS W DUDA
300 W COLFAX
PALATINE, IL 60067

0075 POWER & CRONIN
JOHN P FASSOLA
900 COMMERCE DR SUITE 300
OAK BROOK, IL 60523

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

- [ ] 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

Kyle P. Salek
Employee/Petitioner

v.

City of Elmhurst
Employer/Respondent

Case # **10** WC **36349**

Consolidated cases: ____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christine Ory**, Arbitrator of the Commission, in the city of **Wheaton**, on **May 21, 2018**. By stipulation, the parties agree:

On the date of accident, **April 7, 2010**, 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 **$78,159.64**, and the average weekly wage was **$1,503.97**.

At the time of injury, Petitioner was **35** years of age, ***married*** with **3** dependent children.

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

Respondent shall be given a credit of **$7,014.34** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$7,014.34**.

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 **$664.72**/week for a further period of **50** weeks, as provided in Section **8 (d) 2** of the Act, because the injuries sustained caused **10% loss of use of person as a whole.**

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

April 25, 2019
Date

ICArbDecN&E p.2

APR 3 0 2019

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kyle P. Salek	)	
Petitioner,	)	
vs.	)	**No. 10 WC 36349**
City of Elmhurst	)	
Respondent.	)	

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

This matter proceeded to hearing in Wheaton on May 21, 2018 The parties agree that on April 7, 2010, petitioner and respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act; that their relationship was one of employee and employer, that petitioner suffered accidental injuries that arose out of and in the course of his employment with respondent and that petitioner's colon cancer was caused by the work accident. They further agree that in the year preceding the injuries, the petitioner earned $78,159.64, and that his average weekly wage was $1,503.07.

The only matter at issue is the nature and extent of petitioner's injury.

FINDING OF FACTS

Petitioner testified he was hired by respondent on November 1, 1999 as a firefighter. Prior to his employment with respondent, he had no symptoms. His grandmother had colon cancer. His duties included fire suppression and accident scenes.

He worked 24 hour shifts on and then had 48 hours off. During his 24-hour shift, he lived at one of the two fire houses.

Petitioner testified he began noticing rectal bleeding in the fall of 2009.

In March, 2010 he saw his family doctor, Dr. Jakstys, for a sinus infection. He advised Dr. Jakstys of his stomach problems and rectal bleeding. Dr. Jakstys referred him to Dr. Rahim; whom he saw at the end of March, 2010 due to the rectal bleeding. Dr. Rahim advised the rectal exam was okay. A colonoscopy was performed by Dr. Rahim on April 6, 2010 by Dr. Rahim.

Petitioner consulted with Dr. Bentrem from Northwestern on April 9, 2010. Dr. Bentrem removed eighteen inches of petitioner's colon on April 15, 2010 at Northwestern. He was advised the diagnosis was stage III colon cancer. Dr. Hantel administered chemotherapy.

From May 13, 2010 to October, 2010 he received chemotherapy every other Thursday. Since 2011, he received a colonoscopy every six months. He has blood tests and CAT Scan every three months. The colonoscopies, CAT scans and blood tests have decreased over the past seven years. He now has to undergo a colonoscopy only every three to five years. The last visit with Dr. Hantel was August 15, 2017.

He continues to have stomach pains, cramps, bowel and diarrhea. This occurs two to three times a year. He takes anti-spasmodic medication.

He was seen by Dr. Peter Orris on February 23, 2017 his attorney's request.

Petitioner confirmed on cross examination he is able to perform his job as fire fighter; passes yearly exam. He confirmed all screens since the surgery has been cancer free. He was released from Dr. Hantel's care as of August 17, 2017.

Petitioner confirmed he saw Dr. Nadimpalli on and off due to abdominal pain.

Medical Bills (PX.1)

Dr. Tariq Rahim April 6, 2010 Colonoscopy Report (PX.2)

Dr. Rahim reported encountering a 45 to 50 centimeter malignant appearing mass during the April 6, 2010 colonoscopy; a biopsy was performed.

Dr. Alexander Hantel April 12, 2010 Cancer Center Consultation Report (PX.3)

Dr. Hantel consulted on April 12, 2010 for petitioner's diagnosed colon cancer. The records also include the surgical pathology report of adenocarcinoma.

Dr. David Bentrem Records (PX.4 & PX.5)

On April 9, 2010, petitioner sought a second opinion from Dr. Bentrem as a referral from Dr. Tomas Jakstys and Dr. Rahim regarding his colon cancer. On April 28, 2010, petitioner returned to Dr. Bentrem after undergoing a laparoscopic sigmoidectomy on April 15, 2010.

Petitioner underwent a MRI of the abdomen on April 12, 2010 regarding the liver lesion. The MRI indicated the liver lesion was consistent with a hemangioma.

Petitioner followed up with Dr. Vinay Rawlani on March 2, 2011; he was doing well.

Northwestern Medical Center Records (PX.6)

Petitioner underwent a laparoscopic left partial colectomy with anastomosis, takedown of splenic flexure on April 14, 2010.

Alexander Hantel M.D. Records (PX.7; PX. 8; PX.9; PX. 16)

Petitioner received chemotherapy by Dr. Hantel from May 13, 2010 to October 14, 2010. He followed up with Dr. Hantel on September 23, 2013, March 31, 2014, September 22, 2014, December 26, 2014 and June 25, 2015, which showed no signs of reoccurrence of the cancer.

On July 14, 2016 petitioner was seen by Dr. Hantel. He was doing well. Dr. Hantel advised petitioner to return in one year; at which time he will be seven years out from diagnosis and likely be released from care at that time.

Infusystem Inc. Records (PX.10)

Naperville Radiologists Records (PX.11)

Reports of CT scans.

Dr. Jeffrey Coe June 24, 2011 Report (PX.12)

Dr. Coe performed a medical records review regarding petitioner's colon cancer diagnosis at respondent's request. Dr. Coe noted petitioner did not have an inherited predisposition to colon cancer. Dr. Coe found petitioner, as a firefighter for respondent of greater than five years was at an increased risk for colon cancer.

Suburban Gastroenterology/Dr. Ravi Nadimpalli Records (PX. 13 & PX.14)

Dr. Nadimpalli performed colonoscopies on December 29, 2011, May 21, 2012 and December 19, 2013.

Petitioner also saw Dr. Nadimpalli due to abdominal pain on February 15, 2015. He was advised to obtain a follow up colonoscopy in 2016.

Petitioner had a colonoscopy on December 7, 2016.

On November 13, 2017 petitioner was seen due to abdominal pain.

Rush Copley Medical Center (PX. 15)

Report of the April 6, 2010 colonoscopy.

Dr. Peter Orris o UI Health February 23, 2017 Report (PX.17)

Dr. Orris performed an examination of petitioner at request of petitioner's attorney. Dr. Orris concluded, based upon petitioner's history as a firefighter and review of petitioner's medical records, petitioner's colon cancer was the result of his employment as a firefighter.

Edward Hospital Records (PX.18)

Petitioner's Fire Calls with Respondent (PX.19)

Dr. Alexander Hantel August 15, 2017 Report (RX.1)

Petitioner was seen by Dr. Hantel on August 15, 2017. He was seven years out from the diagnosis of stage III colon cancer. Petitioner was doing well.

As petitioner was seven years out from the diagnosis of colon cancer without reoccurrence, the likelihood of reoccurrence of cancer is less than 1%.

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

In support of the Arbitrator's decision with regard to the nature and extent of injury, the Arbitrator finds the following:

As petitioner's date of exposure of April 7, 2010 was prior to the September 1, 2011 Amendment of the Act, the factors provided in §8.1b of the Act does not apply.

Petitioner was diagnosed on April 7, 2010 with stage III colon cancer which the parties stipulated was caused by the petitioner's employment as a fire fighter with respondent. He underwent a left partial colectomy to remove the 45 to 50 cm. mass. Fortunately, he has been given a clean bill of health as of August 15, 2017; with only a 1% chance of reoccurrence. He does, however, complain of periodic bouts of diarrhea and cramping.

Based upon the foregoing, the Arbitrator finds petitioner sustained a 10% loss of use of person as a whole, pursuant to §8 (d) 2 and awards 50 weeks PPD at the maximum rate of $664.72 per week.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC012413
Case Name	AMEZCUA, MONICA v. KNOLL INC
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b) REMANDED ARBITRATION
Decision Type	Commission Decision
Commission Decision Number	21IWCC0527
Number of Pages of Decision	11
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Matthew Jones
Respondent Attorney	Leo Plucinsky

DATE FILED: 10/21/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MONICA AMEZCUA,

Petitioner,

vs. NO: 18 WC 12413

KNOLL, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering all issues, and being advised of the facts and law, reverses the Decision of the Arbitrator and finds that Petitioner's repetitive work duties caused her to develop bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, and left ring finger flexor tenosynovitis manifesting on February 24, 2018. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

I. Findings of Fact

Petitioner has worked for Respondent for seven years and eight months in a sewing position that required her to use machines to sew cushions to furniture. Petitioner identified PX 5A through PX 5D as job videos she recorded in August 2019 that accurately depicted her work activities. PX 5A shows an individual sewing the lining on a sofa, which was an activity Petitioner performed prior to her accident that required her to keep her arms raised while pulling the leather material to prevent it from wrinkling. Petitioner testified that this action was physically difficult, because it involved pulling heavy material. There were days when Petitioner spent her whole eight-hour shift working with the same heavy material, including leather and velvet. Petitioner estimated that she did not work with those heavy materials only one or two days within a two-week period. She further testified that she had to use a hammer to soften the material, as also demonstrated in PX

5A, five or more times during an eight-hour period.

Petitioner also performed the task depicted in PX 5C, which was pushing leather material forward, every day. Petitioner testified that pushing the material through the sewing machine was physically difficult and required her to exert a lot of force with her hand. Prior to her manifestation date, Petitioner worked with the heavier materials of velvet and leather; however, PX 5D depicts the lighter screen material that Petitioner later worked with after she returned to light duty work on February 11, 2019 through the hearing date.

Petitioner testified that she began experiencing increased left hand, wrist, thumb, elbow, and arm pain in February 2018. In addition to the left-sided pain, Petitioner noticed some right wrist pain as well. Petitioner presented for treatment on February 24, 2018 to Dr. Luis Santiago with complaints of on and off hand pain. Dr. Santiago noted that Petitioner worked sewing at a factory and diagnosed her with left carpal tunnel syndrome. When Petitioner returned on March 10, 2018, Dr. Santiago's diagnosis was bilateral carpal tunnel syndrome after Petitioner complained of pain in both her arms and hands for two months. Dr. Santiago referred Petitioner to a hand surgeon and took her off work for one week. After that week, Petitioner returned to work and continued working until she was placed off work again in May 2018.

Petitioner then saw Dr. Roberto Levi of Orthopaedic and Rehabilitation Centers on March 19, 2018. At that time, Petitioner complained of two years of hand numbness when she slept as well as pain in the wrist, hand, forearm, and lateral aspect of both arms. Dr. Levi diagnosed Petitioner with possible bilateral carpal tunnel syndrome and ordered an EMG of the bilateral upper extremities, which was obtained on April 2, 2018. The EMG yielded slightly abnormal results with evidence of early and subtle bilateral carpal tunnel syndrome affecting only the median nerves sensory components with demyelinating features.

On April 9, 2018, Dr. Levi found that the EMG showed bilateral carpal tunnel syndrome, more severe on the left. Dr. Levi further indicated that Petitioner had a positive Phalen's test and numbness in the median nerve territory. He recommended a carpal tunnel release; however, Petitioner opted to first proceed with an injection. The left carpal tunnel cortisone injection was administered on April 16, 2018 by PA Robert Stickler. PA Stickler then opined that Petitioner's condition was work-related, as she had been in the same position for five years performing repetitive work. He believed that the repetitive motion of Petitioner sewing couches for a living on a daily basis had created her bilateral carpal tunnel syndrome. He prescribed Tylenol Extra Strength, gabapentin, and bilateral wrist braces.

On May 14, 2018, Dr. Levi reported that Petitioner's median nerve numbness had disappeared or lessened post-injection, but she still felt numbness in the last two digits in the ulnar nerve area of both hands. Dr. Levi found that Petitioner's carpal tunnel syndrome was improving, but she also had bilateral cubital tunnel syndrome. He opined that Petitioner's symptoms were produced by her work that involved sewing leather in a repetitive motion and using a lot of effort to pass through the leather. Dr. Levi recommended that Petitioner continue wearing her splints and be taken off work. He thereafter continued Petitioner's off-work restrictions and medication at her follow-up visit on June 11, 2018. At that time, Dr. Levi indicated that Petitioner had carpal tunnel and cubital tunnel syndromes because she had to perform repetitive hand motions and

pulling that required a lot of effort with her hands while sewing leather.

At Respondent's request, Petitioner then presented for a §12 examination for her bilateral hands with Dr. William Vitello on June 14, 2018. Dr. Vitello noted that Petitioner had tenderness and pain over her left ring finger A1 pulley area with nodules and swelling within the flexor sheath. Dr. Vitello opined that Petitioner had left ring finger flexor tenosynovitis that was causally related to her work injury. However, he disagreed with Dr. Levi's diagnosis of carpal tunnel syndrome, since Petitioner had reported to him very little numbness and tingling on her left side with no numbness and tingling on her right side. Dr. Vitello stated that although Petitioner's EMG showed early carpal tunnel syndrome, it did not correlate with her subjective complaints and clinical findings at the §12 examination.

Petitioner next presented for a physical therapy evaluation on June 19, 2018 and complained of chronic bilateral hand pain and tingling that had worsened over the last six months. Petitioner no longer had right hand pain after being off work for one month and decreasing her repetitive movements, although her left hand complaints persisted. The physical therapist found that Petitioner had positive Phalen's tests bilaterally and a positive Tinel's sign on her left side, as consistent with the EMG results and referring diagnoses.

On July 9, 2018, Dr. Levi reported that Petitioner's carpal tunnel syndrome and right cubital tunnel syndrome were improved, although she still had left hand numbness in her last two fingers indicative of remaining left cubital tunnel syndrome. Dr. Levi recommended continued physical therapy, off-work restrictions, medication, and splints. He indicated that if Petitioner did not thereafter improve in a month, he would schedule a left ulnar nerve transposition. Dr. Levi again opined that the cause of Petitioner's symptoms was her repetitive work that required her to use significant effort with her hands while sewing leather.

On August 6, 2018, Dr. Levi disagreed with Dr. Vitello's opinions and argued that although Dr. Vitello's diagnosis of tenosynovitis of the flexor tendon may have been present at the time of the §12 examination, she did not have any symptoms of that condition now. Instead, he indicated that Petitioner's symptoms of carpal tunnel syndrome had been diagnosed with a positive EMG. As for the cubital tunnel syndrome diagnosis, Dr. Levi explained that even without a positive EMG and with full ROM, it was cubital tunnel syndrome when there was numbness in the last two fingers with flexion of the elbow. Dr. Levi further noted that Petitioner had a positive Tinel's sign but a negative Phalen's test, which indicated that Petitioner's carpal tunnel syndrome had improved while her cubital tunnel syndrome had not. Dr. Levi then recommended an ulnar nerve transposition.

In an addendum to this note, Dr. Levi reported that Petitioner had returned to work three weeks prior since Respondent had changed the type of work she was doing. Petitioner still had to sew leather-like material, but it involved a thinner fabric. However, Petitioner recounted that after working for two weeks, she started having pain again at her ulnar wrist and hand, as well as numbness in her last two fingers with flexion of the elbow. Dr. Levi believed the numbness in the last two fingers was produced by how Petitioner moved her arms on the sewing machine with flexion and extension of the elbows at all times. Petitioner had returned to work on July 15, 2018 and worked up to this August 6, 2018 visit, at which time Dr. Levi again took Petitioner off work.

Petitioner's off-work restrictions were thereafter continued by PA Stickler on August 27, 2018.

On September 24, 2018, Dr. Levi noted that Petitioner would wake up with numbness in her last two fingers when her splint moved at night and her elbow flexed. Dr. Levi found this to be typical of cubital tunnel syndrome. Dr. Levi further stated that Petitioner had a positive EMG for carpal tunnel syndrome but had since improved and did not need any carpal tunnel surgery or injections. Nevertheless, for the ongoing cubital tunnel pain and numbness, Dr. Levi kept Petitioner off work and again recommended a left ulnar nerve transposition. When Petitioner returned to Orthopaedic and Rehabilitation Centers on October 19, 2018, Dr. Jennifer Connor agreed with Dr. Levi's recommendation for a cubital tunnel release and off-work restrictions.

On November 12, 2018, Dr. Levi again noted that Petitioner's carpal tunnel syndrome had improved, but she continued to have cubital tunnel syndrome with numbness in the last two digits of her left hand. Dr. Levi continued to recommend surgery, medication, and off-work restrictions. When Petitioner next returned on December 10, 2018, Dr. Levi discontinued her physical therapy after finding that Petitioner had plateaued.

Petitioner was next seen by Dr. Connor on January 21, 2019, since Dr. Levi was out of the office that day. On examination of the left upper extremity, Dr. Connor found that Petitioner had a positive Tinel's sign at the medial elbow, but a negative Tinel's sign at the wrist as well as a negative Phalen's test. Dr. Connor found that Petitioner's symptoms remained consistent with cubital tunnel syndrome. She further stated that although Petitioner had mild carpal tunnel syndrome on her EMG, it had improved with her treatment and time off work.

On February 4, 2019, Dr. Levi indicated that Petitioner wanted to return to light duty work even though she still lacked surgical approval for her cubital tunnel syndrome. Dr. Levi placed Petitioner on light duty with no more than six hours of work per day. He again noted that Petitioner's carpal tunnel syndrome had improved to the point where she had no numbness except for in the last two digits of her left hand. Dr. Levi stated that Petitioner also had similar numbness on her right side, but it was not as severe. Petitioner testified that prior to her accident, she worked 40 hours per week; however, on February 11, 2019, she returned to work within Dr. Levi's restrictions and worked 30 hours per week through the hearing date.

On February 25, 2019, Dr. Levi noted that Petitioner had returned to work on light duty and was sewing lighter material, although she still had difficulty. For her bilateral cubital tunnel syndrome, Dr. Levi recommended surgery for both of Petitioner's elbows, starting first with the more severe left elbow. In the meantime, he continued Petitioner's medication and light duty restrictions.

At Respondent's request, Petitioner then presented for a second §12 examination with Dr. Vitello on February 27, 2019. At this time, Dr. Vitello opined that Petitioner's current condition was consistent with left cubital tunnel syndrome, as Petitioner's physical examination was consistent with ulnar nerve compression at the elbow. However, he found that Petitioner had no ongoing pathology in the right upper extremity. Dr. Vitello further opined that Petitioner's carpal tunnel syndrome and ring finger flexor tenosynovitis had resolved.

In order to make a causal opinion as to the bilateral elbow conditions, Dr. Vitello requested additional information regarding Petitioner's tasks. Nevertheless, Dr. Vitello stated that it was evident from the job description that he was already provided that Petitioner performed pushing, grasping, and pulling with her left upper extremity. However, he indicated that such description did not support a causal connection, because repetitive pushing, pulling, and grasping in and of itself would not necessarily lead to the development of cubital tunnel syndrome. Instead, Dr. Vitello explained that the type of work that would be causally related would involve a combination of highly repetitive and forceful gripping, grasping, pushing, pulling, or prolonged elbow flexion and awkward positioning of the upper extremity. He stated that the constant forceful flexion and extension of the elbow was a mechanism that could cause cubital tunnel syndrome.

Dr. Vitello further opined that a cubital tunnel release was a reasonable treatment option for Petitioner. However, when asked to opine regarding causation of such prospective care, Dr. Vitello responded that he had insufficient information to make a clear determination. Dr. Vitello recommended review of a job video or a detailed quantitative analysis of the force and repetition of Petitioner's work in order to answer the question as to causation for prospective care. Nevertheless, Dr. Vitello opined that Petitioner had not yet reached MMI for her left cubital tunnel syndrome, although she had achieved MMI regarding her right upper extremity complaints. As for restrictions, Dr. Vitello opined that Petitioner should be limited from heavy and forceful pushing, pulling, and grasping with the left upper extremity.

Petitioner thereafter presented to Dr. Gabriel Levi, also of Orthopaedic and Rehabilitation Centers, on April 3, 2019. On examination, Petitioner had a positive Tinel's sign in the cubital tunnel of the right elbow. Dr. G. Levi also opined that Petitioner required a left ulnar nerve transposition and light duty restrictions, including no more than six hours of work per day.

On April 25, 2019, Dr. Vitello authored a §12 addendum after being provided with a 10-second job video showing an individual sewing pieces of fabric on a sewing machine. Dr. Vitello opined that the type of work depicted was not consistent with a combination of heavy forceful and repetitive pushing and pulling of the upper extremities. Dr. Vitello also stated that the video did not show prolonged elbow flexion in awkward positions of the upper extremity consistent with the development of cubital tunnel syndrome. As such, Dr. Vitello opined that Petitioner's left cubital tunnel syndrome was not causally related to the work that Petitioner reported performing nor the work depicted on the job video.

Petitioner returned to Dr. G. Levi on May 15, 2019, at which time he warned that Petitioner was more likely to develop a permanent nerve injury the longer his recommended cubital tunnel surgery was delayed. Dr. G. Levi noted that Petitioner had persistent pain and paresthesia in her left ring and small fingers. At this visit, as well as Petitioner's follow-up visit on June 26, 2019, Dr. G. Levi continued to push for the surgery and provide light duty restrictions. Additionally, after reviewing the recent §12 addendum, Dr. G. Levi opined that Dr. Vitello was mistaken in his finding that Petitioner's cubital tunnel syndrome was not work-related. He further accused Dr. Vitello of not being truly independent. Dr. G. Levi thereafter continued to recommend cubital tunnel surgery at Petitioner's return appointments on July 24, 2019 and August 28, 2019.

Around this time, Dr. R. Levi wrote a letter to Petitioner's attorney in response to a request

for his opinions. Although the letter is undated, the request from Petitioner's attorney that Dr. R. Levi was responding to was dated September 10, 2019. Dr. R. Levi indicated that he had reviewed a job description from Respondent, listened to a job explanation from Petitioner, and watched a short job video. Based on this, Dr. R. Levi observed that Petitioner was required to perform constant pulling and pushing of heavy material. He stated that while doing this task, Petitioner's movement was repetitive throughout all of her working hours. Dr. R. Levi opined that this had eventually produced Petitioner's symptoms. He further noted that his colleagues agreed that Petitioner's cubital tunnel symptoms were due to the type of work that she performed, including the repetitive and forceful movements she had to use.

Dr. R. Levi disagreed with Dr. Vitello's §12 diagnosis and instead found that Petitioner had bilateral carpal tunnel syndrome and bilateral ulnar compression at the elbows, producing cubital tunnel syndrome. However, he described Petitioner's carpal tunnel syndrome as improved and her right ulnar compression as not significantly present. Nevertheless, Dr. R. Levi opined that the type of work Petitioner performed caused her conditions, because she was flexing her elbows and wrists as well as pulling and pushing heavy leather material. He believed that Petitioner's work, which he characterized as heavy and repetitive, caused her symptoms. Dr. R. Levi further opined that Petitioner's treatment to date had been reasonable, necessary, and causally related to her work activities. He again recommended an ulnar nerve transposition of the left elbow.

Dr. G. Levi also continued to recommend the left cubital tunnel surgery and light duty restrictions of no more than six hours of work per day at Petitioner's follow-up appointments from October 23, 2019 through June 15, 2020. Then, on July 1, 2020, PA Max Levine, also of Orthopaedics and Rehabilitation Centers, added additional restrictions of no lifting, pushing, or pulling over five pounds with the left upper extremity.

Shortly thereafter, on July 17, 2020, Dr. Vitello authored another §12 addendum after reviewing five more job videos for Petitioner. Dr. Vitello opined that the activities depicted in the videos were inconsistent with the development of carpal tunnel and cubital tunnel syndromes, as they did not depict a combination of heavy, forceful, and repetitive gripping, grasping, or twisting. Dr. Vitello further stated that the videos did not show the upper extremities in a prolonged awkward position or flexed posture. Additionally, he observed no pressure over the medial elbow and noted that it was not resting on any surface as the machine pulled the material through. As such, Dr. Vitello determined that the position of the operator's upper extremities was inconsistent with the development of carpal tunnel and cubital tunnel syndromes.

At the time of the hearing, Petitioner expressed a desire to undergo the recommended left elbow surgery. She testified that she still had pain at her elbow and on the side of her wrist that traveled to her pinky and ring fingers. Petitioner further testified that she continued to have difficulty pulling the material at work.

II. Conclusions of Law

Following a careful review of the entire record, the Commission reverses the Decision of the Arbitrator and finds that Petitioner's repetitive and forceful work duties caused her to develop bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, and left ring finger flexor

tenosynovitis manifesting on February 24, 2018.

The job videos submitted into evidence, combined with Petitioner's testimony, establish that Petitioner's work duties required repetitive and forceful movements of her upper extremities as well as constant forceful flexion and extension of her elbows. When using the sewing machine, Petitioner had to pull heavy leather material tight to prevent it from wrinkling. Petitioner testified that she also had to keep her arms in a raised position while pulling the material as depicted in PX 5A. She testified that pulling the heavy material was physically difficult and that there were days when she spent eight hours working on the same heavy material. Petitioner also had to use a hammer to soften the material, as shown in PX 5A, five or more times during an eight-hour period.

The job video of PX 5C further depicted the heavy leather material being pushed forward, which was a task Petitioner performed daily. Petitioner testified that while pushing the material, she had to apply a lot of force with her hand. Prior to returning to light duty work in February 2019, Petitioner worked with the heavier materials of velvet and leather. She never worked with the lighter screen material shown in PX 5D until after her accident.

Although the Decision of the Arbitrator stated that Petitioner worked with the heavy material only once or twice over a two-week period, the Commission views Petitioner's testimony differently. Instead, Petitioner testified that she did *not* work with heavy materials on one or two days within a two-week period. This indicates that Petitioner had to handle the heavier material on a much more frequent basis.

The job videos submitted into evidence show the sewing machine operator pulling the heavy leather material tight to thread it through the machine. After reviewing the job videos, Dr. Levi believed it was obvious that Petitioner had to constantly pull and push heavy material. Dr. Levi indicated that to perform this task, Petitioner's movements were repetitive throughout all of her working hours and eventually produced her symptoms. He opined that Petitioner's cubital tunnel syndrome was causally related to the work that she performed, which required repetitive and forceful movements.

Although Dr. Vitello disagreed that the activities depicted in the job videos were consistent with the development of carpal tunnel and cubital tunnel syndromes, he nevertheless indicated that the type of work that would be causally related involved a combination of highly repetitive and forceful gripping, grasping, pushing, pulling, or prolonged elbow flexion and awkward upper extremity positioning. Dr. Vitello conceded that the constant forceful flexion and extension of the elbow would be a mechanism that could cause the development of cubital tunnel syndrome.

After reviewing the job videos, the Commission finds that they demonstrate sufficiently repetitive and forceful job activities. Moreover, Petitioner presented unrebutted testimony that she had to forcefully and repetitively pull heavy leather material through the machine for up to eight hours a day and was only relieved of this task once or twice during a two-week period. As such, the Commission finds that Dr. Levi conveyed a more accurate understanding of the repetitive nature of Petitioner's work duties.

Dr. Vitello's opinion loses further persuasiveness in light of the EMG evidence of carpal

tunnel syndrome. On April 2, 2018, Petitioner's bilateral upper extremity EMG yielded slightly abnormal results with evidence of early bilateral carpal tunnel syndrome. This represented clear diagnostic evidence of carpal tunnel syndrome, even though the treatment records document that Petitioner's carpal tunnel syndrome had largely resolved following her cortisone injection and time off work. The treatment records show that Petitioner's symptoms of bilateral carpal tunnel syndrome and right cubital tunnel syndrome improved over time, but she continued to complain of numbness in the last two digits of her left hand consistent with cubital tunnel syndrome. Given the resolution of some of Petitioner's symptoms during her treatment, it is not unreasonable that Dr. Vitello found that Petitioner had a negative examination for carpal tunnel syndrome on June 14, 2018. Nevertheless, the EMG finding of bilateral carpal tunnel syndrome remained.

Additionally, even though the treatment records suggest a resolution of Petitioner's left ring finger flexor tenosynovitis, Dr. Vitello's findings at the §12 examination on June 14, 2018 were consistent with this condition. Specifically, Dr. Vitello observed tenderness and pain over Petitioner's left A1 pulley area with nodule and swelling within the flexor sheath. Dr. Vitello, the §12 examiner, then opined that Petitioner's left ring finger flexor tenosynovitis was causally related to her work accident. Even though Dr. Levi found that Petitioner lacked symptoms of flexor tenosynovitis at the time of his later examination, he conceded that she may have had such symptoms at the time of Dr. Vitello's §12 examination.

In consideration of the above, the Commission finds Dr. Levi's causal opinions to be more persuasive, since Petitioner had to forcefully and repetitively pull heavy leather material for up to eight hours a day, had EMG evidence of carpal tunnel syndrome, and had examination findings that correlated with the diagnoses of carpal tunnel and cubital tunnel syndrome after her manifestation date of February 24, 2018. The Commission reverses the Decision of the Arbitrator and finds that Petitioner's bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, and left ring finger flexor tenosynovitis were causally related to her repetitive work activities, which required the frequent and forceful repetitive movement of her hands and elbows.

Consistent with its causal finding, the Commission awards all reasonable and necessary medical expenses incurred for Petitioner's bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, and left ring finger flexor tenosynovitis from the February 24, 2018 manifestation date through the August 27, 2020 hearing date. In doing so, the Commission notes that even though Dr. Vitello found no causation, he nonetheless agreed that Petitioner's treatment had been reasonable. Dr. Levi also persuasively opined that Petitioner's treatment had been reasonable, necessary, and causally related to her work injury. The Commission further awards prospective care in the form of the left ulnar nerve transposition surgery recommended by Dr. Levi for Petitioner's ongoing symptoms of left cubital tunnel syndrome.

Lastly, the Commission awards temporary total disability benefits from March 10, 2018 through March 17, 2018, May 15, 2018 through July 14, 2018, and August 5, 2018 through February 10, 2019 for a total of 37 weeks. Dr. Santiago first took Petitioner off work on March 10, 2018 for one week. Petitioner testified that she remained off work for one week per Dr. Santiago's recommendation, but subsequently returned to work and continued working until May 2018. Petitioner was then placed off work again by Dr. Levi on May 14, 2018. Thereafter, at her August 6, 2018 visit, Petitioner informed Dr. Levi that she had returned to work three weeks prior

because Respondent had changed the type of work that she performed. Petitioner testified that she had returned to work on July 15, 2018 and worked until August 6, 2018, at which time Dr. Levi took her off work again. Then, on February 4, 2019, Dr. Levi indicated that Petitioner wanted to return to light duty work as she waited for surgical approval. Dr. Levi placed Petitioner on light duty restrictions limited to six hours of work per day. Petitioner testified that on February 11, 2019, she returned to work within Dr. Levi's restrictions and began working 30 hours per week. Petitioner continued to work in a light duty capacity through the hearing date.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated February 4, 2021, is hereby reversed as stated herein.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner suffered a compensable repetitive trauma accident manifesting on February 24, 2018 and that Petitioner's bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, and left ring finger flexor tenosynovitis conditions were causally related to her repetitive work duties, which included forceful and repetitive hand and elbow movements.

IT IS FURTHER ORDERED that Respondent is liable for all reasonable and necessary medical expenses related to Petitioner's bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, and left ring finger flexor tenosynovitis through the hearing date of August 27, 2020 pursuant to §8(a) and §8.2 of the Illinois Workers' Compensation Act.

It IS FURTHER ORDERED that Respondent is liable for prospective medical care for Petitioner's causally related left cubital tunnel syndrome in the form of the left ulnar nerve transposition surgery recommended by Dr. Levi.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $394.14 per week for 37 weeks, commencing on March 10, 2018 through March 17, 2018, May 15, 2018 through July 14, 2018, and August 5, 2018 through February 10, 2019, as provided in §8(b) of the Act. Pursuant to §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 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 $25,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

October 21, 2021

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

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

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

DLS/met
O- 8/25/21
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ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC034238
Case Name	GONZALEZ, FERNANDO v. DIESEL RADIATOR COMPANY
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0528
Number of Pages of Decision	23
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Monica Dembny
Respondent Attorney	Neal Strom

DATE FILED: 10/21/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Fernando Gonzalez,

Petitioner,

vs. No. 17 WC 34238

Diesel Radiator Company,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by the parties herein and proper notice given, the Commission, after considering the issues of causal connection and prospective medical care, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

The Arbitrator found accident and causation relative to the disputed cervical spine condition. The Arbitrator awarded temporary total disability benefits, which are not at issue on review, but "[made] no findings" regarding prospective medical care for the cervical spine condition because "Petitioner did not testify he would like to undergo the surgery recommended by Dr. Singh."

Petitioner points out that in the request for hearing form, he put at issue the neck surgery recommended by Dr. Singh. In his opening statement, Petitioner's counsel unequivocally raised the issue of prospective medical care by stating: "[W]e seek authorization from the Industrial Commission for the recommended cervical surgery by the treating physician." In his brief on

review, Petitioner affirms that he "needs neck surgery" and asks the Commission to award "prospective medical care to the cervical spine."

The Commission agrees with the Arbitrator on the issue of causation. Further, the Commission finds the issue of prospective medical care is properly before us. The Commission awards the treatment and the cervical spine surgery recommended by Dr. Singh, as supported by the record.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 8, 2021, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $560.62 per week for a period of 68 3/7 weeks, from April 17, 2018 through August 8, 2019, 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, medical benefits or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide prospective medical care in the form of the treatment and the cervical spine surgery recommended by Dr. Singh, pursuant to §§8(a) and 8.2 of the Act.

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

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

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

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

October 21, 2021

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

SJM/sk
o-09/15/2021
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/s/*Deborah J. Baker*
Deborah J. Baker

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

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

GONZALEZ, FERNANDO
Employee/Petitioner

Case# **17WC034238**

DIESEL RADIATOR COMPANY
Employer/Respondent

On 1/8/2021, 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:

2194 STROM & ASSOCIATES
NEAL B STROM
180 N LASALLE ST SUITE 2510
CHICAGO, IL 60601

0000 HOLECEK & ASSOCIATES
MONICA DEMBY
PO BOX 64093
ST PAUL, MN 55164-0093

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)

Fernando Gonzalez
Employee/Petitioner

v.

Diesel Radiator Company
Employer/Respondent

Case # **17** WC **34238**

Consolidated cases: ______

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Wheaton**, 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. [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 [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, **September 10, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**43,728.32**; the average weekly wage was $**840.93**.

On the date of accident, Petitioner was **64** years of age, **married** with **0** dependent children.

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

Respondent shall be given a credit of $**41,035.92** for temporary total disability benefits that have been paid.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of **$560.62**/week for **68 3/7** weeks, commencing **04/17/18 through 08/08/019,** as provided in Section 8(b) of the Act.

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

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

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

Signature of Arbitrator

12/29/2020
Date

ICArbDec19(b)

JAN - 8 2021

Procedural History

On October 29, 2020, this matter was tried pursuant to Section 19(b) and 8(a) of the Act. Petitioner alleges he injured his left shoulder and cervical spine on September 10, 2017. Respondent accepted the left shoulder injury but denied the cervical spine injury. Petitioner seeks TTD benefits, payment of medical expenses and the authorization for surgery related to the cervical injury. (Arb. Ex. #1).

Findings of Fact

Fernando Gonzalez (hereinafter referred to as "Petitioner") testified he worked for Diesel Radiator (hereinafter referred to as "Respondent") for 10 years. He testified he welded radiators which weighed from 60 to 200 pounds. Petitioner testified he also would pick up the parts from pallets and place them on the table. Petitioner testified some days he would lift from 60 to 80 of the 200-pound radiators while other days he would lift from 60 to 80 of the medium-sized radiators. (T. 14).

Petitioner testified he previously underwent a surgery in 2012 and had been released to return to work full duty and was able to perform his duties since that time. [1] (T. 15). Petitioner testified on September 10, 2017 he was performing heavy lifting at work when he noticed pain in his neck and left shoulder. (T. 16). On that day, Petitioner testified he reported his injury to Sergio who told him to get a massage.[2] (T. 16).

Petitioner testified he continued working but his pain worsened so he reported his injury to Luis Santana. Petitioner testified he told Mr. Santana he was performing heavy lifting when he developed neck and shoulder pain on October 16, 2017. Petitioner testified Mr. Santana filled out a report at that time. (T. 18). Petitioner testified he was sent to the Company's occupational clinic by Mr. Santana.

Petitioner testified prior to being sent to the Company's occupational clinic he saw his own doctor at Community First Medical Center on two occasions (10/5/2017 and 10/16/2017) and had been referred to a specialist. (T. 20). Petitioner testified the Company clinic gave him a cream, prescribed a left shoulder MRI, physical therapy and issued light duty restrictions. (T. 20). Petitioner testified the Company clinic referred him to an orthopedic physician before releasing him to work full duty on the 22nd of November. Petitioner testified after being

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[1] Petitioner had a C5-6 ACDF in 2010 performed by Dr. Sean Salehi.

[2] Sergio Garcia was Petitioner's direct supervisor. (T. 52).

released from the Company clinic he sought another opinion from Midwest Orthopedics at Rush. (T. 20-22).

Petitioner testified he went to Midwest Orthopedics at Rush was treated by Dr. Chen and was given a shot in his left shoulder. Petitioner testified on January 2, 2018 Dr. Cheng told him that something was wrong with his neck. (T. 23). Petitioner testified Dr. Verma examined his left shoulder on January 8, 2018. Petitioner testified on January 23, 2018 he underwent a cervical MRI and returned to Dr. Cheng who said part of his problem involved his neck. (T. 24-25). Petitioner testified he was given a shot into his neck on February 19, 2018. Petitioner testified Dr. Verma told him he had both a left shoulder and neck problem. Petitioner testified he was referred Dr. Singh, a spine surgeon, who ordered a cervical myelogram. (T. 26). Petitioner testified after reviewing the myelogram, Dr. Singh recommended neck surgery. (T. 27).

Petitioner testified he was sent to see Dr. Jerry Bauer by the insurance company and that no interpreter was present for the examination. (T. 28). Petitioner testified he returned to Dr. Verma who believed the left shoulder surgery would help but not for his neck symptoms. Petitioner proceeded with the left shoulder surgery on January 24, 2019. (T. 29). Petitioner testified he continued to have a neck pain and was released to light duty work by Dr. Verma on April 22, 2019. (T. 30).

Petitioner testified he returned to Dr. Singh on June 7, 2019 recommended proceeding with the neck surgery. (T. 31). Petitioner testified the insurance company sent him back to Dr. Bauer on July 7, 2019. Petitioner testified after that visit he was sent back to work full duty.

Petitioner testified he returned to work but was laid off in January of 2020. (T. 32-34). Petitioner testified upon returning to work his neck pain became more intense. (T. 34). Petitioner testified during the day his pain levels are around 5-6 and the pain levels are between 8-9 by the end of the day. Petitioner testified he took pills for the pain. (T. 35).

Petitioner testified he found a new job in February and the work he performed did not require heavy lifting. Petitioner testified he continues to experience neck pain and symptoms in his hands but more on the left side. (T. 36).

Medical Records:

Community First (PX 1):

On October 5, 2017, Petitioner presented to Community First Medical Center Emergency Medicine complained of posterior left shoulder pain extending down the left arm for the past

month. Petitioner also complained of bilateral hand, elbow and knee pain. Petitioner reported he had a work injury a year ago and has been having a tough time doing is work. The medical records list the onset of symptoms as acute and that the symptoms had been worsening over time. X-rays of the left shoulder were taken which showed minimal degenerate changes of the left acromioclavicular and glenohumeral joints, evidence of a previous lower cervical anterior fusion and degenerative changes of the thoracis spine. Petitioner was diagnosed with a left shoulder strain. Petitioner was prescribed Flexeril.

Petitioner returned to Community First Medical Center on October 16, 2017 reporting hand and shoulder pain for a year from a work-related injury, but the pain has worsened is now affecting his job. Petitioner denied any new trauma or a fall. The medical records state Petitioner was assessed with either adhesive capsulitis or a rotator cuff injury. Petitioner was referred to an orthopedic specialist. (PX 1).

<u>*Occupational Health Centers of Ill. (PX 2)*</u>

On October 16, 2017, Petitioner sought treatment at the Occupational Health Center of Illinois. At that visit, Petitioner complained of upper left back and shoulder pain with swelling of the left hand after picking up heavy object from the floor weighing about 120- pounds about a month ago. Petitioner reported pain located in the left posterior shoulder. Petitioner also reported radiating pain which is exacerbated by lifting and shoulder movements. The left shoulder examination noted tenderness in the posterior shoulder and cervical spine examination noted no tenderness and full range of motion. The records list the date of injury as September 10, 2017 and Petitioner was assessed with a left shoulder strain.

Petitioner returned on October 18, 2017 complaining pain in the left anterior shoulder and left posterior shoulder. Petitioner was referred to physical therapy. Petitioner returned on November 2, 2019 complaining of left shoulder pain, decreased AROM overhead, weakness and left upper neck pain/tightness. Therapy was recommended and Petitioner was returned to work with restrictions.

On November 6, 2017, Petitioner returned complaining that his left shoulder symptoms had worsen. An MRI was ordered and Petitioner underwent the MRI on November 9, 2017 which identified moderate supraspinatus tendinosis with near full-thickness tear at its insertion involving the anterior fibers, moderate subscapularis and mild infraspinatus tendinosis without any discrete tear, moderate tendinosis involving the intra-articular portion of the biceps tendon

and mild diffused PD signal abnormality within the anterior superior glenoid labrum. On November 15, 2017, Petitioner was diagnosed with a rotator cuff tear and referred to an orthopedic specialist.

Petitioner returned on November 22, 2017 reporting resolved or resolving right shoulder pain[3]. Petitioner was found to have reached maximum medical improvement and was released from care. (PX 2).

Rush Medical Center (PX 3)

Petitioner presented to Dr. Verma on December 4, 2017 reporting the onset of bilateral shoulder pain after lifting heavy objects at work on September 10, 2017. Petitioner also reported pain in his neck and lower back which radiated down the arms and legs. The exam of the cervical spine revealed pain with range of motion. Dr. Verma assessed left shoulder pain, neck and lower back pain and bilateral hand symptoms with swelling. Dr. Verma injected the left shoulder with cortisone and referred Petitioner to Dr. Cheng.

Petitioner presented to Dr. David Cheng on January 2, 2018 complaining of neck pain, bilateral arm pain and weakness in the hands. Petitioner reported having a work-related accident that began on September 10, 2017 while performing heavy lifting at work. The exam showed functional range of motion of the cervical spine, negative Spurling's maneuver and axial compression test on both sides. Dr. Cheng noted 4/5 hand grip strength on both sides and reflexes that were grossly diminished on the right side. Petitioner had 2+ reflex on the left biceps and brachioradialis. Dr. Chang noted Petitioner previously underwent a C4-5 ACDF and had bilateral arm pain in the setting of C6-7, disc degeneration and possible radiculopathy. Dr. Cheng assessed cervical radiculopathy and recommended 4 weeks of cervical physical therapy. Dr. Cheng recommended a cervical MRI if no improvement after therapy.

Petitioner returned to Dr. Verma on January 6, 2018, Dr. Verma who noted tenderness to palpation over the bilateral cervical facets and cervical paravertebral muscles. Dr. Verma assessed left shoulder pain secondary to a partial supraspinatus rotator cuff tear and cervical neck pain radiating to bilateral upper extremities with known history of C5-6 ACDF. Dr. Verma indicated he could not rule out cervical radiculopathy. In his report, Dr. Verma stated

[3] Prior to this date, Petitioner's complaints and treatment involved the left shoulder and neck. It is unclear from the medical records why Petitioner's right shoulder was examined. The records do not show that Petitioner's left shoulder was examined at that time.

Petitioner's symptoms were likely due to a combination of cervical radiculopathy and rotator cuff tear. Dr. Verma stated given Petitioner's significant cervical pathology affecting his functionality he should move forward with the cervical MRI and follow up with Dr. Cheng to rule out cervical pathology prior to proceeding with the left shoulder arthroscopy surgery.

On January 23, 2018, a cervical MRI was performed and the radiologist identified a solid anterior fusion at C5-C6, chronic degenerative change of upper and lower cervical foraminal narrowing at C3-4 and C6-7, and mild central canal stenosis at C4-5 and C6-7 without cord compression. Petitioner returned to Dr. Cheng on February 5, 2018 to review the MRI. Dr. Cheng noted uncinate process hypertrophy at C3-4 on the left side with moderately severe foraminal stenosis and mild disc height loss with left-sided paracentral disc bulge with moderate foraminal stenosis. At that time, Petitioner reported that the bulk of his discomfort was over the deltoid and traveling slightly into the arm. Dr. Cheng noted a decrease of muscle bulk over the upper trapezius on the left side.

On February 12, 2018, Petitioner returned to Dr. Verma who noted Petitioner had a known work-related injury on September 10, 2017 with bilateral shoulder pain and radiating pain extending down upper extremities into the hands. Dr. Verma assessed left shoulder pain secondary to partial supraspinatus rotator cuff tear and cervical neck pain associated with radiculopathy secondary to left C3-4 and C6-7 foraminal stenosis. Dr Verma recommended additional treatment for the cervical symptoms. Dr. Verma stated Petitioner's current symptoms appear more consistent with a cervical pathology than left shoulder pathology. Dr. Verma noted that Petitioner had a left shoulder cortisone injection without much relief.

On February 19, 2018 Dr. Cheng preformed C6-7 epidural steroid injection. On March 13, 2019, Petitioner followed up with Dr. Cheng who noted Petitioner felt no discernable difference on the left side and the pain travels in a non-dermatomal fashion. At that time, Dr. Cheng indicated Petitioner should return to Dr. Verma to discuss proceeding with the rotator cuff repair.

On April 16, 2018, Petitioner presented to Dr. Kern Singh. At that time, Petitioner reported working as a welder for the past 6 years and, on September 10, 2017, he did not have a specific injury, but pain due to the accumulation of lifting, standing, twisting and reaching. Petitioner complained of pain, numbness, and tingling into the left scapular boarder with focal pain along the left shoulder into the mid arm. Petitioner also complained of occasional

numbness and tingling in both hands. The examination noted positive Spurling's sign on the left. Dr. Singh ordered a CT myelogram of the cervical spine.

Dr. Singh noted Petitioner had a prior C5-6 ACDF in 2010 performed by Dr. Sean Salehi. Dr. Singh diagnose post C5-6 anterior cervical discectomy and fusion, C4-5 and C6-7 adjacent level stenosis.

The CT myelogram was performed May 14, 2018. Dr. Singh reviewed the CT myelogram and found a C4-5 central HMP with cord compression and a C6-7 osteophyte with cord compression. Dr. Singh recommended surgery consisting of C4-5 and C6-7 ACDF.

On May 16, 2018, Dr. Singh issued a report noting that Petitioner had neck pain at 6-7 out of 10 and pain into the left upper extremity with numbness and hand grip weakness. Dr. Singh's examination noted a positive Hoffman's sign, Inverted Brachioradialis sign and Spurling's sign. Dr. Singh diagnosed a C4-5 central herniated nucleus pulposus with cord compression, C6-7 cervical stenosis with cord compression and status post C5-6 anterior cervical discectomy and fusion. In the report, Dr. Singh recommended surgery consisting of a C4-5, C6-7 ACDF with removal of hardware at C5-6 with re-arthrodesis and exploration of fusion mass. (Px3).

Section 12 examination and report prepared by Dr. Jerry Bauer (Rx 3)

On August 6, 2018, Petitioner was examined by Dr. Jerry Bauer pursuant to Section 12 of the Act. The report indicates the interpreter, who had been scheduled to appear, was not present for the evaluation so Petitioner's wife interpreted for Dr. Bauer. The report states Petitioner's left arm was in a sling and he appeared to be uncomfortable during the examination. Dr. Bauer's examination noted tenderness in the left paracervical muscle extending into the left trapezius muscle and along the left shoulder area, neck range of motion of 45 degrees to the right and 60 degrees to the left, extension to 30 degrees and flexion to 60 degrees. No Horner's sign or Adson sign or atrophy or fasciculations was noted. Dr. Bauer found exostosis over the superior aspect of the left shoulder which was tender and marked tenderness around the shoulder girdle. Dr. Bauer noted Petitioner had pain with both active and passive motion of the left shoulder. In his report, Dr. Bauer stated Petitioner described pain extending primarily to the shoulder and down his left arm into the left second and third digits.

Dr. Bauer reviewed the various imaging and opined Petitioner had marked pain around the left shoulder with marked limitation of range of motion of the left shoulder which does not

relate to any cervical pathology. Dr. Bauer stated the MRI and myelogram CT scan suggested neural foraminal stenosis on the left at C6-7 due to a large prominent osteophyte and narrowing of the neural foraminal due to degenerative disc disease at C6-7.

In his report, Dr. Bauer stated there was no evidence of any acute injury of the cervical spine and Petitioner has degenerative disc disease at C6-7 which had progressed causing left-sided neural foraminal stenosis. Dr. Bauer also stated Petitioner had a central herniated disc at C4-5 with some central stenosis, mild right neural foraminal stenosis and neural foraminal stenosis on the left at C3-4 which would not cause pain radiating down the left arm.

Dr. Bauer stated Petitioner primarily reported left shoulder pain with a radicular component in the left arm. Dr. Bauer opined the imaging studies of the cervical spine showed degenerative changes that pre-exists the injury date of September 16, 2017. Dr. Bauer stated Petitioner has a radicular component down his left arm which may be related to the neural foraminal stenosis from left C6-7. Dr. Bauer opined the degenerative changes existed in the 2012 at C6-7 and had likely progressed since there was no evidence of an injury to the cervical spine that could related to the September 16, 2017 accident. Dr. Bauer further opined the majority of the Petitioner's symptoms were related to the left shoulder.

Dr. Bauer recommend treating the left shoulder pathology and upon completion of the left shoulder treatment to reassess the cervical spine. Dr. Bauer recommended deferring the cervical spine surgery until the left shoulder issues were resolved. Dr. Bauer opined Petitioner was not at MMI for the left shoulder. (Rx 3).

Rush Medical Center (PX 3)

On September 30, 2018, Dr. Singh authored a report stated he disagreed with the independent medical examination of Dr. Jerry Bauer. Dr. Singh stated Dr. Bauer made an assumption the left shoulder pain, which he has no opinion for, was emanating from the shoulder thus disregarding the opinions of Dr. Verma, the chief of Sports Medicine at Rush University Medical Center, who opined that Petitioner's shoulder complaints were not emanating from the shoulder. Dr. Singh also noted an intraarticular injection into the shoulder generated no pain relief. In his report, Dr. Singh wrote "*In essence, we have a patient who has complaints of left shoulder pain which Dr. Bauer does acknowledge and does believe that there is foraminal narrowing on the left side at C6-7 and we have a world-renowned expert shoulder surgeon who has evaluated the patient, Dr. Verma, who states it is not emanating from his shoulder itself. As*

such, the only reasonable conclusion that we can draw is the patient has stenosis at the C6-7 level as previously opined by myself and requires surgical intervention to address that.". Dr. Singh further wrote "*In light of that with a shoulder expert opinion that there is not shoulder pathology and radiographic studies demonstrating left-sided foraminal narrowing which would be consistent with the patient's shoulder complaints, I believe that patient would benefit from a cervical fusion that I had previously opinioned. I do believe that he sustained an aggravation of his underlying condition and I do believe that his is work related and necessitated by his date of injury from September 16, 2017.*" (Px 3).

On October 8, 2018, Dr. Verma re-examined Petitioner and opined Petitioner may have two ongoing conditions in the rotator cuff and neck. Dr. Verma agreed to proceed with shoulder surgery.

Section 12 examination and report prepared by Dr. Craig Westin (Px 8)

Dr. Craig Westin conducted a Section 12 examination on November 12, 2018. At that time, Petitioner reported experiencing pain in the neck and left shoulder on September 16, 2017 after lifting a part weighing over 200 pounds. Petitioner further reported his pain persisted and he developed numbness in the radial three digits of his left hand.

In his report, Dr. Westin noted that Petitioner reported bilateral shoulder pain with neck, back and hand symptoms to Dr. Verma on December 4, 2017. Dr. Westin also noted that Dr. Cheng diagnosed cervical radiculopathy on January 2, 2018 and administered a C6-7 intralaminar epidural steroid injection using the right paramedian approach. Dr. Westin indicated the right paramedian approach may had been a mistake in his records versus the left. Dr. Westin further noted that Dr. Singh reviewed the CT cervical myelogram and found C4-5 and C6-7 cord compression and recommended surgery. In his report, Dr. Westin noted Dr. Bauer opined Petitioner's pain emanated from the left shoulder while Dr. Singh opined Petitioner's pain emanated from the cervical spine and that Dr. Verma's examination of the cervical spine noted that the Spurling's test reproduced posterior left shoulder symptoms.

Dr. Westin's examination of the neck noted that extension and rotation to the left produced left scapular pain which the Spurling's test aggravated and that rotation to the right produced pain at the base of the neck. Dr. Westin also noted that Petitioner underwent a cervical fusion in 2010 and, at that time, he was experiencing right arm pain. Dr. Westin further noted that Petitioner reported his left arm symptoms started after the September 16, 2017 incident.

Dr. Westin opined the lifting incident on September 16, 2017 was a competent mechanism cause of the left shoulder rotator cuff tear or permanent aggravation of a preexisting tear. Dr. Westin further opined Petitioner's left shoulder condition was related to the September 16, 2017 work accident. In his report, Dr. Westin diagnosed left sided cervical radiculopathy and stated Petitioner's cervical radiculopathy may still contribute to shoulder pain following his left shoulder surgery. Dr. Westin made no opinion regarding the cervical radiculopathy treatment because spine surgery was outside the scope of his practice. (Px. 8).

Rush Medical Center (PX 3)

Petitioner underwent left shoulder arthroscopy on January 24, 2019 which consisted of rotator cuff repair, decompression and acromioplasty, distal clavicle resection, and biceps tenodesis. In the post-surgical report Dr. Verma identified a 1-1.5 mm tear in the rotator cuff.

Petitioner returned to Dr. Singh on June 7, 2019 reporting neck pain of 7-8 out of 10 and that he was experiencing stabbing and burring pain into the upper deltoids and interscapular region as well as triceps pain and numbness into the 3rd, 4th and 5th digits. Dr. Sign noted Petitioner was recovering from a left shoulder surgery and was transitioning to a work conditioning, but the transition was limited due to his neck and upper extremity paresthesias. Dr. Singh renewed his surgery recommendation consisting of C4-5, C6-7 ACDF with removal of hardware at C5-6 with rearthrodesis and exploration of fusion mass.

On July 22, 2019 Petitioner followed up with Dr. Verma. At that time, Petitioner denied stiffness or pain with range of motion. Dr. Verma noted full range of motion and 5/5 strength and he found Petitioner had reached MMI for the left shoulder and he released Petitioner to return to full duty work. (Px 3).

Testimony of Dr. Singh (Px 6)

Dr. Singh testified he first examined Petitioner on April 16, 2018 and, at that time, Petitioner complained of neck and shoulder pain as a result of repetitive lifting, standing, twisting and reaching. Petitioner reported he was a welder and had been working full-time until the date of his injury. Dr. Singh performed an examination which noted pain in the left scapula, mid arm and numbness and tingling into both hands. Dr. Singh also noted weakness in the Petitioner's left arm, in particular the bicep, as well as wrist extensor. Dr. Singh testified Petitioner had a positive Spurling's sign on the left, indicative of cervical pathology and produces pain into the shoulder and arm. Dr. Singh also testified the Spurling's test shows nerve

root compression of the foramen. Dr. Singh testified the weakness in the biceps showed involvement of the C5 nerve root and the weakness of wrist extensor showed possible C6 or C7 nerve root involvement.

Dr. Singh testified the January 23, 2018 MRI showed stenosis at C4-5 and C5-6, above and below the prior fusion site. Dr. Sigh testified the May 16, 2018 CT myelogram showed a central disc herniation with cord compression at C4-5. Dr. Singh opined the CT myelogram correlated with his exam findings because it showed C4-5 spinal cord compression and foraminal narrowing resulting in C5 nerve root involvement, which involves the biceps, and the C6-7 stenosis from a disc osteophyte in C6-C7 nerve root, would involve the triceps and wrist extensor.

Dr. Singh testified he reviewed Dr. Bauer reports and noted that Dr. Bauer stated Petitioner reported scapular shoulder pain but not left arm pain. Dr. Singh testified interscapular pain can be correlated to the C4-5 level from referred pain, but it is often over the shoulder, and that's why the shoulder and the cervical spine get commonly misdiagnosed. Dr. Singh testified he was concerned Dr. Bauer opined Petitioner's pathology was primarily related to his shoulder when Dr. Verma, a world expert, opined Petitioner's symptoms did not make sense for the shoulder. Dr. Singh also expressed concern regarding Dr. Bauer's belief that Petitioner reported significant improvement of his symptoms following his shoulder surgery, which was inconsistent with what Petitioner had been reporting.

Dr. Singh opined Petitioner suffered an aggravation of a preexisting stenosis at C4-5 and C6-7. Dr. Singh opined stenosis can be asymptomatic and then rendered symptomatic by activities such as lifting and twisting as Petitioner identified as his work-related activities. Dr. Singh testified the C5 nerve root could cause symptoms into the shoulder which get often misdiagnosed. Dr. Singh opined the totality of Petitioner's pain complaints and motor weakness correlates with spinal stenosis and left upper extremity weakness and severe spinal stenosis in the neural foramen at C6-7 and moderate stenosis at C4-5 aggravated by the activities Petitioner said he was performing at the time of his work injury on September 16, 2017. Dr. Singh also opined Petitioner's pain complaints and the need for surgery were work related.

Dr. Singh testified Petitioner consistently reported left upper extremity weakness and pain and had motor strength deficits in his C5-6 and C6-7 distributions throughout his encounters which correlated with Petitioner's stenosis. Dr. Singh testified there is a significant overlap

between the shoulder and cervical spine pathology which both are treated before ultimately the true diagnosis is elicited. (Px 6).

Testimony of Dr. Jerry Bauer, Section 12 examiner (Rx 1)

Dr. Bauer testified he examined Petitioner on August 6, 2018. Dr. Bauer testified Petitioner complained of left upper extremity pain after lifting a heavy object from the floor weighing 120 pounds. Petitioner had tenderness in the left paracervical muscles extending into the left trapezius muscle especially along the left shoulder area. Petitioner's range of motion was limited to 45 degrees to the right and 60 degrees to the left. Dr. Bauer found no Horner's or Adson signs nor any atrophy or fasciculation. Dr. Bauer testified Petitioner had pain with active and passive motion of the left shoulder tilting his head in either direction. Dr. Bauer testified Petitioner described pain extending primarily to the shoulder but also down the left arm to the 2nd and 3rd digits. Dr. Bauer testified Petitioner had limited range of motion of the neck with pain involving motion of his left shoulder which, he said, suggested that Petitioner's pathology involved the left shoulder. Dr. Bauer testified that he was not a shoulder specialist.

Dr. Bauer opined the findings on the imaging studies were degenerative in nature and preexisting the injury date of September 16, 2017. Dr. Bauer testified Petitioner may of had a radicular component in his left arm related to foraminal stenosis on the left C6-7 but the overwhelming issue Petitioner reported was left shoulder pain.

Dr. Bauer opined Petitioner had degenerative changes in his cervical spine which did not require surgery. Dr. Bauer also opined there was no evidence of an injury to the cervical spine related to the September 16, 2017 event. Dr Bauer testified he recommended treating the shoulder pathology and reevaluating the cervical spine upon completing the shoulder treatment.

Dr. Bauer testified he examined Petitioner after the left shoulder surgery and, at that time, Petitioner reported pain between his shoulder blades and in the back of his neck with a pulling sensation on the right side of the back of his neck. Dr. Bauer testified Petitioner denied radicular pain. Dr. Bauer testified Petitioner had no nerve root symptoms, radicular pain and no weakness, numbness or tingling.

Dr. Bauer opined Petitioner had no nerve root or spinal cord compression. Dr. Bauer opined Petitioner had degenerative changes in his cervical spine which preexisted the date of injury. Dr. Bauer testified the degenerative changes were present in 2012 and had progressed. Dr. Bauer opined the degenerative changes specifically at C6-7 consisted of narrowing of the

disc space and osteophytes or bone spurs which were stress reactions to degenerative disc disease. Dr. Bauer testified he did not find any evidence clinically or by history or by examination that Petitioner had spinal cord compression or nerve root compression. Dr. Bauer opined surgery was not indicated because Petitioner had no evidence of pressure on the spinal cord or nerve roots and had a normal neurologic examination.

On cross-examination Dr. Bauer testified left arm weakness, bicep weakness could consistent with cervical disc or cervical radiculopathy. Dr. Bauer testified biceps weakness and loss of grip strength could be from the C6 dermatome. Dr. Bauer acknowledged he did not do a Spurling test. Dr. Bauer agreed that Drs. Verma and Singh found motor weakness. Dr. Bauer also agreed that he was aware Petitioner complained of pain in the upper side of his back and shoulder on October 16, 2017 and that Dr. Verma noted radicular pain radiating down Petitioner's arms on December 4, 2017. Dr. Bauer further agreed Dr. Chang assessed bilateral arm pain in the setting of C6-7 disc with possible radiculopathy on January 2, 2018. Dr. Bauer acknowledged Dr. Verma noted Petitioner's condition appeared to be more consistent with cervical pathology than the shoulder on February 18, 2018.

Dr. Bauer testified he did not believe the MRI or cervical myelogram showed cord compression. When asked whether stenosis could be rendered symptomatic by activities, Dr. Bauer responded, "*The answer is a complex answer*". Dr. Bauer was asked whether trauma or mechanism of this injury aggravate a stenosis and he responded, "*I suppose in the realm of could, anything could, yes.*" Dr. Bauer was asked whether numbness, weakness and compression of the cord be the result of an aggravation and he responded, "*It's a complex question that doesn't lend itself—so I can answer the question? So there's an anatomic answer and there's a physiologic answer. The anatomic answer is that there's no aggravation from this injury that could have caused stenosis or touching the spinal cord. The physiologic question was also the same. There was no—this injury did not cause spinal cord compression, nor was there spinal cord compression.*" (Rx 1).

Testimony of Witnesses:

Sergio Garcia testified for the Respondent. Mr. Garcia testified the average weight of the parts handled by the Petitioner was 50 pounds. He testified the largest part that Petitioner had to handle was 55 pounds. (T 53).

On cross-examination, Mr. Garcia admitted he met two days prior to the hearing with Luis Santana, Lisa, the human relations director and Respondent's attorney. They were all in the same room and everyone participated in the meeting. The case was discussed at that time. (T 65). Mr. Garcia admitted he knew nothing about Petitioner's accidental injury. (T 62).

Luis Santana testified for Respondent. He testified he was the safety supervisor in October 2017. He testified he spoke to Petitioner on October 16, 2017. Mr. Santana testified he said that Petitioner should go to the clinic. (T 75).

Mr. Santana stated he completed an accident report marked Respondent's Exhibit No. 8. Mr. Santana admitted Petitioner told him he had a work accident and he testified that he did not doubt him. Mr. Santana also admitted radiators could weigh anywhere from 50 pounds to 200 pounds. (T. 83-84).

Luis Gonzalez testified for Respondent that he was in charge of safety orientation for Respondent. (T 104). He testified when Petitioner returned to work on or about August 27, 2017 as a welder, he was working on smaller parts. (T 109).

On cross-examination, Mr. Gonzalez witness admitted upon receipt of a return to work note, he failed to contact the Petitioner. (T 118). He testified he does not know when the Petitioner was notified that he was able to return to work. (T 121).

The Arbitrator found the testimony of Petitioner to be credible.

Conclusions of Law

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992).

With respect to issue "C", whether Petitioner suffered accidental injuries which arose out of and in the course of his employment, the Arbitrator finds as follows:

An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. 820 ILCS 305/2 (West 2006). Both elements must be present at the time of the claimant's injury to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d. 478, 546 N.E.2d. 603 (1989). "In the course of" the employment refers to the time, place and circumstances under which the claimant is injured. *Scheffler Greenhouse, Inc. v. Industrial Comm'n*, 66 Ill.2d. 361, 362 N.E.2d 325 (1977). "Arising out of" the employment refers to the origin or cause of the claimant's injury. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d. 193,

797 N.E.2d. 665 (2003). An accident arises out of one's employment if its origin is 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. 541 N.E.2d 665 (1989). It is not enough Petitioner is working when accidental injuries are realized, the Petitioner must show the injury was due to some cause connected with employment. Board of Trustees of the *University of Illinois v. Industrial Comm'n,* 44 Ill.2d. 207, 254 N.E.2d. 522 (1969).

In this case, Respondent stipulated that Petitioner sustained an accidental left shoulder injury which arose out of and in the course of his employment on September 10, 2017. Respondent disputes that Petitioner also sustained an accidental injury to his cervical spine at that time.

The Arbitrator finds Petitioner proved by the preponderance of the evidence that he sustained an accidental injury which arose out of and in the course of his employment for the left shoulder and cervical spine conditions. Petitioner testified on September 10, 2017 he was performing a heavy lifting at work when he noticed pain in his neck and left shoulder. (T. 16). Petitioner testified he reported to his supervisor, Sergio, on September 10, 2017, that he was experiencing neck and left shoulder pain after performing heavy lifting. (T. 16). Petitioner testified he continued working but his pain worsened so he subsequently reported the incident to Luis Santana, the safety supervisor. Mr. Santana testified Petitioner reported the incident on October 16, 2017 and he filled out an accident report that day. (T 75).

The Arbitrator finds Petitioner needs to prove by the preponderance of the evidence that he sustained an accidental injury that arose out of and in the course of employment, not that Petitioner must also identify the underlying source(s) of his symptoms. The Arbitrator finds that Respondent's stipulation incorporates other conditions which may have or could have developed out of the same event.

With respect to issue "F", whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

In pre-existing condition cases, recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the pre-existing disease such that the employee's current condition of ill-being can be said to have been causally-connected to the work-related injury and not simply the result of a normal degenerative process of a pre-existing condition. *Caterpillar Tractor Co. v. Industrial Comm'n,* 92 Ill.2d 30, 36-37. When a worker's physical structures, diseased or not, give way under the stress of their usual tasks, the law views it

as an accident arising out of and in the course of employment. *General Electric Co. v. Industrial Comm'n,* 89 Ill.2d 432, 60 Ill.Dec. 629, 433 N.E.2d 671 (1982). When an employee with a preexisting condition is injured in the course and of his employment the Commission must decide whether there was an accidental injury which arose out of the employment, whether the accidental injury aggravated or accelerated the preexisting condition or whether the preexisting condition alone was the cause of the injury. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d 193, 278 Ill.Dec. 70,797 N.E.2d 665, (2003). Even though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill.2d 52, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989).

The Arbitrator finds Petitioner proved by the preponderance of the evidence that his cervical condition is causally related to the injury. Petitioner testified the onset of his cervical symptoms occurred on September 10, 2017 after lifting heavy items at work. Petitioner testified his symptoms progressed over time after that incident. The Arbitrator finds the opinions of Dr. Singh to be more persuasive than the opinions of Dr. Bauer and more consistent with the findings and opinions of Drs. Verma, Cheng and Westin, who performed a Section 12 examination.

Dr. Bauer opined Petitioner's left shoulder pain was emanating from his shoulder while Dr. Singh opined Petitioner's left shoulder pain was emanating from the cervical spine. Dr. Singh assessed cervical radiculopathy, but Dr. Bauer did not find cervical radiculopathy. Dr. Westin's exam noted extension and rotation to the left produced left scapular pain aggravated during the Spurling's test. Dr. Westin diagnosed left-sided cervical radiculopathy and found Petitioner's radiculopathy and rotator cuff tear were both causing left shoulder pain. Dr. Westin indicated Petitioner's cervical radiculopathy may still contribute his shoulder pain after shoulder surgery. Dr. Verma assessed left shoulder pain secondary to partial supraspinatus rotator cuff tear and cervical neck pain associated with radiculopathy secondary to left C3-4 and C6-7 foraminal stenosis. Dr Verma noted Petitioner's symptoms appear more consistent with cervical pathology than the left shoulder pathology. Dr. Cheng also diagnosed cervical radiculopathy.

Dr. Singh opined Petitioner suffered an aggravation of a preexisting stenosis at C4-5 and C6-7. Dr. Singh opined stenosis can be asymptomatic and then rendered symptomatic by activities such as lifting and twisting which were activities Petitioner reported that caused his symptoms. Dr. Singh testified C5 nerve root could cause symptoms into the shoulder which are

often misdiagnosed. Dr. Singh testified Petitioner consistently reported left upper extremity weakness and pain and had motor strength deficits in his C5-6 and C6-7 distributions throughout his encounters which correlated with Petitioner's stenosis. Dr. Singh opined the totality of Petitioner's pain complaints and motor weakness correlates with spinal stenosis and left upper extremity weakness and severe spinal stenosis in the neural foramen at C6-7 and moderate stenosis at C4-5 aggravated by the activities Petitioner said he was performing at the time of his work injury on September 16, 2017.

With respect to issues "J" whether the medical services provided were reasonable and necessary, the Arbitrator finds as follows:

Under Section 8(a) of the Act, a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury. *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm'n,* 409 Ill.App.3d 463, 470 (4th Dist. 2011).

The Arbitrator finds that Petitioner failed to prove by the preponderance of the evidence entitlement to reasonable and necessary medical services. The Request for Hearing does not list any unpaid medical bills which, he claims, Respondent is liable and Petitioner's exhibits, entered into evidence, do not contain any unpaid medical bills.

With respect to issues "K" whether Petitioner is entitled to prospective medical care, the Arbitrator finds as follows:

The Arbitrator finds Petitioner failed to prove by the preponderance of the evidence he is entitled to prospective medical care. As stated above, the Arbitrator found that Petitioner's cervical spine condition was causally connected to his injury. In June of 2019, Dr. Singh recommended surgery consisting of C4-5, C6-7 ACDF with removal of hardware at C5-6 with rearthrodesis and exploration of fusion mass. However, Petitioner did not testify he would like to undergo the surgery recommended by Dr. Singh.

The last surgical recommendation was made in June of 2019. Since that time, Petitioner returned to work and has been working albeit with a different employer and preforming less physically demanding work. Since Petitioner did not testify that he wants surgery it is a reasonable assumption he does not want surgery at this time. Based upon the record, an award

of prospective medical treatment would be based upon guess, speculation or conjecture. An employer's liability for benefits cannot be based on guess, speculation or conjecture. *Illinois Bell Telephone v. Industrial Comm'n,* 265 Ill.App.3d 681, 638 N.E.2d 207 (1994). Because Petitioner did not testify he want surgery the Arbitrator makes no findings regarding the reasonableness and necessity of the surgery recommended by Dr. Singh.

With respect to issue "L" whether Petitioner is entitled to TTD benefits, the Arbitrator finds as follows:

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, "*i.e.,* until the condition has stabilized." *Gallentine v. Industrial Comm'n,* 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MM.I. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n,* 2014 IL App (3d) 130028WC at 28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n,* 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, but also that he was unable to work. *Gallentine,* 201 Ill. App. 3d at 887; *see also City of Granite City v. Industrial Comm'n,* 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

Petitioner seek TTD benefits from April 17, 2018 through August 8, 2019 for 68 3/7 weeks. Respondent claims Petitioner was owned TTD benefits from April 17, 2018 through July 22, 2019 representing 66 weeks. Respondent paid Petitioner $41,035.92 in TTD benefits. As stated above, the Arbitrator found Petitioner sustained an accident to his cervical spine that arose out and in the course of his employment and the cervical condition was causally related to his accident. The Arbitrator finds that Petitioner's condition did not stabilize until August 8, 2019. As such, the Arbitrator further finds Petitioner proved by the preponderance of the evidence that he was entitled to TTD benefits from April 17, 2018 through August 8, 2019 less a credit for TTD benefits Respondent paid.

21IWCC0528

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC023758
Case Name	PAYNE, PASHA v. ILLINOIS DEPT OF
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0529
Number of Pages of Decision	17
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Michael D. Block
Respondent Attorney	Danielle Curtiss

DATE FILED: 10/22/2021

/s/Maria Portela, Commissioner
Signature

21IWCC0529

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PASHA PAYNE,

Petitioner,

vs. NO: 15 WC 23758

ILLINOIS DEPARTMENT OF HUMAN SERVICES,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms the Arbitrator's Decision with the exception that it modifies the permanent disability award from 15% loss of a person as a whole to 10% loss of a person as a whole.

The Commission modifies the Arbitrator's reasoning regarding issue (L) "Nature and Extent of the Injury" as it pertains to the fourth factor, the employee's future earning capacity. The Arbitrator found that Petitioner had to voluntarily resign from a better paying job with the State as a Child Welfare Specialist after three months because she was unable to safely perform her duties, which involved the transport of young children and placing them in/taking them out of car seats. The Arbitrator acknowledged this was not a loss of her permanent trade but resulted in a permanent loss of income and impairment of earning capacity due to her June 11, 2015 injuries. The Arbitrator also found that Dr. Coe opined that Petitioner's permanent, multifactorial chronic pain syndrome in her lumbar and cervical spine would prohibit her from ever working above a medium physical demand level. The Arbitrator further noted the Child Welfare job required bending and twisting under load, activities from which she was restricted from performing by Dr. Coe which would, in turn, affect her future earning capacity. As the Arbitrator

concluded, Petitioner's condition did not result in a loss of her current trade, but the Commission disagrees with the Arbitrator's finding that there was a permanent loss of income and impairment of earning capacity due to Petitioner's June 11, 2015 injuries.

Dr. Coe imposed future permanent restrictions of medium physical demand level with no lifting over 50 pounds on an occasional basis and the avoidance of repetitive bending or twisting with her back under load. The Petitioner testified she voluntarily resigned from the Child Welfare job because she experienced increased sharp, shooting low back pains while attempting to lift a 20-pound child and place him in a car seat and that she did not feel that she could safely continue in her new job. Petitioner testified that in this position she had difficulty lifting infant and toddlers in and out of child car seats but offered no testimony as to the frequency of the repetition involved in doing so. As there is no evidence to corroborate that the duties of the Child Welfare Specialist position exceeded Dr. Coe's restrictions and by her own admission, Petitioner voluntarily resigned from this job, the Commission assigns no weight to this factor.

The Commission further modifies the Arbitrator's analysis corresponding to factor (v) "Evidence of Disability Corroborated by the Treating Medical Records". The Arbitrator noted that Dr. Coe imposed future permanent restrictions of medium physical demand level with no lifting over 50 pounds, on an occasional basis, and the avoidance of repetitive bending or twisting with the back under load. (Pet. Ex. 17, p. 57, 36-39) Dr. Coe also opined that Petitioner's permanent and chronic pain syndrome will affect her ability to work in the future as her discomfort will cause her to frequently move around, move in her chair, and change positions (Id. at 36-37) and that, specifically, sitting – as is required for an office job – is one of the worst things for a person with multifactorial pain. (Id. at 33) Additionally, with regard to her lumbar pain, Respondent's Section 12 physician agreed Petitioner's symptoms were chronic in nature. (Id. at 14) The Commission emphasizes that Dr. Coe's restrictions pertain only to future employment but that Petitioner requires no specific restrictions to be able to return to work as a case worker at the Illinois Department of Human Services. Neither Drs. Hampton nor An imposed any restrictions in regard to Petitioner's ability to return to her pre-accident occupation as a case worker. The Commission assigns significant weight to this factor.

Accordingly, the Commission finds that Petitioner sustained a 10% loss of use of the person as a whole as a result of injuries sustained in the work accident on June 11, 2015.

Moreover, in *Young v. Ill. Workers' Comp.* Comm'n, 2014 IL App (4th) 130392WC ¶23 the Court reasoned that "when a claimant is injured due to an employment-related risk—a risk distinctly associated with his or her employment—it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public. A neutral risk has no employment-related characteristics. Where a risk is distinctly associated with the claimant's employment, it is not a neutral risk." Relying on *Young*, the Commission finds that no risk analysis was necessary and therefore strikes the portion of the Arbitrator's decision beginning with the fourth paragraph of page 9, starting with "Nonetheless, Petitioner's accident is also compensable under a neutral risk analysis…" through the second paragraph of page 10. The Commission also strikes the last paragraph on page 12 of the Arbitrator's decision.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $702.37 per week for a period of 70 3/7 weeks, from June 11, 2015 through October 16, 2016, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $623.13 per week for a period of 50 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 10% loss of the person as a whole.

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

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

October 22,2021

/s/ *Maria E. Portela*

MEP/dmm
O: 8/24/21
49

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

21IWCC0529

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PAYNE, PASHA Case# **15WC023758**
Employee/Petitioner

ILLINOIS DEPT OF HUMAN SERVICES
Employer/Respondent

On 4/22/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.39% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

6149 ASSISTANT ATTORNEY GENERAL
DANIELLE CURTISS
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

APR 22 2019

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

STATE OF ILLINOIS)
)
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

Pasha Payne
Employee/Petitioner

v.

Illinois Department of Human Services
Employer/Respondent

Case # 15 WC 23758

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 **Arbitrator Gregory Dollison**, Arbitrator of the Commission, in the city of **New Lenox, Illinois**, on **February 15, 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. [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 **June 11, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**54,784.60**; the average weekly wage was $**1,053.55**.

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 $**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 $IN FULL under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services of $8,257.43, as provided in Sections 8(a) and 8.2 of the Act.

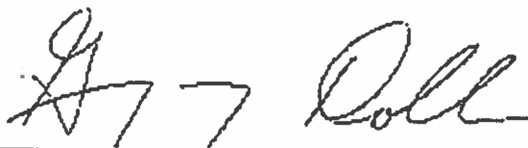
Respondent shall be given a credit IN FULL for medical benefits that have been paid, and Respondent shall hold Petitioner safe and harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $702.37/week for 70-3/7 weeks, commencing June 11, 2015 through October 16, 2016, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of 623.13/week for 75weeks, because the injuries sustained caused the 15% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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



Signature of Arbitrator

4/20/19
Date

APR 2 2 2019

Attachment to Arbitrator Decision
(15 WC 23758)

Statement of Facts:

Petitioner, Pasha Payne ("Petitioner"), testified that on her June 11, 2015, date of injury she was a 33-year-old female employed by the Illinois Department of Human Services as a Case Worker. She began working for the State as a Mental Health Technician around July 16, 2002 and thereafter as a Case Worker in May 2013, where she has continued to work but for a short period of time as a Childe Welfare Specialist.

As a Case Worker, Petitioner described working full-time, 40-hour work weeks at her IDHFS facility from 9:00 a.m. to 5:00 p.m., Monday through Friday. She was allowed a one-half hour lunch and two 15-minute breaks.

Petitioner described her position as an "office job." She testified that her primary job duties involved meeting with clients, counseling them, and assisting them apply for state, local, and federal benefit programs. She testified that on a typical day, she would arrive to work and then spend about 5 minutes checking her email and getting her work assignment from her manager. Next, she would call her first client, stand up from her work chair, walk approximately 30-40 feet to the front of the office to meet her client, walk them back to her cubicle, and finally sit down in her work chair. She had to perform these tasks because office policy was not to let clients roam around unattended.

Petitioner testified that her job was busy. On a normal day, she would meet with 15-20 clients, with each meeting lasting 10-15 minutes. During the client meeting, she described performing an intake process that included collecting paperwork from clients to scan, copy, and fax as needed. To perform this work, she had to get up from her work chair and walk to the copy machine – because she did not have one at her desk – and then walk back to her desk and sit back down in her work chair. Petitioner testified that during the interview, she would often get up and sit down several times to use the copy machine as needed. After meeting with a client, she would again stand up, walk the client to the front desk, walk back to her desk, and sit down in her work chair to complete additional data entry, email, paperwork, and any more necessary scanning, copying, or faxing. She would meet with clients in this manner her entire work day. She testified that, on average, she would sit down and stand up from her work chair 8-10 times per hour.

Petitioner testified about the layout of her workspace. First, she stated her cubicle was approximately 9 feet wide by 7 feet long and included a desk, filing cabinet, personal chair with 5 wheels, and another stationary chair, without wheels, for clients. Her cubicle was about 30-40 feet from the front desk. Second, she testified that her filing cabinet was about three feet away from her desk. However, due to the configuration of the cubicle, she could not "roll" over in her chair, but rather had to stand up and walk over. Third, Petitioner testified that she did not have a scanner, copier, or fax machine on her desk. Rather, she had to stand up and walk over to a communal print/scan/fax machine. Petitioner specifically testified that the carpet in and around her cubicle was "old and worn" and had many stains. It laid flat to the ground and did not have any padding or cushioning underneath.

Petitioner testified that two weeks prior to hearing she took the photographs in Petitioner's Exhibits 18 and 18a. She stated that they are true and accurate descriptions of the two types of chairs in the office on her June 11, 2015, date of accident. She explained that the chairs in Petitioner's Exhibit 18 were newer and, although it was not a written policy, everyone understood they were reserved for senior employees, which she was not. As such, she did not complain about her chair (Pet. Ex. 18a), which she testified was present since she began working at the facility in the fall of 2014. The chair was "light," and not sturdy. Specifically, she explained that her work chair rolled easily due to its light weight and the worn, thin carpet at her cubicle.

Although she admitted that the chair in Petitioner's Exhibit 18A was not the exact chair that she had on her date of accident, it did truly and accurately depict the exact type of 5-wheeled work chair at her work station on August 11, 2015.

Next, Petitioner testified about her specific mechanism of injury on the morning of June 11, 2015. According to Petitioner, it was busy that day with lots of clients present. Petitioner testified that prior to her injury, she had been working with a client to apply for food stamps. She was between clients and had to get up from her 5 wheeled work chair to make copies of verifications and was hurrying due to her work load. After rising from her chair, she walked to the copy machine, made copies, and returned to her work station with the papers in her dominant right hand. Petitioner testified that because her right hand was full of work papers, she did not reach for a chair's arm prior to sitting down, because she did not want to wrinkle the papers that she would later have to scan and fax. She did testify that, in the absence of holding work papers, it was her routine to grab the chair handle while sitting down, which was not the case here. Rather, as she approached her desk, Petitioner said she saw her chair and then turned to "back in" to the middle of the seat with her backside. However, her chair rolled away as she tried to sit down, causing her to miss the chair entirely and land directly onto her buttocks. Petitioner was unaware of any part of her body touching the chair prior to falling. However, on cross-examination, she admitted that it was possible that part of her buttocks could have touched the chair as she began the process of backing in to the wheeled chair.

After falling, Petitioner completed an accident report (Respondent Ex. 1). She explained that she accidentally wrote "company machine" when she meant "copy machine" but otherwise the report was accurate despite not having enough space to provide a more detailed account of her accident.

After completing the accident report, Petitioner left work early to seek treatment at Advocate Beverly Clinic (Pet. Ex. 1, 248-258; Pet. Ex. 2, 8-14). She complained of low back and neck pain, which she described as sharp, with frequent stooling. She underwent x-rays of her lumbar spine, cervical spine, sacrum, and coccyx before being referred to Christ Advocate Hospital via ambulance for a higher level of care status post falling.

Later that evening, Petitioner presented to Christ Advocate Hospital Emergency Room on referral of Dr. Hampton (Pet. Ex. 1, p. 217 -246). She complained of severe pain located at her right-sided lateral neck pain rated 4/10, tailbone pain, and low back pain after "she missed the chair" at work, landing on her coccyx and lower back (*Id.* at 219). She reported no prior back problems (*Id.* at 220). On exam, the ER physician noted right-sided lateral tenderness and swelling in addition to sacral midline tenderness (Id. at 220). After undergoing a lumbar spine CT scan that was read to show minor degenerative disc disease (Id. at 262), she was prescribed Hydrocodone and told to follow-up with Dr. Hampton within 24 hours.

On June 12, 2015, Petitioner presented for a follow-up with Dr. Hampton, who noted "[s]he fell on the floor yesterday when she missed the chair when she went to sit down at work. She has never had back pain before…" (Pet. Ex. 2, p. 15) Dr. Hampton read the June 11, 2015, lumbar spine CT scan to show a mild disc bulging at L3-4, L4-5, and L5-S1. After performing a physical examination and reviewing Petitioner's diagnostic imaging, his diagnosis was neck pain and bulging lumbar disc. (Id. at 18) She was given prescriptions for pain medication and muscle relaxers and taken off work.

On July 20, 2015, Petitioner began physical therapy at PhysioTherapy Associates on the referral of Dr. Hampton. (Pet. Ex. 4) Her initial complaints were of neck and low back pain rated 8/10 after a fall at work on June 11, 2015. Her mechanism of injury was that "… she was going to sit into a chair on wheels which rolled out from underneath her…" causing her to fall onto her buttock and then back into a wall. (Id. at 16,19)

On September 5, 2015, Petitioner underwent a lumbar spine MRI ordered by Dr. Hampton. (Pet. Ex. 3) The radiologist indicated that at T11/12 there was very minimal asymmetric anterior disc height loss

accompanied by very minimal focal angular kyphosis. Also at that level there was very minimal circumferential disc-osteophyte complex, asymmetric anterior producing very mild effacement of the anterior subarachnoid space. At L5-S1 there was physiologic disc morphology/borderline pathologic disc protrusion producing very minimal effacement of the anterior subarachnoid space and both neural foramen. (Id.)

On October 5, 2015, Petitioner was discharged from PhysioTherapy Associates after she underwent approximately six physical therapy sessions. Her prognosis was fair and she was given a HEP. Of note, she had limited results due to significant pain levels. (Pet. Ex. 4, p. 44-45)

Petitioner remained under the care of Dr. Hampton. On March 16, 2016, Dr. Hampton referred Petitioner to pain management On June 21, 2016, Petitioner began treatment with Dr. Udit Patel at Pain & Spine Institute (Pet. Ex. 6, 6a). Dr. Patel obtained a history of Petitioner's work accident and prior treatment, noting unrelieved symptoms to date. On exam, Dr. Patel noted cervical myofascial and facet joint tenderness and lumbar myofascial tenderness without focal neurological abnormalities before diagnosing her with neck and low back pain and prescribing physical therapy. (Pet. Ex. 6, p. 21)

On June 28, 2016, Petitioner began physical therapy at ATI. (Pet. Ex. 7, p. 53-55) Petitioner complained of increased low back and cervical pain with sitting during 8 hour work shift, twisting her lumbar spine while seated at work, looking behind while driving, stair negotiation, and sleeping (Id.) while affecting her ability to perform activities of daily living after a June 2015 work injury where she went to sit down in a wheeled chair that rolled out from under her, causing her to fall on her bottom. (Id.)

On July 28, 2018, Petitioner was discharged from ATI after 11 visits, noting a 65% improvement of symptoms. (Id. at p.15) Petitioner testified that this treatment helped alleviate her symptoms, although the improvement was only noticed after some time.

During her treatment at ATI, Petitioner remained under the care of Dr. Patel, who prescribed and performed a lumbar trigger point injection on August 3, 2016. (Pet. Ex. 6, p. 6) She noted temporary improvement after the injection and continued to treat with Dr. Patel until August 26, 2016, at which time he recommended additional trigger point injections for Petitioner's diagnosed neck pain, lower back pain, and myofascial pain syndrome.

Dr. Hampton continued to treat Petitioner for her low back and neck injuries from her date of accident until October 5, 2016, when he allowed her to return to work full duty as of October 17, 2016. (Pet. Ex. 2a, p. 17)

On May 9, 2017, Petitioner underwent a Section 12 Examination, at the request of her attorney, with Dr. Jeffrey Coe, a Board Certified specialist in Occupational Medicine. Dr. Coe is also an adjunct professor at the University of Illinois Medical Center who most recently has been teaching about occupational injuries to the lower back, including causation, diagnosis, treatment, rehabilitation, accident prevention and avoidance. (Pet. Ex. 17, p. 8-9) The Arbitrator adopts Dr. Coe's medical record chronology and review at pages two through four of his report. (Pet. Ex. 8; *see also* Pet. Ex. 17, p. 30-34) Dr. Coe testified that part of his practice includes evaluating work stations where he has seen a variety or rolling chairs, and also performing risk assessment of workplace hazards. (Id. at 42, 21)

Dr. Coe testified that Petitioner did not have any prior medical history of pain in her neck, mid, or low back which was consistent with the medical records he reviewed. (Pet. Ex. 17, p. 12-13) At the time of his examination, his diagnosis was both acute and chronic multifactorial cervical and lumbar pain, which was described as a chronic pain syndrome. (Id. at 13-14) He explained that Petitioner's pain was multifactorial

because she had pain from multiple sources, including intervertebral discs, cervical and lumbar facet joints, and myofascial tissue pain. (Id. at 14)

Dr. Coe further testified that Petitioner's mechanism of injury occurred when attempting to sit down into a chair at work, it rolled away from her causing her to fall down to the ground below, missing the chair, and falling onto her buttocks. (Id. at 19) After noting that Petitioner was 5'0" tall and weighed 200 pounds on her date of accident, Dr. Coe opined that biomechanically, Petitioner sustained a contusion after falling unbalanced in an awkward fashion onto her buttocks with immediate onset of low, mid, and upper back pain and tailbone pain. (Id. at 20 Dr. Coe noted that Petitioner's fall was, medically speaking, worse due to the fact that she was vertical at the time of the unexpected impact because such an impact bypasses the standard shock absorption of the spine and allows a wave of force to radiate up towards the head. (Id.)

Dr. Coe opined that, after reviewing Petitioner's medical history and performing a physical evaluation, it was his opinion that Petitioner's diagnosis was causally related to her June 11, 2015, mechanism of injury. (Pet. Ex. 8, p. 8) Dr. Coe testified that Petitioner's mechanism of injury would be a competent cause to produce or aggravate her disc protrusion at L5-S1 (Pet. Ex. 17, p. 29), all prior medical treatment was reasonable, necessary, and causally related to her work accident (Id. at 40), and that Petitioner's condition was permanent and that her chronic pain syndrome will affect her ability to work in the future as her discomfort causes her to frequently move around, move in her chair, and change positions. (Pet Ex. 17, p. 36-37) Specifically, Dr. Coe opined that sitting – as is required for an office job – is one of the worst things for a person with multifactorial pain. (Id. at 33) Although he opined that Petitioner would not need any specific restrictions to return to work as a Case Worker at IDHFS, he testified that due to her work accident, Petitioner's future employment would be limited to the medium physical demand level, with permanent restrictions of no lifting over 50 pounds, on an occasional basis, and the avoidance of repetitive bending or twisting with her back under load. (Id. at 57, 36-39)

Dr. Coe testified that Petitioner was temporarily and totally disabled from work between June 11, 2015, and October 16, 2016 (Id. at 34-35), her MMI date was 10/16/16 (Id. at 35), and that it would be reasonable for her to seek future medical treatment for her chronic pain syndrome with a pain management specialist. (Id. at 67)

Dr. Coe was posed with several hypotheticals at his deposition. When posed with a hypothetical where an employee gets up from a chair 8-10 timer per hour during an 8-hour work shift, and works a 37-40 hour work week, 5 days a week, Dr. Coe opined that quantitatively the employee would be at a greater risk than the general public. (Id. 22-23) On cross examination, he further opined that although doctors recommend employees in office settings to get up and move around often, they often do not follow this advice and that it is unusual for a person to get up and sit down 8-10 times per hour. (Id. at 44)

When posed with a hypothetical where qualitatively, under the same parameters set forth above, if working with a wheeled chair under a cement floor with worn carpeting would impose a greater risk for hazard than working with a chair without wheels (Id. at 23-24), Dr. Coe opined that the employee would be at a greater risk than the general public. In Dr. Coe's medical opinion, the number of wheels on a chair is not an important distinction because a wheeled chair is inherently sliding and unstable. (Id. at 64-66) He went further and testified that anyone using a wheeled chair would be at some increased risk, be it at home or work. (Id. at 24) However, Dr. Coe testified that Petitioner's described work environment of frequent sitting and standing in her chair is different than what most individuals do at home (Id. at 25); moreover, someone at home would be unlikely to do that over the course of an 8 hour non-workday (Id.) and thus that employee would be at an increased risk. (Id.)

Finally, Dr. Coe was asked a hypothetical where if, once again under the same circumstances outlined above, an employee would be at a greater risk of harm as compared to the general population where she was

coming back from the copier, her hand was full of paper that she did not want to wrinkle, and therefore and in an attempt to sit down and not wrinkle the papers, did not grab the arms of the chair. (Id. 25-26). He opined that, yes, that employee would be at a greater risk because not using the arms removes a point of stability while sitting down. (Id. at 26)

At Dr. Coe's deposition, he explicitly noted that while he sat in a wheeled chair, every other chair in the room was a non-wheeled, stationary chair, which was a conscious decision to decrease the risk of injury for guests. (Id. at 78)

At the bequest of Respondent, Petitioner underwent a Section 12 examination with Dr. Howard An at Midwest Orthopedics at Rush on September 11, 2018. (Respondent's Ex. 2) Dr. An's examination was limited to Petitioner's lumbar spine. However, he did note that Petitioner complained of immediate onset low back and neck pain on her June 11, 2015, date of injury. With regard to Petitioner's lumbar spine, Dr. An noted that Petitioner did not have any prior low back complaints prior to her date of injury. Additionally, Dr. An opined that she sustained a low back injury on June 11, 2015, while attempting to sit in a chair at work. Dr. An noted that he did not find any malingering or exaggeration during the history or examination. Dr. An diagnosed chronic lumbar strain or discogenic low back pain without radiculopathy. He opined that her symptoms at the time of his examination were causally related to her date of injury.

At the time of hearing, Petitioner testified that she continues to work for Respondent as a Case Worker and that her job duties are unchanged. Currently, Petitioner is using a new chair at work that does not roll as easily and is more stable than her previous chair. (*See* Pet. Ex. 18; *cf.* Pet Ex. 18a)

Petitioner testified that she did not have any low back or neck issues prior to her June 21, 2011, date of accident, nor has she had any subsequent accidents to those body parts. Petitioner testified that her current low back pain was 5/10 and that her symptoms included sharp and shooting pain, tenderness, and stiffness. She further testified that these symptoms are aggravated with prolonged sitting, sitting up and down from a chair (especially when done quickly), and heavy lifting. To relieve her symptoms, Petitioner uses a heating pad, rests by lying down, and takes Ibuprofen 800 mg as prescribed by Dr. Hampton who she last saw in January 2018 and performs her Home Exercise Program she learned at physical therapy.

Petitioner also testified about her current neck symptoms. These symptoms were described as sharp, predominately on the right side of her neck, and traveling down to the middle of her neck. As a result, she testified she has difficulty moving her neck.

Petitioner testified that prior to her work accident, she considered herself a strong person. At trial, however, she said she could not drive for long periods of time, or lift anything over 10 pounds often due to her persistent low back and neck pain and symptoms. Petitioner also stated that, in general, she feels limited in the amount of activities she can perform due to her work injury. She testified that sitting in a plastic molded chair without standing up was causing throbbing low back pain.

Petitioner testified that after her return to work, in approximately January 2018, she received a promotion and began working as Child Welfare Specialist for the State of Illinois Human Services, which included a raise in salary. She testified that her job duties included driving to and from family homes to perform case management duties, driving to and from court to attend hearings, and transporting children. Petitioner testified that she only held this new position for 3 months before voluntarily returning to her old job as a Case Worker because she had difficulty lifting infants and toddlers into and out of child car seats. Specifically, Petitioner recounted an incident where she experienced increased sharp, shooting low back pain while attempting to lift a 20-pound child and place him into a car seat causing the child to fall to one side of the car seat. Petitioner testified that as a result, she did not feel that she could safely continue in her new job.

Petitioner testified that she was off work for approximately 6 months where she did not receive any pay or TTD benefits. Thereafter, she began short term, followed by long term disability and received 50% of her salary, plus benefits.

Petitioner has outstanding medical bills related to her work accident from Advocate Christ Hospital in the amount of $250.00 (Pet. Ex. 10), Midwest Diagnostic Pathology in the amount of $27.00 (Pet. Ex. 11), Pain & Spine Institute in the amount of $1,575.00 (Pet. Ex. 14), and ATI Physical Therapy in the amount of $6,405.43 (Pet Ex. 15). She paid for some of her medical care and treatment with her HMO insurance.

Petitioner's job description (Respondent's Exhibit 4) corroborates her testimony regarding her specific job duties. Specifically, it states "[r]equires ability to operate commonly used ... office equipment including copier, fax machine and personal computer." (Id. at 1). Moreover, it states that a Case Worker must verify data from customers (Id. at 2), prepare and submit memoranda and documentation (Id.), prepare/maintain current case file documentation including case records with all verifications (Id. at 3), and meet with customers to perform various tasks and counseling. (Id. 2-3)

In Support of the Arbitrator's Decision regarding "C" (Accident Arising out of it and the course of the employment), the Arbitrator makes the following findings and conclusions:

Respondent denied benefits in this claim arguing that Petitioner was not exposed to a greater risk than the general public. However, the Arbitrator finds Petitioner's injuries arose out of a peculiar risk while performing her duties as a Case Worker for the Illinois Department of Humans Services, but that if a neutral risk analysis was performed, she was quantitatively and qualitatively exposed to a greater risk than the general public.

The rule is that injuries resulting from a risk distinctly associated with employment, i.e., an employment-related risk, are compensable under the Act. 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." *Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill. 2d 52, 58 (1989).* "A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." *Id.* When a claimant is injured due to an employment-related risk, it is not necessary to perform a neutral risk analysis. *Young v. Illinois Workers' Compensation Comm'n, 2014 Ill. App. (4th) 130392WC, ¶23.*

The Arbitrator finds instructive the Commission's decision in *Luloh v. Federal Express, 17 I.W.C.C. 04583 (2018),* and the Appellate Court's decision in *Accolade v. I.W.C.C., 2013 IL App (3d) 120588WC, ¶3.* In *Luloh,* the Commission addressed whether a delivery person's knee injury was compensable where she was not carrying anything while returning to her truck, was not in a hurry, and there was no defect to the ground. In reversing the Arbitrator and unanimously finding that a compensable work accident occurred, the Commission noted that Petitioner was performing acts essential to her employment at the time of her injury because a delivery person must bend, rise, and turn as necessary. And even though they are acts performed by the public, they are essential to a delivery persons job and that conduct was reasonably anticipated by her employer.

Similar to the Petitioner in *Luloh,* Petitioner here was performing a task essential to her job at the time of her injury (getting up and down 8-10 per hour, for 8 hours per day) that included acts also performed by the general public. And just like in *Luloh,* it is undisputed that Petitioner was performing these tasks as an essential part of her employment, that is, processing as many client's paperwork for government benefits as possible

throughout the day. The facts surrounding Petitioner's employment duties and work station are corroborated by the unrebutted testimony of Petitioner, and her job description. (Resp. Ex. 4)

Here, Petitioner's unrebutted testimony is that she worked in a busy office where she hurried to serve as many clients as possible during an 8 hour work day. She had to guide 15-20 clients back and forth to her desk, which would entail sitting 30-40 times a day beyond that of someone doing only clerical work, without regard to her additional frequent trips to and from the copy/fax machine. An essential duty of her job was to copy verification forms from clients, and make associated faxes, scans, and copies necessary to apply for state, local, and federal benefits. Because she escorted clients to and from her desk, did not have a copy and/or fax machine at her desk, and had to stand up to perform filing, Petitioner had to get up from and sit down a minimum of 8-10 times per hour from the 5 wheeled chair provided to her by Respondent. Moreover, the evidence clearly established that on Petitioner's June 11, 2015, date of accident, she was injured after returning from the copy machine with work papers in her dominant right hand when her 5 wheeled work chair rolled away from her while attempting to sit down. While admitting on cross-examination she could have placed the papers on her desk first, she was in a hurry to serve her employer. She also did not want to wrinkle the freshly copied papers that she would have to later fax and/or scan, so she also went to sit down without grabbing the arms of the chair.

In *Accolade,* the Petitioner worked as a caregiver and injured her right shoulder while reaching to pick up a soap dish. *2013 IL App (3d) 120588WC, ¶3.* The Appellate Court affirmed the Commission's finding that Petitioner's injury arose out of and in the course of her duties of a caregiver because the act of reaching for the dish was taken in attempting to ensure the safety of a resident in the assisted living facility, which was an activity she might reasonably be expected to perform incident to her assigned duties *(Id. at ¶18).* Of note, the Court specifically refused to perform a neutral risk analysis.

Just like in *Accolade,* the injury in the instant case – attempting to sit down after making copies to process a client's paperwork – was an activity in furtherance of Petitioner's job duties that Respondent reasonably expected her to perform, especially where she is holding copies which for all material purposes precluded her from grabbing the arms of the chair. In short, she was performing her duties of employment, as opposed to doing something incidental to employment. Respondent set Petitioner's work duties, controlled the setup of her work station, and, of note, provided her with a copy machine and/or fax machine away from her desk necessitating her to get up and down, out of and into her chair quite often to process benefits for clients.

Nonetheless, Petitioner's accident is also compensable under a neutral risk analysis. "Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public." *Springfield Urban League v. Illinois Workers' Compensation Comm'n,* 2013 IL App (4th) 120219WC, ¶ 27. The increased risk may be either qualitative (*i.e.,* when some aspect of the employment contributes to the risk) or quantitative (such as when the employee is exposed to the risk more frequently than members of the general public by virtue of his employment). *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n,* 407 Ill. App. 3d 1010, 1014 (2011).

The Appellate Court's decision in *Adcock v. Illinois Workers' Comp. Comm'n,* 2015 IL App (2d) 130884WC, is directly on point. There, the Appellate Court reversed the Commission and awarded benefits to a welder who injured his knee turning in a chair to perform a welding task. The Court found that the Petitioner's job required constant movement in a chair, including swiveling, at a rate more frequently than members of the general public (Id. at ¶34). His job required him to turn in a chair more frequently than members of the general public while under time constraints, which increased the risk of injury both quantitatively and qualitatively (Id.). The facts are essentially the same as in the case at bar. Two justices concurred in the unanimous decision but were of the opinion the claim was compensable without a neutral risk analysis under those facts.

The Appellate Court's decision in *Noonan v. Ill. Workers' Comp. Com'n*, while denying benefits, offers clarity as to why the instant case is compensable. 2016 IL App (1st) 152300WC. In *Noonan*, the Court affirmed the Commission's decision to deny benefits to a man working as a "clerk" at a trucking company where his job duties included answering phones and completing paperwork, injured his right arm when the wheeled chair he was sitting in tipped over while he reached for a pen (Id. at ¶4-5). In affirming the Commission's decision to deny benefits, the Appellate Court specifically noted that no evidence was presented as to the defective condition of the employer's premises, nor was there any evidence to contradict that claimant had been sitting in an ordinary chair on an ordinary surface, who was injured after falling from a rolling chair after he reached for a pen to fill out a form (Id. at ¶29). Unlike the instant case, the Court held that no work-related task contributed to his risk of falling (Id. at ¶30). On its face, the instant case is clearly distinguishable. Here, there is clear evidence that Petitioner's work duties contributed to her risk of injury. However, in *Noonan*, there was no evidence that the wheeled chair itself was an increased risk, whereas in this case Dr. Coe's testimony as someone who conducts risk assessments for employers, discussed *infra*, was that a wheeled chair is inherently sliding and unstable, causing anyone who used a wheeled chair to be at some increased risk of injury. (Pet. Ex., p. 64-66, 24) To wit, Dr. Coe testified that Petitioner's described frequent sitting and standing in her chair to perform her duties as a Case Manager, and which was not disputed at trial, is different than what most individuals do at home, something that one would be unlikely to do that over the course of an 8 hour non-workday, and thus that an employee would be at an increased risk. (Id. at 25)

Most importantly, and just like the Petitioner in *Adcock*, Petitioner in the instant case was required to frequently get up from and sit down in a wheeled chair provided by her employer under time constraints, the specifics of which are discussed supra and supported by the unrebutted testimony of both Petitioner and Dr. Coe. The Arbitrator notes that Petitioner provided consistent histories of her work duties and mechanism of injury to her employer and medical providers. The Arbitrator finds persuasive the unrebutted testimony of Dr. Coe who opined Petitioner's reported getting up and down out of a wheeled chair 8-10 times an hour over an 8 hour work day, 5 days a week, placed Petitioner both at a quantitative and qualitative risk of injury as opposed to the general public, and even more so when she had work papers in her hand. This is clearly within Dr. Coe's expertise due to background performing risk assessments of work stations with wheeled chairs for employers. The Arbitrator has also considered the job description put into evidence by Respondent, which corroborates Petitioner's testimony. *Noonan* entailed a factual situation where the claimant was not performing actual work duties when he was injured, and there was no evidence of increased risk, quantitatively or quantitatively. In the case at bar, the contrary is true, as in *Adcock*. Accordingly, the Arbitrator finds Petitioner sustained an accident arising out of and in the course of her employment.

In Support of the Arbitrator's Findings regarding "F" (Causal Connection) the Arbitrator makes the following findings and conclusions:

See the Arbitrator's findings and conclusions regarding "C" accident arising out of *supra*. Both the chain of events and the medical testimony strongly support causal connection. Moreover, the undisputed evidence in this case supports the Arbitrator's finding that Petitioner's permanent low back and neck conditions are causally related to her June 11, 2015, work accident. Causal connection is supported by Petitioner's treating physicians, Dr. Coe (Pet. Ex. 8, p. 8), and even Respondent's Section 12 physician. (See Resp. Ex. 2, p. 2)

In Support of the Arbitrator's Findings regarding (k) (Temporary Total Disability/Maintenance), the Arbitrator makes the following findings and conclusions:

The Arbitrator finds that the undisputed medical evidence in this case establishes that Petitioner was unable to work from June 11, 2015, through October 16, 2016, due to injuries she sustained at work on June 11, 2015. Dr. Hampton, Petitioner's original treating physician on her date of accident, ordered her off work until

October 17, 2016, when she was allowed to return to work full duty. Dr. Hampton's medical opinion was corroborated by Petitioner's Section 12 physician, Dr. Coe, who had the opportunity to review Petitioner's entire two-year course of medical treatment. Of note, Respondent does not dispute the period of TTD claimed only that they are not liable based on their position regarding accident.

In Support of the Arbitrator's Decision regarding "J" (Medical Treatment), the Arbitrator makes the following findings and conclusions:

Petitioner admitted bills into evidence and many of the bills were paid by group insurance. Dr. Coe testified that the bills were reasonable and necessary and causally related to the accident in question (Pet. Ex. 17, p. 40) and Respondent's Section 12 physician agreed that Petitioner's prior medical treatment was reasonable and causally related. (Resp. Ex. 2, p. 2) Respondent only objected to the bills at trial on the basis of liability.

Accordingly, medical bills are awarded in the total sum of $8,257.43, subject to the Fee Schedule. Respondent shall have a credit for any payments made by group insurance and shall hold Petitioner safe and harmless with respect to any such payments pursuant to Section 8 of the Act.

With respect to the Arbitrator Decision regarding (L) "Nature and Extent of the Injury" the Arbitrator makes the following findings and conclusions:

The Act sets forth in §8.1(b) the criteria for determining Permanent Partial Disability for injuries occurring after September 1, 2011.

With regard to the first factor, AMA impairment rating, the Arbitrator notes that no report was submitted into evidence and therefore gives no weight to this factor.

With regard to the second factor, Petitioner's occupation, the Arbitrator notes that Petitioner was employed as a Case Worker for the Illinois Department of Human Services at the time of the accident and returned to her pre-injury position without restrictions on October 17, 2016. The Arbitrator notes that Petitioner's job duties involve light physical demand consistent with office work as outlined herein. As a result, some weight is given to this factor.

With regard to the third factor, Petitioner's age at the time of injury, the Arbitrator notes that she was 33 years old which weighs strongly in favor of Petitioner.

With regard to the fourth factor, decreased earning capacity as a result of her injury, the unrebutted evidence shows that Petitioner had to voluntarily resign from a better paying job with the State as a Child Welfare Specialist after three months because she was unable to safely perform her job duties, which involved the transport of young children and placing them in/taking them out of car seats. Although this is not a loss of her current trade, the Arbitrator finds this was a permanent loss of income and impairment of earning capacity due to her June 11, 2015 injuries. Moreover, Dr. Coe opined that Petitioner's permanent, multifactorial chronic pain syndrome in her lumbar and cervical spine will prohibit her from ever working above a medium physical demand level. The Child Welfare job required bending and twisting under load which he restricted her from. This will affect her future earning capacity as outlined *supra* and at Pet. Ex. 17, 36-37. As a result, this factor weighs strongly in favor of Petitioner.

With regard to the fifth factor, evidence of disability corroborated by the treatment medical records, the Arbitrator notes that Dr. Coe imposed future permanent restrictions of medium physical demand level, with no lifting over 50 pounds, on an occasional basis, and the avoidance of repetitive bending or twisting with her back under load (Pet. Ex. 17, p. 57, 36-39). Also, Dr. Coe opined that Petitioner's permanent and chronic pain

syndrome will affect her ability to work in the future as her discomfort will cause her to frequently move around, move in her chair, and change positions (Id. at 36-37) and that, specifically, sitting – as is required for an office job – is one of the worst things for a person with multifactorial pain (Id. at 33). Her pain is from multiple sources, including intervertebral discs, cervical and lumbar facet joints and then myofascial or soft tissue pain, all of which are pain generators that often occur together to be described as multifactoral, chronic pain syndrome. (Id at 14) Additionally, with regard to her lumbar pain, Respondent's Section 12 physician agreed her symptoms were chronic in nature. (Resp. Ex. 2, p. 2) Accordingly, the Arbitrator awards 15% MAW in permanent partial disability as set forth herein.

In support of this award, the Arbitrator relies on *Ferguson v. Harrah's Casino* 12 I.W.C.C. 876. In that case, the Commission's unanimously affirmed the Arbitrator's award of 50% MAW for loss of trade where the Petitioner, a card dealer at a casino, suffered very similar injuries and was unable to return to her pre-injury job. As previously stated, the Petitioner in this case has returned to her pre-injury job without restrictions. Nonetheless, she has already suffered actual loss of a potential new trade (working as Child Welfare Specialist) and earning impairment. These facts, coupled with Dr. Coe's imposition of permanent restrictions, including avoiding bending and lifting under load, are strong considerations with an employee who was 33 years old on the date of her injury. This factor weighs greatly in favor of Petitioner.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC003413
Case Name	BROWN, LISA v. CONTINENTAL TIRE OF THE AMERICAS, LLC
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0530
Number of Pages of Decision	16
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Daniel Keefe
Respondent Attorney	Neil Giffhorn

DATE FILED: 10/22/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lisa Brown,

Petitioner,

vs. NO: 19 WC 003413

Continental Tire of the Americas, LLC,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 19, 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 $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.

October 22, 2021

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

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CMD/ma
045

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC003413
Case Name	BROWN, LISA v. CONTINENTAL TIRE OF THE AMERICAS, LLC
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Daniel Keefe
Respondent Attorney	Neil Giffhorn

DATE FILED: 5/19/2021

INTEREST RATE FOR THE WEEK OF MAY 18, 2021 0.03%

/s/ *Jeanne AuBuchon, 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)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION

PETITIONER PROPOSED DECISION
19(b)

Lisa Brown Case #19 WC 003413
Employee/Petitioner

Continental Tire of the Americas, 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 **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Collinsville**, on **April 27, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

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

K. ☒ 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 In the event that the Arbitrator conludes Petitioner is not entitled to prospective medical care, nature and extent of PPD

FINDINGS

On the date of accident, 6/22/18, 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* 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 52 weeks preceding the injury, Petitioner earned $41,600.00; the average weekly wage was **$800.00**.

On the date of accident, Petitioner was **52** 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 no credits for TTD, TPD, or Maintenance. Respondent shall be given a credit for $4,314.24 for other benefits, for a total credit of $4,314.24.

ORDER

Petitioner sustained a compensable accident on 6/22/18, and has not yet reached maximum medical improvement., as evidenced by the independent medical examination of Dr. David Volarich dated 10/1/19.

Respondent shall authorize and pay for any medical treatment recommended by Dr. David Volarich to include, without limitation, an MRI arthrogram of Petitioner's right shoulder, a cortisone injection for the right shoulder, additional physical therapy for the right shoulder, pain management, injections and additional physical therapy for the cervical spine, consultations with Dr. James Emanuel for the Petitioner's shoulder and an orthopedic surgeon for the Petitioner's cervical spine, and whatever other treatment is determined by these doctors to be reasonably

necessary to cure and relieve Petitioner from her current condition of ill-being, as provided in Section 8(a) and 8.2 of the Act.

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

The issue of nature and extent of injury is not ripe at this time.

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 — MAY 19, 2021

Signature of Arbitrator

PROCEDURAL HISTORY

This matter proceeded to trial on April 27, 2021, pursuant to Sections 19(b) and 8(a) of the Illinois Workers' Compensation Act (hereinafter "the Act"). The issues in dispute are: 1) the causal connection between the accident and the Petitioner's right shoulder, right wrist and cervical spine conditions and 2) entitlement to prospective medical care to the Petitioner's right shoulder, right wrist and cervical spine. The Respondent has agreed to pay medical bills submitted by the Petitioner for charges prior to May 14, 2019, pursuant to fee schedule or by agreement, making the issue of unpaid medical bills moot.

FINDINGS OF FACT

At the time of the accident, the Petitioner was 52 years old and employed by the Respondent as a tire builder. (T. 9-10) On June 22, 2018, the Petitioner fell over a tire that had fallen off the conveyor where she was working. (T. 13-14) Most of the force of the fall was on her right side. (T. 14) She heard her neck snap and suffered a rubber burn on her knee. (Id.) She believed she injured her right wrist, right shoulder, neck and right knee. (Id.) The Petitioner is right-handed. (T. 21)

On that day, the Petitioner went to the emergency room at Good Samaritan Hospital, where she reported posterior cervical pain radiating to her bilateral upper extremities, superficial abrasions to her patellar right knee, "wrist wrist" (believed to be right wrist) loss of range of motion and weak grip. (T. 15, PX2) A cervical X-ray showed that the Petitioner's cervical vertebral body heights and intervertebral disc heights were maintained. (PX2) Knee and wrist X-rays showed no evidence of fracture or dislocation. (Id.) The Petitioner was diagnosed with cervical and wrist sprain and a knee contusion. She was given a splint for her wrist, prescribed Flexeril and Toradol,

placed on light duty for four days and instructed to follow up with an orthopedic doctor if she did not improve. (Id.)

On September 4, 2018, the Petitioner saw Dr. Franklin Hayward, a neurosurgeon at Heartland Spine Institute, complaining of neck pain and right shoulder pain – specifically right-sided neck pain going up to her head, right lateral arm pain, anterior forearm pain and a stabbing sensation in the left medial forearm. (PX3) She also reported that all of the fingers of her right hand were numb. (Id.) Dr. Hayward's report stated that she had physical therapy, which was helping. (Id.) However, no physical therapy records were included in the exhibits submitted at Arbitration. From other exhibits submitted, it appears the physical therapy was conducted by Work Fit, the Respondent's in-house therapy provider.

Dr. Hayward surmised that the Petitioner's condition was the result of the work injury. (Id.) His assessment was cervical radiculopathy, which he wanted to rule out versus the possibility of a right shoulder issue. (Id.) He ordered a cervical MRI and X-rays and restrictions of avoiding using her right arm, climbing and crawling. (Id.)

The MRI performed by Cedar Court Imaging on September 19, 2018, revealed: broad-based posterior and right paracentral herniation of the C5-6 disc measuring 4 mm, causing mild narrowing of the central canal and neural foramina bilaterally; a diffuse bulge of the C6-7 disc measuring 3 mm, causing mild narrowing of the central and neural foramina bilaterally; mild diffuse bulges of the C2-3 and C3-4 discs measuring 2 mm, without any significant central canal or neural foraminal narrowing; and mild generalized facetal and uncovertebral arthropathy. (PX4) The cervical X-rays showed straightening of normal cervical lordosis. (Id.)

After examining the test results, Dr. Hayward referred the Petitioner to Dr. Keith Burchill, a physiatrist at Southern Illinois Healthcare, for evaluation and treatment. (Id.) Dr. Hayward also

ordered a nerve-conduction study of the right upper arm. (Id.) He continued the Petitioner's work restrictions. (Id.)

Dr. Burchill saw the Petitioner on October 17, 2018, for management of neck pain. (PX5) He noted in his records that the Petitioner completed five weeks of physical therapy four weeks prior, and that the Petitioner felt worse. (Id.) He diagnosed the Petitioner with osteoarthritis of the right shoulder due to rotator cuff injury, cervical radiculopathy and spondylosis of the cervical region without myelopathy or radiculopathy. (Id.) He listed the mechanism of injury as the work accident. (Id.) He recommended continuing physical and occupational therapy, trigger point injections, a right shoulder Kenalog injection and medial branch blocks at C4-5 and C5-6. (Id.)

The Petitioner had a follow-up visit with Dr. Hayward on November 13, 2018, and informed him that her neck pain was at least 50 percent better but that she was still experiencing pain at levels between two and seven out of ten that was aggravated by raising her right arm and turning her head to the right. (PX3) Dr. Hayward found no surgical indications and that the nerve study failed to demonstrate any radiculopathy. (Id.) He diagnosed the Petitioner with neck pain and opined that the Petitioner could be managed by a physiatrist and/or pain management. (Id.) He continued the prior restrictions pending her following up with a physiatrist or pain management physician. (Id.) He did not believe the Petitioner was at maximum medical improvement. (Id.)

The Petitioner returned to Dr. Burchill on January 16, 2019, with continued neck pain. (Id.) She had not yet followed Dr. Burchill's recommendations. (Id.) On that date, he made the same recommendations as he did on November 13, 2018, with the exception of continuing a home exercise program instead of physical therapy. (Id.) He continued Dr. Hayward's work restrictions. (Id.)

Dr. George Paletta, an orthopedic surgeon at The Orthopedic Center of St. Louis, performed a Section 12 evaluation of the Petitioner on April 8, 2019. (RX1) He examined the Petitioner and reviewed records from Good Samaritan Hospital, Dr. Hayward and Dr. Burchill, as well as MRI reports and the nerve conduction studies. (Id.) From Dr. Paletta's report, it appears that the Petitioner did undergo injections (possibly trigger point injections) with Dr. Siena Elisa Ona at Southern Illinois Healthcare. (Id.) Little is known about these injections because those records were not provided to Dr. Paletta nor submitted as evidence at Arbitration. The Petitioner did tell Dr. Paletta that the injections helped somewhat with the pain. (Id.) According to Dr. Paletta, the Petitioner also underwent an MRI scan of her shoulder on April 3, 2019, that appeared normal. (Id.) She had a cervical spine MRI on February 27, 2019, that demonstrated some multi-level spondylosis, particularly at C5-6 and C6-7. (Id.) The scan also showed some facet hypertrophy and some arthritis with mild foraminal stenosis. (Id.) Dr. Paletta noted no cord compression nor evidence of any localizing disc herniations. (Id.) Dr. Paletta also reported that the Petitioner stated that she had recent chiropractic treatment (again, no records produced) that also helped relieved some of her pain after cervical manipulation. (Id.)

Dr. Paletta diagnosed cervicalgia with multi-level cervical spondylosis and myofascial pain wit trapezial and periscapular trigger points. (Id.) He found no evidence of primary shoulder pathology and stated that the Petitioner required no further treatment nor work restrictions for her shoulder. (Id.) Considering that Dr. Paletta found no primary shoulder pathology, he did not make any findings as to causation of the Petitioner's symptoms. (Id.) He deferred to Dr. Burchill and Dr. Ona regarding treatment for her cervicalgia and myofascial pain. (Id.)

On May 14, 2019, the Petitioner underwent another Section 12 examination with Dr. Russell Cantrell, a physiatrist at Spine Orthopedics and Rehabilitation, who reviewed the same

records as Dr. Paletta and examined the Petitioner. (RX2) Dr. Cantrell also had an occupational therapy note dated February 25, 2019, that showed the Petitioner reported episodes of temporary relief with recent injections and chiropractic care. (Id.) He also had a record from Dr. Ona from March 19, 2019, in what was described as a follow-up visit. (Id.) The note stated that the Petitioner was seeing a chiropractor three times a week and had pain in her shoulder and trapezius. (Id.) The note also stated that trigger point injections and a right shoulder Kenalog injection were performed and that there had been no benefit from a C7-T-1 interlaminar epidural injection. (Id.) Dr. Cantrell reported that at that time, Dr. Ona believed the Petitioner would benefit from C4-5 and C5-6 medial branch blocks. (Id.)

Dr. Cantrell characterized the Petitioner's complaints as subjective and not consistent with a cervical radiculopathy. (Id.) He did not see any acute bony or discogenic pathology that he could attribute to the work accident, adding that the radiographic findings were degenerative in nature and consistent with her age. (Id.) He opined that she did not require any additional procedural pain management, that she reached maximum medical improvement and did not need work restrictions. (Id.) Like Dr. Paletta, Dr. Cantrell did not weigh in on causation of the Petitioner's complaints, seeing that he found no pathology. (Id.)

The Petitioner's counsel sent the Petitioner for an independent medical evaluation with Dr. David Volarich, a radiologist and occupational medicine physician. (PX1) He reviewed records from Good Samaritan Hospital, Dr. Hayward, Dr. Burchill, Dr. Paletta and Dr. Cantrell – along with the X-rays, MRIs and nerve-conduction studies. (Id.) He evaluated the Petitioner on October 1, 2019, and noted that she continued to have persistent posterior cervical spine pain with associated right upper extremity paresthesias and associated right upper extremity paresis. (Id.) She denied radiating symptoms into her right upper extremity but complained of occasional

headaches that were occipital and that she had increased neck discomfort with lifting. (Id.) Her neck discomfort was alleviated with ice or using a TENS unit. (Id.) She also complained of occasional right wrist discomfort described as stabbing and intermittent and intermittent paresthesias in her fingers. (Id.) Regarding her right shoulder, the Petitioner complained of discomfort at her acromioclavicular joint with associated tenderness. (Id.)

Dr. Volarich's exam revealed restricted cervical motion with flexion, extension and rotation, with the largest percentage of range of motion loss with right rotation. (Id.) Palpation elicited discomfort in the right trapezius and over the right shoulder blade medially. (Id.) Trigger points were found in those regions, and Spurling's test was equivocal to the right. (Id.) Dr. Volarich found a 20 percent loss of motion in the right shoulder as well as moderately positive impingement signs and crepitus and popping with circumduction. (Id.) O'Brien's test caused shoulder pain and some grinding, and apprehension and Adson's testing were negative. (Id.) Grip strength was mainly equal in the right and left hands, but pinch strength was less in the right than the left. (Id.)

Dr. Volarich diagnosed the Petitioner with: internal derangement of the right shoulder, consistent with impingement and labral injury; cervical resolved right arm radiculopathy and paresthesias secondary to disc bulging at C5-6 and C6-7; and intermittent mild right wrist pain. (Id.) He opined that the work accident was the competent producing factor causing the Petitioner's right shoulder derangement, cervical strain, and cervical disc abnormalities, including aggravation of spondylosis at C5-6 and C6-7. (Id.) He believed the Petitioner had not achieved maximum medical improvement. (Id.) He recommended that the Petitioner undergo an MRI/arthrogram of her right shoulder to exclude a labral tear, a cortisone injection to the shoulder and more physical therapy. (Id.) Regarding the cervical spine, he recommended additional physical therapy and pain

management, including epidural steroid injections, foraminal nerve root blocks and trigger point injections. (Id.) He also recommended the Petitioner be evaluated by Dr. James Emanuel, an orthopedic surgeon at Parkcrest Orthopedics for her shoulder. (Id.)

The Petitioner testified that the injections and physical therapy she underwent previously did not provide any lasting relief. (T. 18) She said that although her knee complaints had resolved, she still had issues with her neck, right shoulder and wrist. (T. 19) Regarding her neck, the Petitioner said she experiences constant pain and can't turn her neck. (T. 20) Regarding her right shoulder, she said she has problems picking up hay on her farm and cleaning and trimming her horses' feet – causing her to modify how she does these chores to prevent further pain. (T. 21-22) She is unable to reach overhead or lift away from her body with her right arm. (T. 22) Her hobbies of making concrete statues, horseback riding and kayaking have been affected by her injuries. (T. 22-24) The Petitioner wants further diagnostics and treatment to relieve her symptoms. (T. 23-25)

CONCLUSIONS OF LAW

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

<u>Issue (F)</u>: Is Petitioner's current condition of ill-being, specifically injuries to her cervical spine, right shoulder and right wrist, experienced after June 22, 2018, causally related to the accident?

An accident need not be the sole or primary cause as long as employment is a cause of a claimant's condition. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 205 (2003). An employer takes its employees as it finds them. *St. Elizabeth's Hospital v. Illinois Workers' Compensation Comm'n,* 371 ILL. App. 3d 882, 888 (2007). A claimant with a preexisting condition may recover

where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm'n,* 92 Ill. 2d 30, 36 (1982).

In this case, the primary issue is whether the Petitioner has injuries in the first place. Three out of five doctors who examined her (Dr. Hayward, Dr. Burchill and Dr. Volarich) believed she does. These doctors appeared to spend much time diagnosing the Petitioner, and Drs. Hayward and Burchill actively treated her. In addition, Dr. Volarich's examination and report were thorough, and his findings appeared well-grounded in the tests he performed. Dr. Cantrell did agree with the radiologist who read the cervical MRI and found that the Petitioner had bulging cervical discs.

The three doctors who found pathology in the Petitioner's cervical spine and right shoulder also found that these conditions were caused by the work accident. Because the other two doctors found no pathology, they did not make findings as to causation. Although the doctors opined that the Petitioner had degenerative conditions, there was no evidence that these caused her any problems prior to the accident on June 22, 2018. Further, there was no evidence of any intervening incidents to which her current conditions could be attributed.

Therefore, the Arbitrator finds that the Petitioner's current right shoulder, right wrist and cervical conditions after June 22, 2018, are causally related to the accident of June 16, 2019.

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).

There was no challenge to the reasonableness and necessity of the medical treatment the Petitioner received thus far. That, along with the causation findings above, set the stage for a determination of whether prospective treatment is in order.

Qualified doctors reached differing conclusions on this point. However, Dr. Volarich appeared to spend considerable time and effort to find solutions to the Petitioner's pain. The Petitioner has attempted some forms of conservative treatment that helped alleviate her symptoms temporarily. However, short-lived relief is not the goal of the Act. The Petitioner's testimony was credible and consistent. She has tried to work within her physical limitations and has tried to change her methods of daily living but is still suffering pain. Dr. Volarich's recommendations of an MRI/arthrogram of the right shoulder to exclude a labral tear, along with potential injections and additional physical therapy for both the shoulder and cervical spine are a reasonable course of treatment for the Petitioner's ongoing issues.

The Arbitrator finds that the Petitioner is entitled to prospective medical care, specifically further diagnostic testing, injections and physical therapy as recommended by Dr. Volarich. The Respondent shall authorize and pay for such.

Issue (O): Other: In the event that the Arbitrator concludes Petitioner is not entitled to prospective medical care, nature and extent of PPD.

In light of the findings above, an analysis of the nature and extent of the Petitioner's injuries in premature.

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	14WC011997
Case Name	BANNISTER, CONNIE L v. DORS//IL DEPT OF HUMAN SERVICES
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0531
Number of Pages of Decision	14
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Jay Johnson
Respondent Attorney	Cori Stewart

DATE FILED: 10/22/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CONNIE BANNISTER,

Petitioner,

vs. NO: 14 WC 11997

DORS/ILLINOIS DEPARTMENT
OF HUMAN SERVICES,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection and temporary total disability (TTD), and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of 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 August 5, 2020 is hereby affirmed and adopted.

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

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

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

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

October 22,2021

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

CAH/tdm
O: 10/21/21
052

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

/s/*Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0531
NOTICE OF 19(b) ARBITRATOR DECISION

BANNISTER, CONNIE Case# **14WC011997**
Employee/Petitioner

DORS/IL DEPT OF HUMAN SERVICES
Employer/Respondent

On 8/5/2020, 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 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2333 WOODRUFF JOHNSON & EVANS
JAY JOHNSON
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

6147 ASSISTANT ATTORNEY GENERAL
CORI STEWART
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SWANSEA, IL 62226

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

1745 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
801 S 7TH ST
SPRINGFIELD, IL 62794

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

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

AUG - 5 2020

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Connie Bannister
Employee/Petitioner

Case # **14** WC **11997**

v.

Consolidated cases: ______

DORS/Illinois Department of Human 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, Illinois**, on **June 5, 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, **July 11, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$17,584.32**; the average weekly wage was $**338.16**.

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 **$19,388.66** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of **$19,388.66**.

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 **$225.44**/week for **411-0/7** weeks, commencing **7/21/12 through 6/5/20**, as provided in Section 8(b) of the Act.

Respondent shall pay the reasonable and necessary medical services as provided in §8(a) and §8.2 of the Act. The Arbitrator orders Respondent to pay $36,245.66 due and owing Good Samaritan Hospital; $13,616.20 due and owing Good Samaritan Physician Services; $171.00 due and owing Tri-State Neurosurgical/Dr. Sneed; $203.00 due and owing Neurological Consultants; $2,450.00 due and owing Commonwealth Pain & Spine/Dr. Winters; and $161.90 due and owing Petitioner for out-of-pocket expenses related to medical treatment. Respondent shall hold Petitioner harmless for any and all health insurance subrogation claims that may or have been asserted by Medicare, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits.

Respondent shall authorize and pay for the treatment recommended by Dr. Sneed, including, but not limited to, an L3-4, L4-5 decompression and discectomy.

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.

Linda J. Cantrell
Signature of Arbitrator

8/2/20
Date

ICArbDec19(b)

AUG 5 - 2020

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

CONNIE BANNISTER,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 14-WC-11997
	)	
DORS/ILLINOIS DEPARTMENT OF HUMAN SERVICES,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on June 5, 2020, pursuant to Section 19(b) of the Act. The parties agree that on July 11, 2012 Petitioner was employed by DORS/Illinois Department of Human Services providing home healthcare services when she fell in the bathroom of a patient's residence. The issues in dispute are causal connection, medical expenses, temporary total disability benefits, and prospective medical care. All other issues have been stipulated.

TESTIMONY

On 7/11/12, Petitioner was 56 years old performing home healthcare services for Respondent. Petitioner testified that on 7/11/12 she was assisting an adult disabled patient in the bathroom when he fell backward on top of her. Petitioner testified she fell to the ground and her left leg was pinned underneath the patient and she struck her back on the corner of the wall. Petitioner testified she felt immediate pain in her left knee and back. She estimated the patient's age to be in the 40's. Some of her job duties included bathing, dressing, shaving, and feeding the patient and transferring him to and from his chair.

Petitioner testified she told the patient's mother the day of the incident that she fell. She reported to the emergency room at Lawrenceville Hospital the day of the accident. Petitioner testified she reported a different history of accident to the emergency room physician because she was afraid of losing her job and she liked her job. She went to the emergency room at Good Samaritan Hospital again on July 21, 2012 where she reported the work-related accident and was

taken off work. Petitioner testified she went to the emergency room a couple of times thereafter before she was referred to a knee specialist.

Petitioner testified she was evaluated by Dr. Fenwick on 8/16/12 and provided a history of accident. She had burning and swelling in her left knee. Petitioner underwent an MRI and physical therapy that did not alleviate her pain. Petitioner underwent injections before undergoing knee surgery on 11/15/12. Petitioner testified she had ongoing symptoms following surgery that required additional injections and physical therapy.

Petitioner testified that she fell on 1/18/13 in a Wal-Mart parking lot. She stated Dr. Fenwick instructed her to wean off the crutches and her leg went out from under her. She testified she reported the incident to Dr. Fenwick and her course of treatment was unchanged.

Petitioner testified she began experiencing back pain in January 2013. She stated she had a little pain in her back since the accident; however, she contributed the back pain to her knee injury. She testified she had burning and pain down her left leg. She started treating with her primary care physician for her back in February 2013. Petitioner was simultaneously treating with Dr. Fenwick in 2013 receiving Synvisc injections in her left knee. Petitioner testified her symptoms were not alleviated with the Synvisc injections and Dr. Fenwick ordered a left knee MRI in June 2013. Dr. Fenwick referred Petitioner to Dr. Michael Turner for a second opinion and no additional treatment was recommended.

Petitioner testified she has not received treatment for her left knee since 2013. She has ongoing burning and bruising in her knee. She has difficulty walking and was ambulating with a cane in the arbitration room.

On 3/14/13, a lumbar MRI was performed and her primary care physician referred her to the pain clinic at Good Samaritan Hospital. She received lumbar injections in the summer of 2013 that did not alleviate the burning and shooting pain in her left leg. She was referred to Dr. Sneed on 8/13/13 who recommended lumbar surgery. Petitioner testified that her workers' compensation benefits were terminated and she continued to treat with her primary care physician. Respondent stipulated on the records that TTD benefits were paid from 7/12/12 through 3/14/14.

On 1/12/15, Petitioner's primary care physician recommended a lumbar MRI and referred her to the pain clinic at Good Samaritan Hospital. Petitioner began receiving injections at the pain clinic in May 2016. On 6/29/16, a repeat lumbar MRI was performed and Petitioner treated at the pain clinic through March 2017. Petitioner testified she has not received treatment for her back since March 2017 because she did not have money to pay for treatment or surgery.

Petitioner testified she has never injured or received treatment for her low back or left leg prior to the 7/11/12 accident, and other than her fall in the Wal-Mart parking lot, she has not had any accidents that would cause injury to her low back or left knee.

Petitioner presently experiences burning and pain in her low back. She testified her daughter assists her in getting in and out of the bathtub. She can no longer do the things she used to do. Petitioner desires to undergo lumbar surgery as recommended by Dr. Sneed.

On cross-examination, Petitioner testified she tried to work between the date of accident and July 21, 2012 when she reported to the emergency room at Good Samaritan Hospital a second time. She said she could not work during that time because she was in too much pain. She was shown time records wherein she reported working 6 ½ hours on the day of the accident, and 6 ½ hours each day on July 14, 2012 and July 15, 2012. Petitioner could not recall the dates or times she worked at that time.

She confirmed she fell in the Wal-Mart parking lot on January 22, 2013. She testified she saw Dr. Hammond at Respondent's request and reported to him the incident was a near slip and she did not fall all the way to the ground but caught herself with her hands.

Petitioner does not currently perform home exercises and does not take any medications for her injuries.

The patient's mother, Barbara Shaffer, testified by way of deposition on 3/2/20. Mrs. Shaffer testified that Petitioner cared for her son for approximately one year prior to the accident and was the best healthcare provider her son has ever had. She stated her son was at least six feet tall and weighed 250 pounds in July 2012. She testified she personally could not transfer her son and relied on her husband to perform such tasks when Petitioner was not present. Petitioner provided daily services for her son. Mrs. Shaffer testified that Petitioner told her the day she fell in the bathroom while assisting her son and her leg was hurting. She stated Petitioner returned to her house the next day and she had to leave to the emergency room because her leg hurt so bad. Mrs. Shaffer recalled Petitioner working only a couple of days after the accident and had to leave because she could not walk.

Respondent did not call any witnesses.

MEDICAL HISTORY

Petitioner sought emergency medical treatment at Lawrence County Memorial Hospital the day of the accident. Petitioner told the emergency physician she struck her left knee one week earlier when she fell on steps. X-rays revealed minimal degenerative changes. She was taken off work through July 13, 2012 and prescribed Tramadol.

On 7/21/12, Petitioner reported to the emergency room at Good Samaritan Hospital with increased leg pain. She reported the work-related accident of 7/11/12 and x-rays revealed joint space narrowing in the medial compartment. She was diagnosed with a sprain of the medial collateral ligament and prescribed a knee immobilizer, crutches, and medication. Petitioner was taken off work and discharged. She returned to the hospital on 8/4/12 with increased pain with weight-bearing and she was referred to Dr. Terry Fenwick for orthopedic evaluation.

On 8/16/12, Petitioner was examined by Dr. Fenwick for pain and burning in her left leg. The record states a history of a patient falling on Petitioner's left knee on 7/12/12. Petitioner reported feeling a pop in her knee when the patient fell on the lateral side of her knee causing the knee to twist inward. Physical examination was positive for arthralgias, back pain, joint stiffness, limb pain and myalgias. Dr. Fenwick noted medial and lateral swelling in Petitioner's left knee, decreased range of motion compared to the right, and pain and crepitus with active extension. Dr. Fenwick diagnosed a left knee strain and recommended physical therapy. Dr. Fenwick ordered light duty work restrictions of very limited walking with crutches and sitting job only. An MRI was ordered that revealed a medial meniscus tear. Dr. Fenwick recommended injections and continued physical therapy.

Petitioner returned to Dr. Fenwick on 9/14/12 ambulating on one crutch. She reported that taping her knee helped and she was taking Tramadol for pain control. Dr. Fenwick performed left knee steroid injections on 9/24/12 and 10/16/12. The injections provided only temporary relief and he recommended surgery. The medical report dated 10/16/12 states Petitioner feels a pulling sensation in the back of her knee with weight-bearing, pain and swelling in her left knee and ankle, with pain radiating to her lower left back.

Petitioner underwent a left medial meniscectomy on 11/15/12, followed by physical therapy. On 12/5/12, Petitioner underwent an injection in the left knee due to pressure and stiffness. On 1/22/13, Petitioner informed Dr. Fenwick she was at Wal-Mart when she felt two pains in her low back that radiated down her left leg and made it unbearable to bear weight and she fell. Dr. Fenwick ordered Petitioner to continue leg lifts as much as her back would tolerate and to continue using a crutch or cane. Dr. Fenwick advised Petitioner to see her primary physician to address her back pain.

On 2/14/13, Petitioner began treating with her family physician at which time she reported mild left leg pain radiating into her foot. On 3/14/13, a lumbar MRI was performed that revealed an L3-4 bulge and L4-5 herniation. Petitioner underwent a series of epidural steroid injections at Good Samaritan Hospital in the summer of 2013 that offered no relief.

Dr. Fenwick performed a Synvisc injection in Petitioner's left knee on 3/27/13 that provided only temporary relief. A new MRI was performed on 6/13/13 that revealed no new findings. On 6/25/13, Petitioner continued to ambulate slowly with a crutch and continued to wear a compression sleeve and engage in home exercises. She reported constant pressure in the front of her knee. She was taking Ultram and Aleve daily. Dr. Fenwick continued Petitioner on light duty work restrictions of sitting jobs only, no stairs, limited walking/standing and she must use one crutch in a non-slip environment. Dr. Fenwick referred Petitioner to Dr. Thomas Turner for a second opinion. Dr. Turner saw Petitioner on 7/30/13 and diagnosed her with complex regional pain syndrome. He did not recommend additional treatment.

Dr. Fenwick referred Petitioner to Dr. Christopher Sneed for back pain. On 8/13/13, Dr. Sneed noted Petitioner's history of injury and reports of burning in her low back into the left buttock, with pain in the lateral thigh radiating behind her left knee to the great toe. Petitioner reported a large bruise on her back following her accident when she struck her back on the

corner of the wall. Dr. Sneed recommended an L3-4, L4-5 decompression and possible discectomy that was initially scheduled on 8/28/13. Respondent denied authorization pending a Section 12 examination.

Petitioner was examined by Dr. Choi pursuant to Section 12 of the Act on 3/20/14 for her left knee. Dr. Choi noted Petitioner exhibited intense knee pain to non-painful stimuli during her examination. She reported having no pain at rest and greater than 10 on a scale of 0 to 10 with activity. Petitioner allegedly reported to Dr. Choi that her work-related injury occurred on 7/12/12. Due to the discrepancy in Petitioner initially reporting on 7/11/12 a history of injuring her knee on stairs, and a work accident of 7/12/12, Dr. Choi could not provide an opinion as to causation without reviewing additional medical records. Dr. Choi opined that Petitioner's subjective complaints do not correlate to her objective findings on physical exam and postoperative MRI findings. Dr. Choi opined Petitioner reached maximum medical improvement and could return to work without restrictions. Dr. Choi clarified that his opinions as to physical restrictions are specific to Petitioner's left knee, excluding any restrictions associated with her lumbar spine condition. Respondent did not offer into evidence any addendums by Dr. Choi regarding causation and he did not testify by way of deposition.

On 3/27/14, Petitioner was examined by Patrick Hammond (PA-C) pursuant to Section 12 of the Act for her lumbar condition. Mr. Hammond states he reviewed a note dated 8/16/12 wherein Petitioner reported that her back injury occurred on 7/12/12. Petitioner stated to Mr. Hammond she believes the injury actually occurred on 7/11/12 because that is the date of her emergency room visit and she had never reported to the emergency room or had knee or back pain prior to that emergency visit. Petitioner reported her back started hurting approximately four weeks after the 7/11/12 accident and she had no intervening accidents at that time. She admitted a "near slip" in the Wal-Mart parking lot in February 2013, but she did not fall to the ground.

Mr. Hammond opined Petitioner's current condition in her lumbar spine was caused by her client falling on her. (RX2, page 10, ¶2). Mr. Hammond opined that Dr. Sneed's recommendation for an L3-4, L4-5 bilateral decompression and discectomy is appropriate, necessary and causally related to Petitioner's injury. (RX2, page 10, ¶6). Mr. Hammond recommended an updated lumbar MRI with nerve conduction studies of Petitioner's lower extremities to evaluate for nerve compromise versus a derangement of the knee. Mr. Hammond opined Petitioner had not reached MMI and should remain off work because she is unable to tolerate ambulating, standing, or prolonged sitting. (RX2, page 10, ¶8).

Petitioner continued to treat with her family physician in 2014 and 2015 for low back pain. She underwent a second lumbar MRI on 1/12/15 that was unchanged from the 2013 study. Petitioner's family physician referred her to Dr. Nicholas Winters, a pain specialist at Commonwealth Pain and Spine. On 5/18/16, Dr. Winters noted Petitioner's history of injury and performed a series of lumbar epidural steroid injections in the summer of 2016. Dr. Winters recommended a new MRI that was performed on 6/29/16 that revealed severe stenosis and bulge at L4-5 and moderate stenosis at L3-4. Dr. Winters adjusted Petitioner's pain medication and patches.

Neither party submitted deposition testimony of Petitioner's treating physicians or Section 12 examiners.

CONCLUSIONS OF LAW

Issue (F): **Is Petitioner's current condition of ill-being causally related to the injury?**
Issue (K): **Is Petitioner entitled to any prospective medical care?**

The parties stipulated Petitioner sustained an accident that arose out of and in the course of her employment with Respondent on 7/11/12. Petitioner testified credibly and without rebuttal that prior to 7/11/12 she was working full duty as a home healthcare worker and did not have any pain, prior injuries, prior treatment, or restrictions with regard to her low back or left leg/knee. Petitioner testified she was able to transfer her adult male patient to and from his chair and bathe and dress him by herself. The patient's mother testified that her son was at least six feet tall and weighed 250 pounds in July 2012. She testified she was not able to transfer her son by herself and relied on her husband to perform those tasks when Petitioner was off work. Petitioner's testimony and the medical records support that since 7/11/12 Petitioner has suffered left leg/knee pain and developed low back pain within weeks of the accident. She testified she struck her low back on the corner of the wall when her patient fell on top of her and she had a large bruise on her low back.

Although Respondent disputes that Petitioner's left knee condition is causally connected to her injury, Section 12 examiner, Dr. Choi, opined he could not give an opinion as to causal connection with regard to Petitioner's left knee until he reviewed additional medical records to resolve the discrepancy in the 7/11/12 emergency room records and Petitioner's allegation her work-related accident occurred on 7/12/12. Respondent did not offer any evidence that Dr. Choi was provided with the requested additional medical records, or an addendum report of Dr. Choi as to causation. Dr. Choi clarified that his opinions as to no permanent physical restrictions are specific to Petitioner's left knee, excluding any restrictions associated with her lumbar spine condition.

Petitioner's treating surgeon, Dr. Fenwick, opined in his medical records on 8/16/12 that based on Petitioner's history of accident and physical examination, he believed with a certain degree of medical certainty Petitioner's work activities were a contributing factor to the development of her condition. There was no medical evidence presented at arbitration to refute Dr. Fenwick's opinions as to causation.

Petitioner was examined by Patrick Hammond (PA-C) pursuant to Section 12 of the Act on 3/27/14 for her lumbar condition. Mr. Hammond stated he reviewed a note dated 8/16/12 wherein Petitioner reported her back injury occurred on 7/12/12. Petitioner stated to Mr. Hammond she believed the injury actually occurred on 7/11/12 because that is the date of her emergency room visit and she had never reported to the emergency room or had knee or back pain prior to that emergency visit. Petitioner reported her back started hurting approximately four weeks after the 7/11/12 accident and she had no intervening accidents at that time. She admitted a "near slip" in the Wal-Mart parking lot in February 2013, but she did not fall to the ground.

Mr. Hammond opined Petitioner's current condition in her lumbar spine was caused by her client falling on her. (RX2, page 10, ¶2). Mr. Hammond opined that Dr. Sneed's recommendation for an L3-4, L4-5 bilateral decompression and discectomy is appropriate, necessary, and causally related to Petitioner's injury. (RX2, page 10, ¶6). Mr. Hammond recommended an updated lumbar MRI with nerve conduction studies of Petitioner's lower extremities to evaluate for nerve compromise versus a derangement of the knee. Mr. Hammond opined Petitioner had not reached MMI and should remain off work because she is unable to tolerate ambulating, standing, or prolonged sitting. (RX2, page 10, ¶8).

An employee is entitled to medical care that is reasonably required to relieve the injured employee from the effects of the injury. 820 ILCS 305/8(a) (2011). Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13, 229 Ill.Dec. 77 (Ill. 2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001).

Dr. Sneed initially scheduled Petitioner's lumbar surgery on 8/28/13. Respondent denied authorization for said surgery pending a Section 12 examination. Based on Mr. Hammond's Section 12 report above, Petitioner's lumbar condition is causally related to her 7/11/12 injury. Petitioner continued to treat with her family physician in 2014 and 2015 for low back pain. She underwent a second lumbar MRI on 1/12/15 that was unchanged from the 2013 study. Petitioner's family physician referred her to Dr. Nicholas Winters, a pain specialist at Commonwealth Pain and Spine who performed a series of lumbar epidural steroid injections in the summer of 2016. Dr. Winters recommended a new MRI that was performed on 6/29/16 that revealed severe stenosis and bulge at L4-5 and moderate stenosis at L3-4. Dr. Winters adjusted Petitioner's pain medication and patches.

Petitioner presented at arbitration using a cane to ambulate. She testified she presently experiences burning and pain in her low back. She testified her daughter has to assist her in getting in and out of the bathtub and she can no longer do the things she used to do. Petitioner desires to undergo lumbar surgery as recommended by Dr. Sneed.

Based on the opinions of Dr. Sneed and Mr. Hammond and the credible testimony of Petitioner, the Arbitrator finds Petitioner met her burden of proof and established that her current conditions of ill-being in her left leg/knee and lumbar spine are causally related to the accidental injury of July 11, 2012 and orders Respondent to authorize and pay for the treatment recommended by Dr. Sneed, including, but not limited to, an L3-4, L4-5 decompression and discectomy.

<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?

Based upon the above findings as to causal connection, the Arbitrator finds that Petitioner is entitled to recover for the medical expenses related to her injuries that occurred on 7/11/12.

The Arbitrator finds Respondent has not paid all charges relating to Petitioner's reasonable and necessary medical care for date of accident 7/11/12, and therefore orders Respondent to pay $36,245.66 due and owing Good Samaritan Hospital; $13,616.20 due and owing Good Samaritan Physician Services; $171.00 due and owing Tri-State Neurosurgical/Dr. Sneed; $203.00 due and owing Neurological Consultants; $2,450.00 due and owing Commonwealth Pain & Spine/Dr. Winters; and $161.90 due and owing Petitioner for out-of-pocket expenses related to medical treatment.

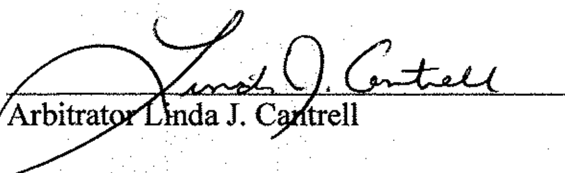
Respondent shall have credit for any expenses paid provided that it agrees to indemnify and hold Petitioner harmless from any claims made by any providers arising from the expenses for which it claims credit. The Arbitrator further orders Respondent to hold Petitioner harmless for any and all health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

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

To be entitled to TTD benefits, it is a claimant's burden to prove not only that she did not work, but also that she was unable to work. *Shafer v. Illinois Workers' Comp. Comm'n,* 2011 IL App (4th) 100505WC, ¶ 45, 976 N.E.2d 1, 13. The record establishes that Petitioner was taken off work through 7/13/12 by the emergency room physician. She testified she tried to work between the date of accident and 7/21/12 when she reported to the emergency room at Good Samaritan Hospital a second time. She said she could not work during that time because she was in too much pain. Her time records reveal she reported working 6 ½ hours each day on 7/14/12 and 7/15/12. The patient's mother testified Petitioner worked only a couple of days after the accident and had to leave because she could not walk. Petitioner's testimony is consistent with that of Mrs. Shaffer's testimony and the Home Services Time Sheet submitted into evidence as Respondent's Exhibit 3.

On 7/21/12, Petitioner reported to the emergency room a second time where she was taken off work. On 8/16/12, Dr. Fenwick placed Petitioner on light duty restrictions which Petitioner testified were not accommodated by Respondent. The medical records support that Respondent could not accommodate light duty restrictions and Petitioner's testimony was not rebutted. Petitioner remained off work with light duty restrictions through the date of arbitration. Respondent's Section 12 examiner, Patrick Hammond (PA-C), opined as of 3/27/14, Petitioner had not reached MMI and should remain off work because she is unable to tolerate ambulating, standing, or prolonged sitting. (RX2, page 10, ¶8).

Therefore, the Arbitrator finds Petitioner was taken off work effective 7/21/12 through the date of arbitration. Respondent is ordered to pay temporary total disability benefits of $225.44/week for 411-0/7 weeks, commencing 7/21/12 through 6/5/20, as provided in Section 8(b) of the Act. Respondent shall receive a credit of $19,388.66 in temporary total disability benefits paid.



Arbitrator Linda J. Cantrell

8/2/20
DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC001311
Case Name	BRISSON, CHRIS v. CHICAGO SOUL SOCCER/ CHICAGO KICK
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0532
Number of Pages of Decision	29
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Scott Shapiro
Respondent Attorney	Thomas Owen

DATE FILED: 10/25/2021

/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

Chris Brisson,

Petitioner,

vs. NO: 13 WC 1311

Soul Soccer/FC LLC/Chicago Kick
Dave Morky, Dan Rutherford, State Officio
Custodian of the Illinois Injured Workers'
Benefit Fund,

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 employment/employee relationship, temporary total disability, causal connection, liability of IWBF, whether Respondent was operating subject to the Act, jurisdiction, notice and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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 June 15, 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 $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.

October 25, 2021

/s/ *Marc Parker*
Marc Parker

MP:yl
o 10/21/21
68

/s/ *Carolyn Doherty*
Carolyn Doherty

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BRISSON, CHRIS
Employee/Petitioner

Case# **13WC001311**

CHICAGO SOUL FC LLC/CHICAGO KICK DAVID MOKRY DAN RUTHERFORD STATE OFFICIO CUSTODIAN OF THE ILLINOIS INJURED WORKERS' BENEFIT FUND
Employer/Respondent

On 6/15/2020, 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 0.18% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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CHICAGO, IL 60661

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2350 HASSELL RD
HOFFMAN ESTATES, IL 60169

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DAVID MOKRY
5333 PRAIRIE STONE PKWY
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6298 ASSISTANT ATTORNEY GENERAL
THOMAS "GRADY" OWEN
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

Chris Brisson
Employee/Petitioner

v.

Chicago Soul FC LLC/Chicago Kick; David Mokry; Dan Rutherford State Officio Custodian of the Illinois Injured Workers' Benefit Fund
Employer/Respondent

Case # **13** WC **1311**

Consolidated cases: ______

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **March 10, 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 **Notice**

FINDINGS

On **October 22, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**16,500.00**; the average weekly wage was $**695.79**.

On the date of accident, Petitioner was **30** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**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

Medical benefits
Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of **$17,594.00 to Midwest Bone & Joint Medical; $10,144.00 to Algonquin Road Surgery Center; $1,218.00 to Barrington MRI; $1,319.00 to ATI Physical Therapy; $115.00 to Specialty Medical Services Bills; $53.40 to Quest Diagnostics,** as provided in Sections 8(a) and 8.2 of the Act.

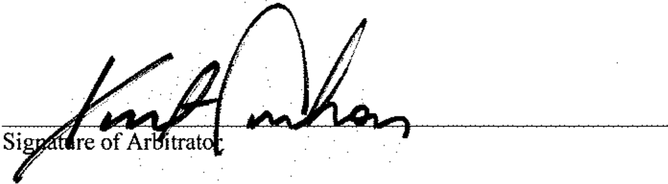
Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $**463.86**/week for **66 and 1/7ths** weeks, commencing **October 23, 2012** through **January 28, 2014**, as provided in Section 8(b) of the Act.

Permanent Partial Disability
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 **$93,991.50 ($417.74 PPD rate x 225 weeks = $93,991.50) due to loss of trade pursuant to Section 8(d)(2) of the Act.**

Injured Workers' Benefit Fund
The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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

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



Signature of Arbitrator

06-15-20
Date

JUN 15 2020

DECISION OF ARBITRATOR
CHRIS BRISSON
v.
CHICAGO SOUL, FC LLC/CHICAGO KICK; DAVID MOKRY/DAN RUTHERFORD
STATE OFFICIO – CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
IWCC No.: 13 WC 1311

STATEMENT OF FACTS

Petitioner, Chris Brisson (hereinafter "Petitioner"), was employed as a full time professional indoor soccer player by Chicago Soul FC LLC (hereinafter the "Soul"), a professional soccer team located in Hoffman Estates, Illinois, and playing in the Major Indoor Soccer League (hereinafter "MISL"). Also present at trial was David Mokry (hereinafter "Mokry") the team owner, named both individually, representing the Chicago Kick/Chicago Soul and himself personally, and the Attorney General as counsel for the Injured Workers' Benefit Fund (hereinafter "IWBF").

Petitioner testified he was hired by David Mokry, the owner of the Chicago Soul to play for the Soul in September 2012. (T. 10). He was contacted by Dave Mokry and asked to join the Soul as a defender/midfielder. Petitioner met with Mokry at Mokry's office and team headquarters in the Sears Center, and signed the contract in Mokry's office on September 19, 2012. (T. 12-14, PX 9). Per Schedule A of the contract, Respondent agreed to pay Petitioner $3,000.00 per month for the period of October 1, 2012 through March 15, 2013. The team retained the exclusive rights to Brisson as a player and employee for the following year through August 3, 2014. (T. 13, PX 9). Petitioner testified the season began October 1, 2012, per the terms of the contract. (PX 9).

Prior to joining the Soul, Petitioner testified to his extensive prior experience as a professional soccer player. Petitioner testified he was a veteran of the MISL. He played 7 years in the MISL for The Minnesota Thunder, Chicago Storm, Rockford Rampage, and Chicago Riot

prior to joining the Chicago Soul in 2012. He also played outdoor Soccer for the Inferno after completing his season with the Riot in 2010/2011. (T.52) Petitioner testified as to the differences between outdoor soccer and indoor soccer. (T. 16 -22). He testified he considered soccer in general a hazardous contact sport, and testified indoor soccer was extra hazardous in nature. (T.17). Petitioner explained indoor soccer was extra hazardous for many reasons. (T. 20-22). The field on which they played indoors was substantially smaller than that of an outdoor field. Outdoor fields are 120 yards and 75 yards wide, with open sidelines and end lines. The field has out of bounds lines where the ball could travel out of bounds and play would stop. (T. 18). Indoors was played on a hockey rink, covered in manmade turf, which was completely surrounded by boards and glass exactly the same as those used in hockey. The playing surface indoors was also extremely hard, as the turf was laid over concrete with no padding. (T. 19). Collisions with other players were also much more likely indoors, and players were at an increased risk of being struck by the ball from any direction because of the boards surrounding the playing field. (T. 19). He testified the collisions could be with other players due to the congested nature of the field, and the collisions were more violent due to the fact that the players ran at a higher rate of speed indoors. The collisions also occurred with the players hitting the boards because players would be pushed into the boards. (T. 20-22). The indoor version of soccer was a much more physical game. In addition fatigue was a greater factor. There were no stoppages in play, and players would come in and out of the game as in hockey, and rapidly have to change direction. (T. 21-22). He testified with fatigue, a player has a greatly increased risk of injury. (T.21). Based upon his extensive experience he testified it was his opinion indoor professional soccer was extra hazardous. (T. 22).

He testified despite the presence of boards, the team did not provide any additional pads

or protective gear to players. (T. 18). The players would only wear shin pads, and sharp cleats. (T. 18). He testified trainers, provided by the team would apply tape to players body parts. He testified the trainers would remove the tape with scissors or a sharp blade. (T. 16.)

Petitioner also testified he witnessed the construction of the indoor playing area/field. (T. 24). He testified forklifts and other heavy machinery was used to construct the field and boards. He also testified alcohol and food were sold to the public for consumption at the games, and the team sold merchandise at the games for the team's own profit. (T. 23).

Petitioner testified on October 22, 2012 he reported for practice at the Sears Center. At that time he was in perfect physical health. (T. 25). He had undergone a team physical prior to the start of the season with Dr. Gitelis, of Midwest Bone & Joint, the team doctor, who told him he was in great physical condition and cleared to play. (T. 26, T. 49). He testified he did previously sustain a tear of his left meniscus in 2010 while playing for another team, the Chicago Riot. He had undergone surgery for that injury, completely recovered in six weeks, rejoined the Riot in 2011, for the remainder of the season, and then played for the outdoor team the Inferno after the Riot with no issues prior to joining the Soul. (T. 26, 52, 60-61, T.67-68).

On October 22, 2012, during practice, Petitioner testified he became entangled with another player, going for the ball, and he and the other player slid into the boards. Petitioner's left knee impacted the boards directly. (T. 26-27). He immediately noticed a lot of pain in his left leg, and swelling of his left knee. He tried to continue playing, because the team had an upcoming scrimmage game in which he wanted to play, but was unable to continue due to the pain. (T. 28, 47-48). He left the field, reported to the Sarah, the trainer supplied by the team, and began icing his knee. (T. 27-28.) He testified the trainer then reported the injury that day to Mokry. Petitioner was instructed to ice the knee and take ibuprofen by the trainer. (T. 28).

Thereafter, Petitioner testified he tried to practice for the scrimmage, but would only practice about half the practices due to the pain in the knee, then stopped practicing all together. (T. 29). He testified on cross examination he did actually play in the scrimmage game shortly after the injury, even though he should not have, but he desperately wanted to play. He testified he even scored a goal, but had to come out of the game immediately after scoring because his knee swelled to the size of a watermelon, and was in a great deal of pain. (T. 48-49).

Petitioner continued to request Mokry to schedule a doctor's appointment, and he was eventually seen by Dr. Gitelis at Midwest Bone & Joint, who also had performed Petitioner's team physical. (T. 30-32, PX 1). Dr. Gitelis prescribed an MRI, reviewed the MRI, and restricted Petitioner from work and playing soccer immediately. Dr. Gitelis advised Petitioner it was a new injury, and a bone fragment broke off his femur, lodged under his patella, and the fragment lacerated his meniscus. Dr. Gitelis informed Petitioner he needed immediate surgery. (T. 31-32).

Petitioner testified he informed Mokry after receiving the diagnosis and prescription for surgery. (T. 32). He testified he spoke to Mokry personally. (T. 34). Mokry told him he was waiting on workers' compensation approval. (T. 34). Petitioner testified he continued to pursue Mokry for the surgery authorization, who kept telling Petitioner the surgery was "going to happen," and Petitioner was going to get a surgery date. (T. 34). Petitioner stated a week turned into two weeks, two weeks turned into three weeks, then a month, and Mokry kept promising him surgery. (T. 34). At no time did Mokry advise Petitioner he did not have workers' compensation coverage. (T. 34). Petitioner testified he relied on the representations of Mokry, and testified Mokry even told him prior to signing the contract the team had workers' compensation coverage. (T. 34).

Petitioner testified he eventually obtained the surgery on June 4, 2013, eight months after the accident. (T. 33). He testified Dr. Gitelis agreed to perform the surgery without guarantee of payment, and all the surgical bills still remain unpaid. (T. 35). He attended physical therapy after surgery at ATI, and all those bills remain unpaid. (T. 36). He testified he could only continue treatment for a couple of months post surgically because nobody was paying the medical bills. He eventually was forced to move back home to Minnesota, because he had no income, and could not continue treating. (T. 36-37). His last date of treatment with Dr. Gitelis was January 28, 2014. (T. 37; PX 1). Petitioner testified Dr. Gitelis informed him he could no longer play soccer. Further, Dr. Gitelis informed Petitioner the delay in obtaining surgery caused a great deal more damage because the bone fragment continued to lacerate and shred his meniscus. (T. 71-72). Upon returning to Minnesota he continued rehabilitation on his own. He was never contacted by Mokry or anyone from the Soul to return to work. (T. 37).

Petitioner testified during the period he was waiting for surgery, he did not receive any pay. (T. 38, 60-65). On cross examination by counsel for the IWBF, he stated he attended some games, worked the bench at the games, worked light duty in the office, per the terms of his contract, but never received any pay. (T. 63). He testified, he eventually stopped attending these activities because he was not being paid. (T. 64). Mokry had told him he would get paid once he had the surgery. (T. 72). Petitioner also testified, upon questioning by IWBF's counsel, prior to his injury, he expected to play until at least 35 years old.

Mokry also attempted to cross examine Petitioner regarding the period after Petitioner's injury. (T. 75). Petitioner testified he called and emailed Mokry regarding pay and he did not respond. (T. 75). Petitioner went on to testify at first Mokry would respond, but then Mokry went silent, and did not speak to Petitioner again. (T. 76).

The IWBF called Mokry to testify. (T. 77). He admitted he did not have workers' compensation insurance. He testified he employed 18 players and another 5 to 6 people in the office. He admitted he knew he was required to carry workers' compensation insurance, and at some later date he did eventually purchase workers' compensation coverage. (T. 79).

On cross examination, Mokry admitted to running the day to day operations of the team. He admitted he oversaw payroll, all other team operations, and was the only owner there every day. (T. 85-89, 91). He alleged he left operating the team in March of 2013. (T. 84). He admitted to signing Brisson's contract for employment. (T. 84). He alleged he paid some amount to the team physicians, but had no proof of said payments. (T. 86). He confirmed he contracted with the Sears Center to play games at that location, and was subject to all local, municipal and state ordinances in order to play at that facility. (T. 88). Mokry confirmed alcohol, food, and concessions were sold at the games, and the team participated in the revenue of such sales. (T. 89). He alleged he thought he had workers' compensation coverage because he paid someone in Tampa for what he thought was coverage, but had no idea what that payment represented, nor could he provide proof of payment. (T. 90-91). He testified he owned the team, and the team contracted with Brisson, and employed Brisson directly. (T. 95).

Petitioner testified to the impact the injury caused. (T. 43). He testified his knee was never the same after the injury. Petitioner testified he suffers from arthritis, and pain on the front side of his knee and inside his knee every day. He testified he suffers from popping and clicking in his knee, and instability. He testified he tried to play intramural games, but could not even do that due to pain and swelling. He never played professional soccer again. He testified playing professional soccer was a lifelong dream and all he ever wanted. (T. 41-43). He testified he could definitely have played longer but for the injury, but due to the injury, his career was cut

short, and ended his career. (T. 43).

21IWCC0532

DECISION OF ARBITRATOR
CHRIS BRISSON
v.
CHICAGO SOUL, FC LLC/CHICAGO KICK; DAVID MOKRY/DAN RUTHERFORD
STATE OFFICIO – CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
IWCC No.: 13 WC 1311

Analysis and Conclusions of Law

A. Regarding whether Respondent was operating under and subject to the Illinois Workers' Compensation, the Arbitrator finds as follows:

The Arbitrator finds Respondent was operating under and subject to the Illinois Workers' Compensation Act. Petitioner produced a copy of the contract Petitioner signed with David Mokry as Petitioner's Exhibit #9. Petitioner testified he signed the contract at Mokry's office in Hoffman Estates, Illinois. Mokry confirmed signing the contract as owner, and meeting with Petitioner in Illinois to sign the contract. Pursuant to Section 1(b)(2), the signing of an employment contract in Illinois affords jurisdiction under the Act as performed by Petitioner.

Petitioner also presented testimony regarding the extra hazardous nature of indoor soccer. Pursuant to Section 3 of the Act automatic coverage applies to any employer, business, or enterprise which are considered "extra hazardous." The Act enumerates 20 such enterprises or businesses which qualify for automatic coverage of the Act. The Commission has held this list is not exclusive. The Commission has held professional contact sports such as American football are considered "extra hazardous" within the meaning of Section 3, due to the substantial contact and potential for injury within the game. The Arbitrator finds the type of work being performed by Petitioner, the playing of indoor professional soccer for Respondent is extra hazardous.

The Arbitrator bases this opinion on Petitioner's credible detailed expert testimony and descriptions of the extra hazardous nature of professional indoor soccer, especially as compared to that of outdoor soccer. Petitioner also characterized outdoor soccer as a hazardous sport in

and of itself. The Arbitrator finds Petitioner, an expert in the game of soccer, both indoor and outdoor, having played national, and professional soccer, and finds his testimony supports the dangerous and extra hazardous nature of the sport.

Petitioner testified indoor soccer is played on a regulation hockey rink, which is substantially smaller than that of an outdoor soccer field. The playing field is enclosed by hockey boards. Due to the boards, collisions with other players, and collisions with the boards surrounding the field, the collisions were frequent and extremely violent. The playing surface, an artificial turf placed over concrete, was extremely hard, and made the game more hazardous, due to the speed of the ball thereby increasing the speed of the game. In addition the high speed of the game caused increased fatigue due to few or no stoppages of play, making players much more susceptible to injuries. The players also did not wear pads or other protective gear, other than shin pads, as compared to a hockey player who is fully padded and playing in the same enclosed playing area. These factors greatly contributed to the extra hazardous nature of the sport. For the foregoing reasons the Arbitrator finds Petitioner's work extra hazardous and falls within Section 3 of the Act.

In addition to the extra hazardous nature of professional indoor soccer, the Arbitrator finds Respondent falls under several other of the enumerated businesses and is subject to Section 3, specifically Section 3(8). Section 3(8) states automatic coverage applies to any enterprise in which sharp edged cutting tools are used. Petitioner, testified Respondent's trainer's utilized scissors or a sharp blade to cut off the tape which the trainers applied to various body parts in order to play indoor soccer. Petitioner also testified he and the other players wore cleats, which are also sharp instruments. The use of scissors, blades, and cleats, are sharp instruments, and confers automatic coverage under Section 3(8).

Automatic coverage also applies pursuant to Sections 3(1). This paragraph of Section 3 states the erection, maintaining, removing remodeling, altering or demolishing of any structure provides automatic coverage under the Act. Section 3(15), also states any business or enterprise in which electric, gasoline or other power driven equipment is used in the operation of the business provides automatic coverage under the Act. Petitioner testified he witnessed how the playing field and practice field, as well as the surrounding structure was constructed, erected, maintained and removed. He testified the playing/practice field was constructed utilizing large forklifts, or other power driven lifts to erect, maintain and remove the playing field, thereby falling under Section 3(1) and 3(15).

The Arbitrator also finds Section 3(12) applies as this section enumerates automatic coverage where an establishment or business is open to the general public and alcoholic beverages are sold to the general public of consumption on the premises. Petitioner and Mokry testified alcohol was sold for consumption at the soccer games. Mokry testified the Soul was to participate in the revenue from the sale of alcohol at their games and alcohol was sold at the games. The sale of alcohol, and the fact the Respondent profited from such sales also allows for automatic coverage pursuant to Section 3(12).

Section 3(9) also applies and creates automatic coverage. This paragraph of Section 3 states any enterprise in which statutory or municipal ordinance regulations are imposed for the regulating, or guarding of the public gives rise to coverage. Mokry testified he was subject to all municipal regulations and ordinances due to contracting with the Sears Center. Section 3(9) goes on to state the placing of machinery or appliances for the protection or safeguarding of the public also gives rise to automatic coverage. Petitioner testified the boards surrounding the

playing field also provided protection to the public spectators watching the game. The Arbitrator finds automatic coverage applies under Section 3(9) as well.

Finally, the Arbitrator also finds Section 3(14) of the Act applies because Mokry, Petitioner, and Petitioner's witnesses testified food was sold for consumption on the premises in the form of concessions. All concessions generally utilize slicing instruments, hot water, hot grease, hot foods/substances or fluids. Mokry testified the Soul was to participate in this revenue, once again giving rise to automatic coverage pursuant to Section 3.

Based on the foregoing, the Arbitrator finds Section 3 of the Act provides automatic application and coverage of the Act to Respondent. The Petitioner provided credible testimony as to the extra hazardous nature of the game, the assumption that there was insurance, as well as the other factors enumerated in Section 3.

B. Regarding was there an employee-employer relationship, the Arbitrator finds as follows:

The Arbitrator finds there was an employee-employer relationship on October 22, 2012, the date of Petitioner's accident. Petitioner presented the contract he signed with the Soul and entered the contract into evidence at trial as Petitioner's Exhibit #9. Mokry as owner of the Soul, admitted he had personally sought out Petitioner to play for his team due to Petitioner's experience and stature in the league, and also admitted Petitioner was an employee of the Soul.

C. Regarding whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

The Arbitrator finds Petitioner sustained an accident that arose out of and in the course of Petitioner's employment by Respondent. Petitioner presented uncontradicted credible testimony regarding his work related accident. He testified he became entangled with another player and slid into the boards during a mandatory practice with the team. He testified his left knee

forcefully impacted the boards. Petitioner's treating physician records also corroborate Petitioner's description of his accident.

The Arbitrator finds Respondent's allegations of Petitioner having a pre-existing injury not credible. Petitioner admitted to a prior injury sustained playing for another team. Petitioner testified he had recovered completely from that injury, and had continued playing soccer professionally after recovering from that injury. Petitioner also credibly testified and Mokry admitted, the team doctors, who eventually performed surgery on Petitioner's knee had cleared Petitioner prior to the beginning of the season to play for the team.

The Arbitrator gives great weight to Petitioner's testimony over the non-credible allegations of the Respondents. Based on Petitioner's credible testimony, along with Petitioner's treating physician's records, the Arbitrator finds Petitioner sustained an accident which arose out of and in the course of Petitioner's employment for Respondent, and finds Respondent liable for Petitioner's injuries.

D. Regarding what was the date of the accident, the Arbitrator finds as follows:

The Arbitrator finds the date of accident was October 22, 2012. The Arbitrator bases this opinion on Petitioner's credible unrebutted testimony regarding the accident, which is corroborated and supported by the medical records.

E. Regarding whether timely notice of the accident given to Respondent, the Arbitrator finds as follows:

The Arbitrator finds Respondent received timely notice of Petitioner's accident. Mokry, the team owner, was given notice by the team trainer who he employed immediately after the accident. Petitioner also credibly testified he contacted Mokry immediately, informing Mokry of the injury, and continued to notify Mokry by requesting authorization for medical care.

F. Regarding whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

The Arbitrator finds Petitioner's current condition of ill-being causally related to the injury. Petitioner presented unrebutted testimony describing how his injury occurred. Petitioner's treating physician records also detail and confirm the injury Petitioner sustained. Petitioner also provided unrebutted, credible testimony as to his attempts to obtain proper medical care. Petitioner testified he attempted for months on end to obtain authorization for surgery. Mokry kept providing excuses and representing to Petitioner he was awaiting workers' compensation approval for the surgery, all the while, knowing, by his own admission, there was no insurance. Petitioner relied on Mokry's representations. The Arbitrator finds Mokry's actions egregious, and Mokry intentionally and detrimentally delaying Petitioner's medical treatment.

Petitioner testified, after approximately 8 months, Dr. Gitelis, his treating orthopedic surgeon, finally performed the surgery without any authorization or guarantee of payment. Petitioner testified his medical care ended because the doctors and physical therapy facility, ATI, could no longer provide treatment without being paid. He testified, at the conclusion of his medical treatment Dr. Gitelis did not clear him to return to soccer, and the delay in obtaining treatment caused his career to be cut short and ended his career.

Petitioner testified at the time of trial, he currently still suffers from arthritis, popping and clicking in his knee, instability, as well as pain in the front of his knee and underneath his patella. He testified prior to his accident, despite having been a veteran in the league at the age of 30, he would have played at least until he was 35 years old, and throughout his career, he never noticed any diminution in his playing ability.

G. Regarding what were Petitioner's earnings, the Arbitrator finds as follows:

The Arbitrator finds the best available evidence as to Petitioner's earnings is contained on Schedule A of Petitioner's contract for employment with Respondent introduced at trial as Petitioner's Exhibit #9. Petitioner's work was seasonal in nature. Per Schedule A, Respondent agreed to pay Petitioner $3,000.00 per month. Per Schedule A the salary commencement date was October 1, 2012, and the salary termination date was March 15, 2013, a period of 5 and one half months, or 23 and 5/7ths weeks. Per the contract Petitioner's total earnings for this period would have been $16,500.00. $16,500.00 divided by 23 and 5/7ths weeks totals $695.79. The Arbitrator finds Petitioner's average weekly wage was $695.79, with a corresponding Temporary Total Disability rate of $463.83, and Partial Permanent Disability rate of $417.47.

H. Regarding What was Petitioner's age at the time of the accident, the Arbitrator finds as follows:

The Arbitrator finds Petitioner was 30 years old on the date of accident. Petitioner's state identification is attached to Petitioner's Exhibit #9, and the Arbitrator relies on this as proof of Petitioner's age.

I. Regarding what was Petitioner's marital status at the time of the accident, the Arbitrator finds as follows:

Petitioner testified he was single at the time of the accident, and did not have any children on the date of accident.

J. Regarding whether the medical services that were provided to Petitioner reasonable and necessary, and whether Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

The Arbitrator finds the medical services provided to Petitioner were reasonable and necessary. Petitioner testified no medical bills were paid on behalf of his injuries. Mokry alleged he paid some amount to Midwest Bone & Joint, but the Arbitrator finds Mokry's

testimony regarding this and all other testimony provided by Mokry not credible at best. The Arbitrator finds Respondent did not pay any of Petitioner's medical bills. The Arbitrator finds Respondent liable for any and all medical treatment incurred by Petitioner. The Arbitrator finds Respondent liable for, and orders Respondent to pay the following medical bills: $17,594.00 to Midwest Bone & Joint Medical; $10,144.00 to Algonquin Road Surgery Center; $1,218.00 to Barrington MRI; $1,319.00 to ATI Physical Therapy; $115.00 to Specialty Medical Services Bills; $53.40 to Quest Diagnostics.

K. Regarding what temporary total disability benefits are in dispute, the Arbitrator finds as follows:

The Arbitrator finds Respondent liable to pay Petitioner temporary total disability benefits for the period of October 22, 2012 through January 28, 2014. Petitioner testified he was unable to work for the aforementioned time period. Petitioner testified he did attempt light office work, and working at a few of the soccer games for Respondent, but testified he was never paid for those time periods. Petitioner's treating physicians records, introduced as Petitioner's Exhibit #1, indicate he was restricted completely from work until he was released on January 24, 2014, by Dr. Gitelis. Petitioner further testified that during his period of incapacity, while he remained in Chicago, he contacted Mokry numerous times to discuss payment of his salary or payment of workers' compensation benefits. Mokry told Petitioner he had to undergo surgery in order for Petitioner to received temporary total disability benefits. This is simply untrue and contrary to the Act. In addition to this, Petitioner's credible testimony indicates Mokry had no intention to pay Petitioner, as Mokry also continually lied to Petitioner regarding scheduling the surgery Petitioner so desperately required. In addition, per the terms of the contract, Mokry was required to pay Petitioner, and he clearly violated the terms of the contract.

The Arbitrator finds Respondent liable for and Petitioner entitled to temporary total disability benefits for the period of October 23, 2012 through January 28, 2014, a period of 66 and 1/7ths weeks, totaling $30,681.03.

L. Regarding what is the nature and extent of the injury, the Arbitrator finds as follows:

The Arbitrator finds Petitioner sustained a permanent injury to his left leg, and loss of trade. The Arbitrator specifically notes the egregious, intentional, and continuous manner in which Mokry continually lied to Petitioner regarding receipt of medical care. The Arbitrator finds any of Mokry's alleged explanations, rationalizations, excuses, or reasons for his actions not credible. Due to Mokry's continual misrepresentation regarding having workers' compensation coverage, and continual falsification to Petitioner that, as his employer, he would pay, or a workers' compensation insurance company would pay for Petitioner's injuries, caused Petitioner to suffer not only pain, but caused Petitioner's career as a premier player in the MISL to come to an abrupt end.

Petitioner provided credible, heartfelt, uncontradicted trial testimony that he was no longer able to play soccer, the game he loved, and was fortunate to play his entire life until Mokry's actions left him partially and permanently disabled. Petitioner testified he no longer could even play the game recreationally. Petitioner testified his left knee was still quite painful. He testified he suffers from instability, popping and clicking in the knee, pain in the front of the knee, pain under his knee cap, and arthritis, all of which he never experienced prior to the accident. Due to his injury the Arbitrator finds Petitioner was no longer able to pursue his occupation as a professional soccer player, and Petitioner testified he had to change occupations. The Arbitrator finds Petitioner entitled to 45% loss of use person as a whole, and orders

Respondent to pay $93,991.50 ($417.74 PPD rate x 225 weeks = $93,991.50) due to loss of trade pursuant to Section 8(d)(2) of the Act.

N. Regarding whether Respondent due any credit, the Arbitrator finds as follows:

The Arbitrator finds Respondent is not due any credit under the Act.

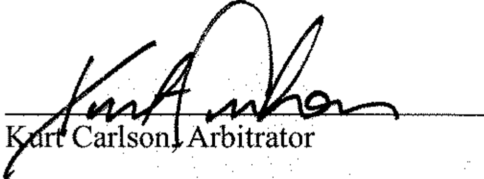
O. Regarding other issues in dispute, including notice to Respondent, the Arbitrator finds as follows:

Arbitrator finds that the Petitioner provided notice of the March 10, 2020 hearing date to the Respondent, and complied with Section 7030.2o(c)(1) of the Rules Governing Practice Before the Illinois Workers' Compensation Commission. The Petitioner served on all parties, and the registered agent for Respondent trial letters proper Notice of Motions and introduced into evidence as Petitioner's Exhibits 12, 13, 14, 15 and 16. The Arbitrator also finds notice was proper as Respondent Mokry, the team's owner was present on his own behalf, and on behalf of Chicago Soul, and Respondent Mokry was present at several prior trial dates, and provided notice personally on said dates.

The Arbitrator finds Respondent did not have insurance. The Arbitrator finds Respondent Mokry's actions and excuses in regard to not obtaining insurance not credible. Mokry admitted in his testimony he did not actually have insurance despite his continued deceptive, injurious misrepresentations to Petitioner, the other players on the team, and the medical providers. Mokry is in violation of Sections 3 & 4 of the Act.

The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer

fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act.



Kurt Carlson, Arbitrator

06.15.20

Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	12WC033750
Case Name	PARKER, FREDERICK NATHAN v. CITY OF CHICAGO
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0533
Number of Pages of Decision	13
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	David Feuer
Respondent Attorney	Donald Chittick

DATE FILED: 10/25/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Frederick Nathan Parker,

Petitioner,

vs. NO: 12 WC 33750

City of Chicago,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 5, 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.

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.

October 25, 2021

/s/ *Marc Parker*
Marc Parker

MP:yl
o 10/21/21
68

/s/ *Carolyn Doherty*
Carolyn Doherty

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PARKER, FREDERICK NATHAN Case# **12WC033750**
Employee/Petitioner

CITY OF CHICAGO
Employer/Respondent

On 5/5/2020, 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 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:

0226 GOLDSTEIN BENDER & ROMANOFF
DAVID Z FEUER
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

0010 CITY OF CHICAGO
D TAYLOR CHITTICK
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Frederick Nathan Parker
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **12** WC **33750**

Consolidated cases: ______

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **9/16/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **4/20/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**81,785.47**; the average weekly wage was $**1,572.80**.

On the date of accident, Petitioner was **55** years of age, ***single*** with **1** dependent children.

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

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

Respondent shall be given a credit of $**898.79** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**898.79**.

Respondent is entitled to a credit of $**233,423.98** under Section 8(j) of the Act.

ORDER

The Arbitrator finds that Petitioner's initial course of treatment prescribed by Dr. Fisher, which included physical therapy and three injections, is causally connected to an aggravation of Petitioner's lower back condition, which occurred on 4/20/12.

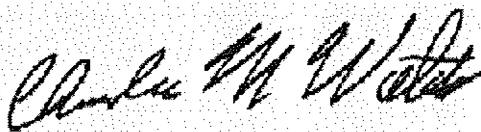
The Arbitrator finds that Petitioner's additional course of treatment prescribed by Dr. Yang, which included a lumbar fusion and post-operative physical therapy, is not causally related to any incident occurring on 4/20/12.

The Arbitrator finds that Petitioner is entitled to TTD from 5/18/12 through 5/23/12. Petitioner's claim for TTD from 7/23/14 through 10/23/14 is denied.

As a result of the injuries sustained, Petitioner is entitled to have and receive from Respondent 10 weeks at a rate of $695.78 because he sustained a 2% loss of the person as a whole.

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

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



Signature of Arbitrator

April 30, 2020
Date

MAY 5 - 2020

Frederick Nathan Parker v. City of Chicago
12 WC 33750

Findings of Fact

On 4/20/12, Petitioner was employed by Respondent as a librarian. On 4/20/12, Petitioner was 55 years of age and had been employed by Respondent since approximately 1986.

Petitioner testified that on 4/19/12, he received a memo from his supervisor, Rosetta Coleman, advising him and other librarians at his branch that they would be required to "shelve books and/or magazines at least one hour per day." Per the Memorandum, these assignments are "effective Friday, April 20, 2011." (Px7).

Petitioner testified that, prior to 4/19/12, he had an exemption from lifting that was accommodated by his employer (Transcript at p. 20). Petitioner testified that this restriction was based on a prior back injury in 1994 that required a laminectomy.

Petitioner testified that despite his history of prior back injury, he was without symptoms from 1995 through March of 2012 (Transcript at p. 12).

On 4/20/12, Petitioner testified he was on duty and was re-shelving books when he experienced pain in his lower back.

On 5/21/12, Petitioner presented to Dr. Theodore Fisher of Illinois Bone and Joint (IBJ) for treatment (Px5). Per the notes of Dr. Fisher, Petitioner reported a history of "in 1/2012 having to re-shelve books which previously was not part of his job description. He reports since then having severe back pain." Dr. Fisher's records from 5/21/12 also note Petitioner's history of "left hemiplegia after a closed head injury in 1973. Petitioner was noted to have left upper and lower extremity atrophy and ambulation difficulties since then." Dr. Fisher diagnosed Petitioner with lumbago, left hemiplegia, and post-laminectomy syndrome status post L5-S1 discectomy, and recommended Petitioner perform physical therapy. Dr. Fisher's work/school status report from 5/21/12 also provides Petitioner's diagnosis of scoliosis.

Petitioner testified that he did not know about his diagnosis of scoliosis (Transcript at p. 29-30).

On 5/24/12, Petitioner performed physical therapy at Swedish Covenant Hospital (Px2 at p. 459-460). The diagnoses noted were abnormality of gait, and disruption of internal operation. The date of onset provided is 10/28/11, and the course of physical therapy noted is from 12/15/11 through 5/24/12. At hearing, Petitioner testified that he had no reason to disagree with these records (Transcript at p. 31).

On 6/25/12, Petitioner followed up with Dr. Fisher and reported having returned to work with modified duty. Dr. Fisher confirmed Petitioner's previous diagnoses and recommended Petitioner continue with physical therapy before transitioning to home exercises (Px5).

On 7/23/12, Petitioner returned to Dr. Fisher and reported "seeing an orthopod by the name of Dr. Miller who recommended Celebrex twice a day and Tylenol with Codeine" for Petitioner's "recurrent left lateral leg 'burning pain'" (Px5). The records of Dr. Miller were not submitted into evidence.

On 7/23/12, Petitioner reported that he did not want injections or surgery, and Dr. Fisher authorized Petitioner to continue working as a librarian without lifting or shelving books (Px5).

On 8/23/12, Petitioner followed up with Dr. Fisher, who noted Petitioner's "chief complaint is left lateral leg pain and his history of L5-S1 disk problems" (Px5). Dr. Fisher recommended Petitioner undergo an updated lumbar MRI and referred him to a knee specialist, noting that "[t]he knee does not appear to be related to the work injury."

Dr. Fisher's records contain a 9/6/12 "memo" from Petitioner to Dr. Fisher (Px5). In the "memo," Petitioner reports his recent history, stating "I started hurting in Spring 2012; by April I went to the GP doctor then to the city's physician."

On 9/28/12, Petitioner returned to Dr. Fisher, who reviewed updated imaging and diagnosed Petitioner with L4-5 moderate spinal stenosis, L5-S1 degenerative disk disease, post-laminectomy syndrome, left intraforaminal disk herniation, and left foraminal stenosis, and left lower extremity radiculopathy (Px5). Dr. Fisher recommended Petitioner receive a L5-S1 transforaminal epidural steroid injection.

On 10/6/12, Petitioner followed up with Dr. Fisher, who noted Petitioner's injection was still pending due to insurance issues (Px5). On 1/11/13, Dr. Fisher's records indicate scheduling of Petitioner's injection for 1/16/13.

On 3/29/13, Petitioner returned to Dr. Fisher and reported receiving three epidural steroid injections with significant improvement following each injection. Dr. Fisher provided the following assessment and plan for Petitioner:

> "For work, I recommend that he continue with the type of restrictions he had prior to the injury, which was avoiding shelving and heavy lifting as well as standing for long periods of time. He is at maximum medical improvement from the standpoint of his back. He will follow up in my office on a p.r.n. basis."

The records of Dr. Fisher show no further follow-ups with Petitioner. Over the next 16 months there are no medical records at all in the record.

On 7/23/14, Petitioner presented to Dr. Benson Yang for consultation (Px3). Under History of Present Illness, the following is provided:

> "He had a bicycle accident with head injury as a teenager and has had a limp in the left leg. He injured himself lifting boxes at work and required a laminectomy in 1994. His job duties were changed and he did not need to do heavy work, but in 2012, his job duties were changed again and he was again required to do heavy work. In Mach 2012, his pain worsened and he was off work for a time. In December/January, he had epidural steroid injections with improvement in his symptoms. This year, his job duties were changed so that he is walking around more. In the last couple months, his symptoms are much worse."

On 7/23/14, Dr. Yang diagnosed Petitioner with lumbar degenerative disc disease and lumbar radiculopathy and recommended a L4-S1 posterior lumbar interbody fusion. Petitioner indicated that he was not interested in conservative care and wished to proceed with surgery (Px3).

On 8/7/14, Petitioner underwent L4-5 and L5-S1 posterior lumbar interbody fusion surgery performed by Dr. Yang (Px3). In the operative report, the indication for the procedure states that Petitioner "was found to have foraminal stenosis at the L4-L5 and L5-S1 level secondary to degenerative disc disease."

Following surgery, Petitioner performed post-operative physical therapy at Swedish Covenant Hospital (Px2). On the Outpatient Physical Therapy – M.D. Report from 10/7/14, the diagnosis provided is lumbago and the "Date of Onset" provided is "01/01/1994" (Px2 at p. 534).

Following surgery, Petitioner continued to follow up with Dr. Yang until 10/31/14, when Dr. Yang released Petitioner to return to work with restrictions. Petitioner testified that he received his full salary for the entirety of his lost time (Transcript at p. 20).

Conclusions on Law

The Arbitrator adopts and incorporates the above Findings of Fact in support of the foregoing Conclusion 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).

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 finds that the testimony of the Petitioner was not credible enough to prove accident but that testimony was unrebutted and there is an injury attached to work in a some of the medical record. The Arbitrator reluctantly notes that he finds there was an accident notes the only reason for doing so is that the issue of Accident was stipulated to by the parties. With regard to the disputed issues, the Arbitrator finds the testimony of Petitioner to not be credible. Petitioner's demeanor at trial was guarded and evasive and he did not recall much if anything inconvenient to his claims. His manner of speech did not evince sincerity and he seemed to be searching for words at times. The Arbitrator believes, after a review of the medical records and considering the live testimony at hearing, that Petitioner exaggerated his symptoms in a convenient manner. Thus, resolution of the disputed issues is had through a thorough review of the medical record with appropriate scrutiny of any part of that record recording the subjective statements of the Petitioner.

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

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).

The Arbitrator finds that Petitioner's initial course of treatment prescribed by Dr. Fisher, which included physical therapy and three injections, is causally connected to an aggravation of Petitioner's lower back condition, which occurred on 4/20/12.

The Arbitrator finds that Petitioner's additional course of treatment prescribed by Dr. Yang, which included a lumbar fusion and post-operative physical therapy, is not causally related to any incident occurring on 4/20/12, but is instead related to Petitioner's underlying degenerative lower back condition and prior history of back injury.

Following Petitioner's lower back aggravation on 4/20/12, he underwent an approved course of treatment with Dr. Fisher. On 3/29/13, Dr. Fisher found that Petitioner had reached MMI and was capable of returning to work with the same restrictions he had prior to 4/20/12. Petitioner was advised to follow up with Dr. Fisher as needed, however, Petitioner never returned to see Dr. Fisher. Instead, approximately 16 months later, Petitioner sought consultation with Dr. Yang. Given this significant gap in treatment and the fact that Petitioner's original treater found Petitioner had reached MMI on 3/29/13, the Arbitrator finds that Petitioner has not met his burden of proof in establishing that his treatment with Dr. Yang was causally connected to his 4/20/12 incident. In reaching this conclusion, the Arbitrator also takes note of the numerous inconsistencies contained in the records.

Petitioner testified that, on 4/19/12, he was advised that his job duties going forward would entail lifting and shelving books and magazines. While the Memorandum advising Petitioner of these new duties is dated 4/19/12, the body of the Memorandum states that this change is to take effect on "April 20, 2011."

Even if the Arbitrator considers this document in the light most favorable to Petitioner, and assumes that the date on the heading of the memo is accurate ("April 19, 2012") and the body of the memo contains a typo ("April 20, 2011"), the inconsistencies with respect to Petitioner's history continue as he begins to seek treatment.

On 5/21/12, at Petitioner's initial appointment with Dr. Fisher, Petitioner reported a history of "in 1/2012 having to re-shelve books which previously was not part of his job description. He reports since then having severe back pain." The January 2012 ("1/2012") onset date contained in this record is inconsistent with Petitioner's testimony and claimed date of accident, 4/20/12, approximately 3 months later.

Petitioner's physical therapy records from Swedish Covenant Hospital, likewise, contain evidence of injury pre-dating any incident in April 2012. In the records from Petitioner's 5/24/12 physical therapy appointment, the date of onset is noted as 10/28/11, and the course of physical therapy is provided as 12/15/11 through 5/24/12. The 10/28/11 date of onset is approximately six months prior to Petitioner's claimed date of accident, 4/20/12. This record, furthermore, confirms that Petitioner was performing physical therapy beginning on 12/15/11, over four months prior to his claimed date of accident.

The records of Dr. Fisher from 7/23/12 contain mention of an "orthopod by the name Dr. Miller" who renders treatment for Petitioner's recurrent left lateral leg pain; however, the records of Dr. Miller were not submitted into evidence.

Furthermore, the records of Dr. Fisher contain a "memo" authored by Petitioner, in which Petitioner states: "I started hurting in Spring 2012; by April I went to the GP doctor then to the city's physician." A plain reading of Petitioner's "memo" leads any reasonable person to conclude that Petitioner was experiencing symptoms prior to April 2012, and "by April," his

symptoms had progressed to the point where he sought treatment. This plain reading of Petitioner's own "memo" is at odds with Petitioner's testimony at hearing that he was without symptoms from 1995 through March of 2012 (Transcript at p. 12).

On 7/23/14, approximately 16 months after Petitioner's MMI discharge from Dr. Fisher, Petitioner presented to Dr. Yang for treatment. The history provided in Dr. Benson's note from 7/23/14 documents Petitioner's brain injury as a teenager and laminectomy in 1994. The history provided by Petitioner is that "[i]n March 2012, his pain worsened and he was off work for a time." Once again, this note suggests that Petitioner's back symptoms pre-dated his incident on 4/20/12 and were, instead present in March 2012, the month prior.

Of note, Dr. Benson's 7/23/14 record also states "This year, his job duties were changed so that he is walking around more. In the last couple months, his symptoms are much worse." This appointment is over two years after Petitioner's claimed date of accident, 4/20/12, and notes new job duties and worsening pain within a couple months prior to 7/23/14. This record suggests an intervening cause (new job duties and worsening symptoms in 2014), which disrupt the chain of causation from Petitioner's 4/20/12 incident to his eventual recommendation for lumbar fusion surgery with Dr. Yang.

These numerous inconsistencies support the Arbitrator's finding that Petitioner's treatment with Dr. Yang, which culminated in surgery, is not causally related to Petitioner's incident on 4/20/12.

(J) What temporary benefits are in dispute? TTD.

The Arbitrator finds that Petitioner is entitled to TTD from 5/18/12 through 5/23/12, while he was off work and pursuing treatment with Dr. Fisher.

As the Arbitrator has concluded that Petitioner's course of treatment with Dr. Yang, including surgery, is not causally related to Petitioner's 4/20/12 incident, Petitioner's claim for TTD from 7/23/14 through 10/23/14 is denied. Additionally, Petitioner testified that he received his full salary for the entirety of his lost time while treating with Dr. Yang, thereby obviating any need for TTD issuance during this period (Transcript at p. 20).

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

In determining the level of Petitioner's disability, the Arbitrator considers five factors:

1) In this case, neither party entered an impairment rating into evidence; however, this alone does not preclude an award for permanent partial disability.

2) Petitioner is employed as a Librarian and, following Dr. Fisher's 3/29/13 release, he returned to work in his usual and customary position as a Librarian with the same restrictions he had prior

to 4/20/12. Following his treatment with Dr. Yang, Petitioner again returned to work as a Librarian with the same restrictions. The Arbitrator places great weight on this factor.

3) Petitioner was 55 years of age on the date of his accident in 2012 and, accordingly, is nearing the end of his career. The Arbitrator places some weight on this factor.

4) Petitioner's future earning capacity was unaffected by his 4/20/12 accident because he has returned to work as a Librarian with the same restrictions as he had prior to 4/20/12. The Arbitrator places great weight on this factor.

5) The treating medical records in this case corroborate Petitioner's lower back injury; however, these records also document a litany of pre-existing conditions as well as inconsistencies that cast doubt on the credibility of Petitioner's testimony. The Arbitrator places some weight on this factor.

As a result of the injuries sustained, Petitioner is entitled to have and receive from Respondent 10 weeks at a rate of $695.78 because he sustained a 2% loss of the person as a whole.

21IWCC0533

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC006735
Case Name	O'CONNOR, JAMES v. BREAKTHRU BEVERAGE
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0534
Number of Pages of Decision	12
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Joseph J. Leonard
Respondent Attorney	Adam Cox

DATE FILED: 10/25/2021

/s/*Carolyn Doherty, Commissioner*

Signature

STATE OF ILLINOIS	)		
	) SS.		
COUNTY OF COOK	)		

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James O'Connor,
Petitioner,
vs. NO: 16 WC 6735

Breakthru Beverage,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 30, 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 $18,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

October 25, 2021

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CMD/ma
045

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

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

O'CONNOR, JAMES
Employee/Petitioner

Case# **16WC006735**

BREAKTHRU BEVERAGE
Employer/Respondent

On 4/30/2020, 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 0.15% 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:

0926 LEONARD LAW GROUP LLC
JOSEPH J LEONARD
325 S PAULINA AVE SUITE 100
CHICAGO, IL 60612

2461 NYHAN BAMBRICK KINZIE & LOWRY
ADAM J COX
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

James O'Connor
Employee/Petitioner

Case # **16** WC **6735**

v.

Consolidated cases: **N/A**

Breakthru Beverage
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 **Tiffany Kay**, Arbitrator of the Commission, in the city of **Chicago**, on **July 16, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

Findings

On **February 11, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**56,188.00**; the average weekly wage was $**1,123.76**.

On the date of accident, Petitioner was **61** 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 $**3,424.78** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $ for other benefits, for a total credit of $**3,424.78**.

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

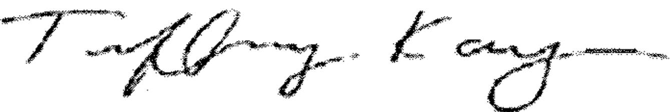
Order

The Arbitrator finds the accident of February 11, 2016 to be a contributing cause to Petitioners condition of ill-being as it relates to his right hip osteoarthritis and trochanteric bursitis condition and for all treatment he received from February 11, 2016 up to the date of Arbitration on July 16,2019.PX1-7,9, 11.

Respondent shall pay petitioner $674.25 per week for a period of 32.25 weeks because the injury caused 15% loss of use of the right leg pursuant to Section 8.1(b) of the Illinois Workers Compensation 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

04/02/2020
Date

ICArbDec p. 2

APR 3 0 2020

PROCEDURAL HISTORY

This matter was heard before Arbitrator Tiffany Kay (hereinafter "Arbitrator Kay") on July 16, 2019 in Chicago, Illinois. The submitted records have been examined and the decision rendered by Arbitrator Kay.

The parties proceeded to hearing with the following issues in dispute: whether James O'Connor's (hereinafter "Petitioner") current condition of ill-being is causally connected to his injury on February 11, 2016 while working for Breakthru Beverage (hereinafter "Respondent") and what the nature and extent of his injury is. (Arb.X1)

The parties stipulated that on February 11, 2016, Petitioner and Respondent were operating under the Illinois Workers' Compensation Act (hereinafter "Act"), that their relationship was one of employee and employer, that Petitioner sustained an accident that arose out of and in the course of his employment with Respondent, and notice of the accident was given to the Respondent within the time limits stated by the Act. Fro the record and the average weekly wage pursuant to Section 10 of the Act was $1,123.76, Petitioner was 61 years of age at the time of the accident, married with 0 dependent children. (Arb.X1)

STATEMENT OF FACTS AND EVIDENCE

Petitioner testified he was 61 at the time of injury and had worked for Respondent for 42 years as a general warehouse worker. (Arb. Ex. 1; Tr. p.10) His duties generally require him to load and unload trucks and restock shelves. (Tr. p.11) On February 11, 2016, Petitioner was carrying a case at work when he caught his heel on a roller, causing him to twist. (Tr. pp.11-12). He testified to the immediate onset of intense pain in his right hip. (Tr. p.12) Petitioner denied ever receiving treatment of any kind to his right hip prior to February 11, 2016. The accident is undisputed. (Arb.Ex.1)

Petitioner continued to work for the next three days prior to seeking any medical attention. (Tr. p.12) On February 15, 2016, Petitioner was seen at U.S. Healthworks. (Tr. p.13; Px1) The history contained in the records from that date state that Petitioner was carrying about 55 pounds when his left went to the side and he felt a pulling sensation in his right groin. (Px1). Heat and Advil provided no relief for three days. X-rays revealed bilateral osteoarthritis in the hips, and he was diagnosed with strains of the right hip and groin. Work restrictions were issued, and physical therapy ordered. *Id.* Petitioner testified that he returned to work the following day, but his pain worsened so he sought another opinion.

On February 15, 2016, Petitioner was seen at U.S HealthWorks. Petitioner transitioned his care later in February of 2016 to Dr. Groya at Community Orthopedics and was first seen on February 19, 2016. (Px2) Dr. Groya agreed with the recommendation for an MRI, which was completed on February 23, 2016. It revealed joint space narrowing with osteophyte formation, diminution of the acetabular labrum with undersurface fraying believed likely due to chronic degeneration, mild insertional tendinosis of the gluteus minimus and medius, and findings suspicious for a left acetabular labral tear. The radiologist suggested a possible MRI of the opposite (left) hip could be considered. The following day Dr. Groya sent him for a surgical consultation for a possible labrile [sic] tear. (Px2, Tr. pp.15-16) He was thereafter referred to Dr. Kang for surgical consultation. He attempted to schedule an appointment with Dr. Kang to no avail at which time Dr. Groya provided another referral to Dr. Domb.

On March 21, 2016, Dr. Domb, and orthopedist with Hinsdale Orthopedics, initially examined Petitioner for complaints of right buttock/groin pain. (Px4) Dr. Domb assessed Petitioner with right hip pain caused by his work accident on February 11, 2016. There were also "coincidental findings of long standing borderline acetabular dysplasia with associated degenerative changes. Specifically, there is a large anterolateral osteophyte, consistent with an ossified labrum and posteromedial joint space narrowing and chondromalacia." Petitioner was restricted to desk work and referred for physical therapy and a steroid injection. (Px4) Petitioner continued to follow up with Dr. Domb's office. (Px4)

On March 28, 2016, Petitioner reported continued pain, "still" located in the anterior groin to Dr. Domb's PA-C, Julie Morgan (hereinafter "Ms. Morgan"). She administered the injection indicated a week earlier by Dr. Domb, and instructed Petitioner to start physical therapy. A month of physical therapy ensued, commencing on March 29, 2016, and ending after 18 sessions on May 6, 2016. (Px5, Px7)

On May 2, 2016, Petitioner returned to see Dr. Domb for his right hip. He reported good relief from the injection, with symptoms decreasing to a rating of 2/10. Petitioner described his symptoms as intermittent and aggravated by extended sitting. Dr. Domb assessed Petitioner with a right hip labral tear in the setting of arthritis, which was improving. Petitioner was released to return to unrestricted work and instructed to complete physical therapy. He could return in three months if he needed another injection. (Px5)

On August 5, 2016, Petitioner returned to Ms. Morgan. Her impression was a labral tear from a work injury that improved with an injection, plus cartilage damage. The report from this date states, "too much cartiledge [sic] damage for arthroscopy. Will continue injections as long as they give relief of pain. Will follow up as needed for injections." (*emphasis supplied*, Px4) Petitioner testified that he discussed hip replacement surgery on at this appointment. (Tr. p.17) The Arbitrator notes that Ms. Morgan's report makes no mention or reference to hip replacement surgery, but does mention, and rule out, arthroscopic surgery.

Following the release to return on an as-needed basis by Dr. Domb on August 16, 2016, Petitioner returned to Dr. Domb's office on nine more occasions, but only once to Dr. Domb himself. These were:

On January 12, 2017, Petitioner was seen by Dr. Domb and told to continue physical therapy (not ordered or under order) and return in three months for an injection. It was noted that balance concerns were secondary to hip arthritis. (Px5, Px7, Px8)

On April 14, 2017, Petitioner was seen by Ms. Morgan, and told there was no progression or arthritis based upon x-rays obtained that date, and to follow up in four months. Complaints of pain were noted in the back of the hip and inner thigh. (Px5, Px7, Px8)

On July 28, 2017, Petitioner was seen by Julie Morgan, PAC for posterior thigh pain, and told to return in six weeks. (Px5 ,Px7)

On November 10, 2017, Petitioner was seen by Stephanie Rabe, NP and told to return in three months for an injection. (Px7)

On March 16, 2018, Petitioner was seen by Amanda Frakes, PAC for complains of "recent onset of severe lateral hip pain," noting he had relief two years earlier from an injection. Ms. Frakes administered a steroid injection into the right hip for an assessment of right hip trochanteric bursitis. (Px8)

On July 20, 2018, Petitioner was seen by Amanda Frakes, PAC for follow up three months after a greater trochanteric injection. The history noted not having much discomfort at that time, and "No major concerns today." Another Cortisone injection was given "for pain relief" and Petitioner was instructed to continue home exercises. (Px7)

On November 16, 2018, Petitioner was seen by Ms. Rabe, NP with minimal pain, but seeking to discuss total hip arthroplasty. After discussion with Petitioner, Ms. Rabe wanted to manage Petitioner's symptoms conservatively, without surgery. Petitioner was to return in three months or as needed for another hip injection. (Px7, Px8)

On March 22, 2019, Petitioner was seen by Amanda Frakes, PAC and reported that his discomfort was manageable and did not need another injection. (Px9)

On June 21, 2019, Petitioner was seen by Amanda Frakes, PAC six months following an injection with good relief reported. Petitioner began to notice some stiffness and tenderness laterally, but not severe enough to warrant another injection. He was assessed with mildly symptomatic trochanteric bursitis in a setting of osteoarthritis and told to follow up in three months or as symptoms arose. (Px9)

On each of the aforementioned dates, no work restrictions were issued. (Px5, Px7, Px8 and Px9) Petitioner testified he continued to work full duty for Respondent since his discharge from physical therapy, in early May of 2016, without difficulty (but perhaps more slowly). (Tr. p.28, Px5)

Petitioner testified he was never pain free since his accident, but his condition seemed to stabilize "the last few years." (Tr.p.20, 22-23) He has another appointment scheduled for September 20, 2019. (Tr. p.24)

On October 9, 2017, Petitioner was seen by Dr. Shane Nho (hereinafter "Dr. Nho") for a Section 12 examination. Dr. Nho's report from this exam was admitted into evidence as Respondent's Exhibit 1. After taking a history from Petitioner, reviewing his medical records, and conducting a comprehensive physical examination of Petitioner's right hip and taking x-rays, Dr. Nho rendered several opinions. (Rx1) Dr. Nho noted that Petitioner's MRI of February 22, 2016 demonstrated mild chondromalacia, a degenerative labrum, tendinosis of the gluteus minimus/medius, areas of chondral loss and osteophytes around the acetabulum, but no bone edema that suggested an acute injury. (Rx1, p.3) Dr. Nho diagnosed Petitioner with a temporary exacerbation of pre-existing mild hip chondromalacia/osteoarthritis related to his work accident. (Rx1, pp.3-4) Despite the temporary exacerbation, Dr. Nho did not believe there was a permanent aggravation to Petitioner's mild chondromalacia/osteoarthritis caused by the work accident, and maximum medical improvement was reached approximately three months post-injury. (Rx1, p.4) Dr. Nho cautioned that it could take several weeks for the response to physical therapy and injections to realize effectiveness. (Rx1, p.4) Concerning arthroscopic surgery, Dr. Nho concurred with earlier records from Dr. Nho that in the setting of osteoarthritis, it is not recommended. Dr. Nho found the possibility of total hip replacement purely speculative. If required in the future, Dr. Nho did not believe the work accident of February 22, 2016 contributed to the need for surgery. In support, Dr. Nho pointed to the mild chondromalacia/osteoarthritis seen on the MRI 11 days after the accident and that these were chronic age-related findings without evidence of an acute injury. (Rx1, p.4)

On cross examination, Petitioner testified that the first time he discussed a hip replacement after his injury was "the first or second time I went to US Healthworks, whoever I saw." (Tr. p.26) Concerning discussing hip replacement with Dr. Domb himself, and not one of the doctor's assistants, Petitioner testified that happened at the first appointment in March of 2016. (Tr. pp26-27) Petitioner conceded that since his physical therapy ended

in May of 2016, he's seen Dr. Domb's Physician Assistants much more frequently than Dr. Domb himself. (Tr. p.27)

Dr. Domb's testimony was taken via evidence deposition on October 30, 2018. The transcript was admitted as Petitioner's Exhibit 11. Dr. Domb testified regarding the treatment he rendered to Petitioner. In reviewing the MRI, Dr. Domb testified he saw a tear of the undersurface of the right acetabular labrum and significant chondromalacia. He could not tell whether the findings were chronic or acute. (Px11, p.12) Dr. Domb's initial assessment was right hip pain due to the work injury, with "coincidental findings of longstanding borderline acetabular dysplasia with associated degenerative changes. Specifically, there was a large anterolateral osteophyte consistent with an ossified labrum and posteromedial joint space narrowing and chondromalacia." (Px11, pp.12-13)

Petitioner had an injection in March of 2016 followed by physical therapy. Dr. Domb next saw Petitioner on May 2, 2016, Petitioner complained of pain rated 2/10, which was intermittent and exacerbated by sitting for extended periods. (Px11, pp.15-16) Dr. Domb testified that the "recent onset of lateral hip pain" reported by Petitioner on March 16, 2018, was consistent with trochanteric bursitis. (Px11, pp.26-27) Dr. Domb opined the finding was sequelae of the work injury. (Px11, p.27) The injection given at that time (by Dr. Domb's assistant) was to a different part of Petitioner's hip. (Px11, p.28)

Over Respondent's objection, Dr. Domb testified that he believed Petitioner sustained a permanent aggravation of pre-existing osteoarthritis. (Px11, p.30) In support Dr. Domb relied upon the absence of pain prior to the injury, and immediate onset of pain following the incident that has waxed and waned since the event. (Px11, pp.30-31) Over another objection to a leading question, Dr. Domb opined that that Petitioner's accident "more likely than not" moved up the time frame for a hip replacement. (Px11, p.33)

On cross examination, Dr. Domb conceded that activity modifications are a common form of treatment for an acute condition, and that Petitioner had been working without restrictions for many years. (Px11, p.34) Further, Dr. Domb could not recall that prior to his deposition whether he reviewed any of the records from the treatment Petitioner received prior to presenting for his first examination. (Px11, pp.34-5, 38) Dr. Domb said he would perform a hip replacement for Petitioner if it was desired because of the arthritis in Petitioner's right hip. (Px11, p.36) Prior to March 16, 2018, Dr. Domb found no indication that the term and diagnosis "trochanteric bursitis" was used in any of Petitioner's prior treatment records. (Px11, p.37) In terms of Petitioner's arthritis, Dr. Domb testified that he uses the term to encompass cartilage damage, as well as osteophytes or bone spurs and the tearing of the labrum, all of which "***may have been*** aggravated by the work injury." (Px11, pp.38-39, *emphasis supplied*) Dr. Domb testified there was no evidence of any structural changes in Petitioner's right hip since May of 2016, including his review of x-rays taken since that time. (Px11, pp.40-41) Dr. Domb did not feel a total hip replacement was warranted as of May 2016. (Px11, p.41)

CONCLUSIONS OF LAW

With respect to issue (F), whether Petitioner's current condition of ill-being causally connected to his injury, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator notes that she found the Petitioner's testimony to be credible and forthcoming. It is long been recognized that, in pre-existing conditions cases, recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the pre-existing disease such that the employees current

condition of ill-being can be said to be causally connected to the work injury and not simply the result of a normal degenerative process of the pre-existing condition. *Caterpillar Tractor Co. v. Industrial Comm'n, 92 Ill. 2d 30, 65 Ill. Dec. 1, 427 N.E.2d 861 (1982)*

It is axiomatic that employers take their employees as they find them. *Baggett, 201 Ill. 2d at 199.* When the worker's physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment. *General Electric Co. v. Industrial Comm'n, 89 Ill. 2d 432, 60 Ill. Dec. 629, 433 N. E. 2d 671 (1982)* Thus even though an employee has a pre-existing condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Sisbro v. Industrial Commission 207 Ill. 2d 193, 278 Ill. Dec. 270 (2003).* 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, 227 N. E. 2d 65 (1967).

Additionally, a chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability and medical treatment may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury. *International Harvester v. Industrial Comm'n, 93 Ill. 2d 59, 442 N.E. 2d 908(1982).*

Finally, in *David Morrison v. Keystone Steel & Wire, 14 ILWC 31081, (Ill.Indus.Com'n), 17 I.W.C.C. 0353, 2107 WL 3023705, "nothing in our Act places a requirement of proof on the petitioner to show evidence of an acute injury on MRI for there to be an aggravation, but rather a change in petitioners symptoms is enough to prove his claim. "(*my emphasis)

Petitioner in the instant case has established the requisite causal connection based on a preponderance of the evidence as supported by his testimony, the summarized medical treatment above, the causal connection opinions of Dr. Domb both in the treating records (Px p.3,4,5,6,7,9) and in his deposition testimony (Px p.11), and by the chain of events analysis. The Arbitrator finds a causal relationship of the right hip injury, specifically the labral tear and resulting aggravation of his preexisting OA and the treatment he underwent following the injury from 2016 up to the date of Arbitration. (Px p. 1-7,9,11)

Dr. Nho's opinions that petitioner sustained a temporary exacerbation of pre-existing mild chondromalacia/osteoarthritis and that same was not aggravated as a result of the work accident is not credible given the 3 years of medical treatment and the immediate symptoms that arose after the work accident and which clearly have remained consistent and unabated since. (Px p.1-7, 9, 11.) Furthermore Dr. Nho has not seen any treatment records after his initial IME of October 9, 2017 despite the apparent need of and the existence of ongoing treatment.

The preponderance of the evidence clearly supports a nexus to petitioner's ongoing right hip pain for over 3 years and the work accident of February 11, 2016. To deny that the work injury of February 11, 2016 is at least "a contributing cause" to petitioner's present condition of ill-being would be against the manifest weight of the evidence presented and to ignore the preponderance of the evidence and the long-standing rule of law as it relates to preexisting conditions cited supra.

With respect to issue (L), what is the Nature and Extent of the injury, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the Section §8.1b of the Illinois Workers' Compensation Act. Here, the accident occurred on February 16, 2016, making section §8.1b applicable.

With regard to (i) there is no AMA report to consider, therefore the Arbitrator gives this factor no weight.

With regard to (ii) of §8.1b(b), the occupation of the employee, Petitioner returned to work in his pre-injury position, and in an unrestricted capacity. Therefore, the Arbitrator gives little weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 61 years of age at the time of the accident. With Petitioner being an older employee, it may be more difficult for him to live and work with the residual issues from his hip as opposed to a younger worker. Therefore, the Arbitrator gives more weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner was able to return to work, in his same position and on a full duty basis. Therefore, the Arbitrator gives little weight to this factor.

With regard to subsection (v) of§8.1b(b), evidence of disability corroborated by the treating medical records Petitioner has voiced continuous complaints of ongoing pain throughout his treatment. In fact, he questioned in November 2018 if he would have to live with these deficits and pain. Hip replacement surgery has repeatedly been discussed and is inevitable. PX9. Petitioner testified at Arbitration to difficulty walking long distances and sitting. On bad days he must apply ice to manage the ongoing pain. The Arbitrator gives more weight to this section as petitioner still experiences consistent right hip pain at the present time corroborated in the medical records.

Based on the above, the record taken as a whole and testimony, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of %15 loss of use to his right leg.

Signature of Arbitrator

04/02/2020
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC011146
Case Name	SOTO, ROSALBA v. DURABLE PACKAGING
Consolidated Cases	14WC029673
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0535
Number of Pages of Decision	10
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Frank Gaughan
Respondent Attorney	Christopher Jarchow

DATE FILED: 10/25/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROSALBA SOTO,

Petitioner,

vs. NO: 13 WC 11146

DURABLE PACKAGING,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering all issues, and being advised of the facts and law, reverses the Decision of the Arbitrator and finds that Petitioner sustained a compensable accident arising out of and in the course of her employment on February 11, 2013 and that the condition of her right upper extremity and cervical spine are causally related to said accident through June 16, 2014. The present claim is consolidated with 14 WC 29673, which the Commission has addressed in a separately issued Decision.

I. Findings of Fact

Petitioner held a non-specified job title for Respondent with duties that included putting labels inside muffin pans as well as receiving and packaging aluminum trays. Petitioner's job required lifting of 10 to 15 pounds, although the aluminum muffin pans that she handled weighed less than an ounce each. Petitioner testified that on February 11, 2013, she had finished receiving trays and bent down to clean her work area when boxes filled with muffin trays fell off a nearby skid from a height of five or six feet onto her right upper extremity. Petitioner did not recall how much the boxes weighed. Petitioner testified that as the boxes fell, she moved her neck to the left and attempted to stop more boxes from falling with her left hand. Petitioner immediately felt numbness and tingling in her right hand through all her fingers and her entire right arm. Surveillance video footage of the accident was admitted into evidence as RX 7.

Petitioner promptly reported the accident to her supervisor and signed an accident report on February 11, 2013, in which she reported that she had been replacing labels on boxes and went

to pick up plastic wrap from the floor when she noticed a nearby stack of boxes moving. Petitioner stated that she tried to grab the boxes to stop them from falling, but one box hit her right hand and another box hit her right shoulder. An accompanying supervisor's report also indicated that Petitioner had been struck when improperly stacked boxes fell off a skid.

On February 12, 2013, Petitioner sought treatment at Marque Medicos with Dr. Fernando Perez, a chiropractor, and complained of neck, bilateral shoulder, and right wrist pain. Petitioner told Dr. Perez that she had been working near a skid that was stacked with heavy boxes containing aluminum plates when the boxes fell, striking her right shoulder and wrist. Although Petitioner reported that she was working without any physical difficulties prior to this accident, she acknowledged a previous neck and back injury from a motor vehicle accident in 2011. Petitioner indicated that she received medical attention following the motor vehicle accident but had since been discharged and returned to her normal activity level. Dr. Perez diagnosed Petitioner with cervical, shoulder, and right wrist pain that was directly related to her work injury on February 11, 2013. He then took Petitioner off work and referred her to Dr. Andrew Engel for pain management.

Petitioner presented to Dr. Engel of Medicos Pain & Surgical Specialists on February 13, 2013. She advised Dr. Engel that she had been struck on her right shoulder and wrist by heavy falling boxes containing aluminum plates and reached up with her left arm to prevent more boxes from hitting her. Dr. Engel diagnosed Petitioner with shoulder pain, cervicalgia, and wrist pain. He noted that although Petitioner had a previous history of neck pain from a motor vehicle accident, she had been working full duty pain-free prior to the February 11, 2013 accident. Dr. Engel opined that the work accident was the direct cause of Petitioner's current pain complaints. He kept Petitioner off work and ordered physical therapy, which Petitioner began for her right shoulder on February 15, 2013.

On February 18, 2013, X-rays of the cervical spine, right hand, and right shoulder revealed unremarkable soft tissue structures with no fractures, dislocations, or joint pathology. However, the cervical X-ray showed flattening of the cervical lordosis and the right hand X-ray indicated a small osseous cyst within the capitate. When Petitioner returned to Dr. Engel on March 6, 2013, it was recommended that she stop physical therapy for her right shoulder since she showed no improvement and instead pursue physical therapy for her cervical spine, which she later began on March 15, 2013. Dr. Engel also kept Petitioner off work and prescribed Dendracin cream.

At Respondent's request, Petitioner presented for a §12 examination with Dr. Prasant Atluri for her right upper extremity on March 7, 2013. Petitioner told Dr. Atluri that she was cleaning her work area and picking up pieces of plastic off the ground when she noticed a tower of boxes falling down. Petitioner indicated that one box hit her right wrist while two other boxes hit her right upper arm. Dr. Atluri found Petitioner's pain responses to be inconsistent when comparing distraction testing with direct examination, which suggested symptom magnification. He diagnosed Petitioner with right upper extremity pain of an unclear etiology and opined that Petitioner's findings were not consistent with any mechanical pathology in her right upper extremity, although he could not exclude a cervical etiology. Dr. Atluri further stated that although surveillance video footage corroborated Petitioner's story that there was contact between the falling boxes and her right upper extremity, it did not appear to show any direct impact. Regardless of the degree of impact, Dr. Atluri found no findings of any mechanical problem in Petitioner's

right upper extremity that could have been caused by that type of injury. He identified no work-related condition that required further treatment or restrictions and placed Petitioner at MMI for her upper extremity, although he deferred to a spine specialist regarding any cervical problem.

Petitioner then presented for another §12 examination with Dr. Gunnar Andersson on March 28, 2013. Petitioner advised Dr. Andersson that she had been working near a skid stacked high with heavy boxes when some boxes fell, striking her right shoulder and wrist. She further reported that she had lifted her left arm to stop the boxes from hitting her. However, Dr. Andersson indicated that he saw no evidence on the surveillance video footage of any box hitting Petitioner or of Petitioner trying to prevent boxes from falling. Although he found no positive nonorganic physical signs on examination, Dr. Andersson believed that Petitioner's history as to her mechanism of injury was inconsistent with the video depicting the accident. He opined that there was nothing to suggest that Petitioner had an injury to her neck or shoulder and that her symptoms were not indicative of a severe underlying problem. As such, Dr. Andersson found that Petitioner's neck and shoulder pain was not work-related. He placed Petitioner at MMI with respect to her neck, although he reiterated that there had been no real accident.

Thereafter, on April 13, 2013, a right shoulder MRI yielded unremarkable results. Dr. Engel agreed with the radiologist's report when he reviewed the MRI films on April 17, 2013 and indicated that Petitioner's neck pain was radiating to her right shoulder with weakness that was potentially a cervical radiculopathy. He kept Petitioner off work and ordered a cervical MRI, which was obtained on April 29, 2013. The cervical MRI found minimal to mild cervical spondylosis most pronounced at C6-C7 with a tiny central disc protrusion at C5-C6 and a small broad-based central disc protrusion at C6-C7, borderline spinal stenosis at C6-C7 with no significant cervical neural foraminal stenosis, and straightening of the normal cervical lordosis that could be due to muscle spasm.

On May 2, 2013, Dr. Engel reviewed the cervical MRI films and contended that the radiologist had under-read the C6-C7 herniation. Dr. Engel found that Petitioner had a contained disc herniation that was causing central stenosis and deformation of the thecal sac. He ordered an EMG/NCV of the bilateral upper extremities to define the radicular component of Petitioner's herniation. Dr. Engel further noted that Petitioner had shoulder weakness and a positive Spurling's sign. He continued Petitioner's medication management and kept her off work. Dr. Perez again continued Petitioner's off-work restrictions when she returned for chiropractic treatment of her right wrist on May 8, 2013.

On May 10, 2013, the EMG/NCV yielded normal results with no evidence of acute denervation of the cervical nerve roots, peripheral entrapment, or polyneuropathy. Shortly thereafter, on May 14, 2013, Petitioner began physical therapy for her right wrist. When Petitioner returned to Dr. Engel on May 23, 2013, she indicated that her right wrist pain had improved. Dr. Engel's diagnoses at that time included a cervical herniated disc, cervical facet syndrome, shoulder pain, and wrist pain. Dr. Engel also indicated that Petitioner's past Spurling's test appeared to be a false positive given that her EMG/NCV was negative. He kept Petitioner off work and recommended right C4, C5, and C6 medial branch blocks.

Dr. Engel also reviewed Dr. Andersson's §12 report and agreed that Petitioner did not have

any underlying problem. He also agreed that Petitioner had all organic physical examination signs and no symptom magnification. Dr. Engel then requested Petitioner's job video to review so that he could make an appropriate opinion regarding causation. He noted that even though Petitioner had no underlying problem that could be causing her pain, the work accident had likely caused her problem. Nevertheless, Dr. Engel reiterated his desire to see the video footage before confirming his opinion.

Petitioner thereafter underwent right C4, C5, and C6 medial branch blocks on June 13, 2013. When she next saw Dr. Engel on June 19, 2013, Dr. Engel expressed concern that the C6-C7 herniation was the root of Petitioner's pain and referred her to Dr. Robert Erickson, a neurosurgeon. Dr. Engel further noted that Petitioner occasionally had numbness that radiated down her right arm into her fingers in a C8 distribution.

On July 3, 2013, a clinical evoked potential upper extremities test revealed significant evidence of right C6 and right C7 dermatomal conduction delays. The same day, Petitioner presented to Dr. Erickson and reported being hit by falling boxes in her right shoulder and wrist. Dr. Erickson noted that the SSEP testing performed earlier that day showed right-sided abnormalities of a mild degree at both C6 and C7, which correlated with the MRI report. His diagnosis was cervical radiculopathy at C6 and C7 due to disc disease from C5 to C7. Dr. Erickson recommended off-work restrictions and physical therapy with cervical traction, which Petitioner began on July 18, 2013. Dr. Erickson also reviewed Petitioner's MRI scans on August 21, 2013 and found that they showed a small herniation at C5-C6 with a slightly larger herniation at C6-C7. However, he stated that Petitioner had begun to improve with physical therapy and appeared as though she would avoid surgery. Dr. Erickson kept Petitioner off work at that time.

On October 3, 2013, Petitioner returned to Dr. Engel with right neck pain radiating to her right shoulder and right wrist pain. Dr. Engel kept Petitioner off work and prescribed Ultram. However, Petitioner's consultations with Dr. Engel were discontinued by Dr. Perez on December 11, 2013, because Dr. Engel was no longer affiliated with Medicos Pain & Surgical Specialists. Instead, Dr. Perez referred Petitioner to a pain management consultation with Dr. Suneela Harsoor, who Petitioner saw on December 12, 2013. Petitioner told Dr. Harsoor that her neck, bilateral shoulder, and right wrist pain began on February 11, 2013 after her work injury. She reported that she was working near a skid that was stacked high with heavy boxes containing aluminum plates when she saw the boxes beginning to fall. Petitioner indicated that one of the boxes hit her right shoulder. Dr. Harsoor diagnosed Petitioner with a cervical disc herniation and wrist joint pain. She recommended a cervical epidural steroid injection, tramadol, and off-work restrictions.

Around this time, Dr. Erickson became ill and Petitioner began seeing Dr. Leonard Kranzler, who was taking over Dr. Erickson's patients. Petitioner first saw Dr. Kranzler at Northside Neurosurgery on January 8, 2014 and reported continued neck pain radiating down her right arm with numbness and tingling as well as posterior headaches. Dr. Kranzler recommended Holter Cervical Traction at home. He also kept Petitioner off work and prescribed Norco.

Petitioner thereafter underwent a cervical epidural injection on February 14, 2014. However, Petitioner reported worsening pain after the injection when she saw Dr. Kranzler on February 19, 2014. Dr. Kranzler indicated that Petitioner's MRI and SSEP testing results were

very mildly abnormal. He recommended continued use of the Holter Cervical Traction and light duty restrictions of no lifting greater than six to eight pounds nine times per day and no bending.

Petitioner returned to Dr. Harsoor on April 11, 2014, at which time her diagnoses included a cervical disc herniation and discogenic pain. Dr. Harsoor held off on further cervical epidural injections since Petitioner's relief was mild. She also kept Petitioner off work; however, at Petitioner's next visit on May 30, 2014, she released Petitioner to light duty with a five-pound lifting restriction. Petitioner returned to work but continued to have right arm pain, neck pain, and difficulty lifting items.

Then, on June 17, 2014, Petitioner had finished running a machine and was standing in front of a skid with product on it. Petitioner testified that after she had cleaned off parts on the floor and stood up, she noticed trays moving toward the front of the skid. Petitioner testified that she turned her head to the left and squished down as the parts came down toward her. The parts were aluminum trays similar to cupcake holders or baking pans that weighed a couple ounces each, although more than 20 trays were grouped together in a stack that fell onto Petitioner's right upper extremity and neck. Petitioner further testified that when she moved her face to the left side and squished down to avoid the falling trays, she experienced strong pain on the back of her neck that was worse than normal. Petitioner filed a separate claim for the June 17, 2014 accident, which is addressed by the Commission in a separate Decision for 14 WC 29673.

Petitioner's supervisor, Marcos Canales, testified that on June 17, 2014, Petitioner told him that some pans had fallen onto her, but there was no injury reported at that time. Mr. Canales further testified that the types of pans that Petitioner claimed had hit her were small and lightweight aluminum muffin pans that weighed a quarter of an ounce each.

After the June 17, 2014 incident, Petitioner returned to Dr. Harsoor on July 18, 2014 and reported that trays had fallen onto her head and right shoulder three weeks prior, causing her worsening pain and stiffening in her neck and shoulder. Dr. Harsoor diagnosed Petitioner with a cervical herniated disc, discogenic pain, and myofascial pain. She then administered cervical trigger point injections and released Petitioner to light duty work with a 10-pound restriction. However, Petitioner testified that her pain stopped her from going back to such light duty work.

On August 7, 2014, Petitioner told Dr. Perez that her present complaints of neck and upper mid-back pain began on June 17, 2014 when a stack of trays fell and struck the right side of her upper back, neck, and head area. Dr. Perez opined that Petitioner had cervical and thoracic pain that was directly related to her work injury sustained on June 17, 2014. Dr. Perez referred Petitioner to physical therapy as well as a pain management specialist. Petitioner thereafter began another round of physical therapy for her cervical spine on August 8, 2014.

On August 13, 2014, another clinical evoked potential upper extremities test found significant evidence of bilateral C6 and C7 dermatomal conduction delays. Thereafter, on August 15, 2014, cervical X-rays further revealed biomechanical alterations that were most likely indicative of a muscle spasm and/or other soft tissue injury. The findings further demonstrated a reversal of cervical lordosis with an anterior translation of the head. Nevertheless, the soft tissue structures appeared unremarkable with no evidence of fracture, dislocation, osseous, or joint

pathology. A thoracic spine X-ray was also obtained and demonstrated degenerative disc disease.

On October 3, 2014, Petitioner complained to Dr. Harsoor of radiating right shoulder pain that had been symptomatic for the last 3.5 months following the June 17, 2014 injury. Dr. Harsoor diagnosed Petitioner with a shoulder injury from the June 17, 2014 accident and a cervical disc herniation, discogenic pain, and myofascial pain from the February 11, 2013 accident. Dr. Harsoor put a second cervical epidural steroid injection on hold, because Petitioner's current shoulder pain was acute and severe. She also took Petitioner off work as she recovered from her shoulder injury, provided an orthopedic referral, and prescribed meloxicam and Flexeril. A few days later on October 8, 2014, Petitioner restarted physical therapy for her cervical spine.

Another clinical evoked potential upper extremities test was obtained on October 22, 2014 that again showed significant bilateral delays at C6 and C7. That same day, Dr. Erickson ordered a repeat cervical MRI, refilled prescriptions for Mobic and Flexeril, and kept Petitioner off work. Petitioner then returned to Dr. Harsoor on November 7, 2014 with complaints of right shoulder and neck pain radiating to her right fingers with numbness and tingling. Dr. Harsoor kept Petitioner off work while recommending a right shoulder MRI and a second cervical injection.

On December 3, 2014, another clinical evoked potential upper extremities test was performed and noted significant evidence of bilateral delays at C6 and C7. Dr. Erickson believed that this SSEP testing showed a moderate delay on the right at C6 and mild delays bilaterally at C7 and on the left at C6. Dr. Erickson then opined that Petitioner might be a good candidate for an anterior discectomy and fusion at C5-C6. Shortly thereafter, on December 10, 2014, a cervical MRI found extensive spondylotic changes with numerous protrusions and disc-osteophyte complexes as well as moderate central canal stenosis at C6-C7.

On January 28, 2015, Dr. Erickson indicated that Petitioner had prominent neck pain and paresthesia radiating to the second, third, and fourth fingers on the right hand and the upper left arm. He stated that his most important neurological examination finding was diminished grip on Petitioner's right side. Dr. Erickson opined that Petitioner required an anterior cervical discectomy and fusion from C5 to C7 as a consequence of her injury on June 17, 2014. Petitioner testified that she did not undergo the surgery recommended by Dr. Erickson, because insurance had not agreed to pay for it. However, on February 13, 2015, Dr. Harsoor canceled the second cervical epidural steroid injection, because Petitioner was being scheduled for the cervical surgery by Dr. Erickson. Dr. Harsoor also continued Petitioner's off-work restrictions.

Over seven months later, on September 24, 2015, Dr. Perez authored a note stating that Petitioner was discharged from any further treatment at Marque Medicos, because she had stopped returning to the facility for treatment of her work-related injury. Dr. Perez again discharged Petitioner on December 10, 2015 and stated that his facility had no further treatment to offer her.

Several years later, on March 22, 2018, Petitioner presented for another §12 examination with Dr. Frank Phillips and reported that heavy boxes had struck her right shoulder and wrist on February 11, 2013. Dr. Phillips found no evidence of a specific structural cervical injury and no objective findings to support Petitioner's subjective complaints. He further contended that Petitioner's cervical imaging revealed no acute pathology or neural compression and her EMG

showed no cervical radiculopathy. As such, Dr. Phillips opined that Petitioner had no cervical diagnosis as a consequence of the alleged 2013 injury. Assuming the accident occurred as Petitioner described, he conceded that Petitioner could have sustained at most a cervical sprain/strain for which she would have long reached MMI. Nevertheless, Dr. Phillips opined that Petitioner lacked any current cervical diagnosis related to the February 11, 2013 and June 17, 2014 accidents. In light of the absence of any structural spine injury, he also contended that Petitioner's subjective cervical complaints were not causally related to either accident. However, Dr. Phillips noted no clear evidence of symptom magnification or nonorganic pain signs.

Petitioner testified that today, she does not have her same pre-accident strength and cannot lift heavy objects secondary to pain in her right upper extremity and neck. Although Petitioner can take a half gallon of milk out of the refrigerator with her right hand, it is painful and she therefore uses her left hand to do so. Likewise, Petitioner removes pots of water from the stove using her left hand and cannot move a two-handed pot herself. Petitioner further indicated that she lacks the strength to carry her two younger children with her right arm and instead carries them with her left arm. Petitioner also notes neck pain and tingling in her arm when she lifts her children. Nevertheless, Petitioner does not have childcare and is able to take care of her five youngest children, who range in age from two to 16 years old, with her older daughter's help.

Petitioner further testified that she has not looked for employment since she stopped working for Respondent, because the jobs she applied to require lifting of more than 10 pounds. Petitioner indicated that she cannot do such jobs, because she does not want to feel the accompanying pain all day.

II. Conclusions of Law

Following a careful review of the entire record, the Commission reverses the Decision of the Arbitrator and finds that Petitioner sustained a compensable accident arising out of and in the course of her employment on February 11, 2013.

Petitioner testified that on February 11, 2013, she had bent down to clean her work area when boxes fell onto her and struck her right arm. She testified that as the boxes fell, she moved her neck to the left and tried to stop more boxes from falling with her left hand. After this motion, Petitioner noticed numbness and tingling in her right hand through all her fingers as well as through her right arm. The Commission finds that the surveillance video footage of this incident, which was admitted into evidence as RX 7, corroborates Petitioner's testimony that she attempted to move out of the way and deflect the falling boxes with her left hand. Although the exact location and degree of impact is hard to discern, the video shows the boxes making contact with Petitioner and Petitioner holding her right shoulder post-incident.

Petitioner immediately reported this accident to her supervisor and filled out an accident report on February 11, 2013. Petitioner then promptly presented for medical treatment the day after the accident, on February 12, 2013, with Dr. Perez. Petitioner informed Dr. Perez that on February 11, 2013, she was working near a skid that was stacked high with boxes containing aluminum plates when the boxes began to fall toward her. Petitioner reported that the boxes had struck her right shoulder and right wrist. Petitioner stated that she was also able to stop some

boxes from hitting her by reaching up with her left arm. Petitioner thereafter consistently treated for her injuries and told her treating doctors the same mechanism of injury, specifically that boxes had fallen onto her right upper extremity. Since Petitioner's testimony is corroborated by the surveillance video, prompt accident report, and Petitioner's statements to her treating doctors, the Commission finds that Petitioner proved that she sustained a compensable work accident on February 11, 2013.

The Commission further finds that the condition of Petitioner's right upper extremity and cervical spine are causally related to the February 11, 2013 accident through June 16, 2014, as Petitioner sustained a second intervening accident the next day. Petitioner's treatment records document that she had a prior neck and back injury due to a motor vehicle accident in 2011. Nevertheless, Petitioner had been discharged from care following that motor vehicle accident and returned to her normal activity level before the February 11, 2013 accident. Nothing in the treatment records suggests that Petitioner's present condition is attributable to her prior motor vehicle accident.

Moreover, on February 12, 2013, Dr. Perez opined that Petitioner's cervical pain, shoulder pain, and right wrist pain were directly related to her work accident. The following day, on February 13, 2013, Dr. Engel diagnosed Petitioner with shoulder pain, cervicalgia, and wrist pain. Dr. Engel then opined that Petitioner's work-related accident on February 11, 2013 was the direct cause of her pain complaints. On the contrary, Respondent's §12 examiners all found no causation, although Dr. Phillips nevertheless conceded that Petitioner could have sustained a cervical sprain/strain in the accident.

The causal opinions of Petitioner's treating doctors are corroborated by the objective findings on Petitioner's cervical MRI. On April 29, 2013, the MRI found spondylosis at C6-C7 with a central disc protrusion at C5-C6 and a small broad-based central disc protrusion at C6-C7, borderline spinal stenosis at C6-C7, and straightening of the normal cervical lordosis that may be due to muscle spasms. Such evidence of objective pathology, combined with the fact that Petitioner had been asymptomatic and working full duty up until the accident, warrants a causal finding.

Petitioner was never placed at MMI by her treating doctors prior to sustaining a second intervening accident on June 17, 2014, which is the subject of the Commission's Decision in 14 WC 29673. As Petitioner's conditions subsequently worsened with the intervening June 17, 2014 accident, the Commission finds causation related to the February 11, 2013 accident up until June 16, 2014 only. The Commission further declines to award permanent partial disability in the present case and instead makes a permanency finding in its Decision for 14 WC 29673.

Nevertheless, consistent with its causal finding in the present claim, the Commission awards all reasonable and necessary medical expenses incurred for Petitioner's right upper extremity and cervical injuries from the February 11, 2013 accident date through June 16, 2014, which represents the period before Petitioner's intervening accident occurred on June 17, 2014.

Lastly, the Commission awards temporary total disability benefits from February 12, 2013 through May 30, 2014. The treatment records show that Petitioner was first taken off work by Dr.

Perez on February 12, 2013. She was thereafter kept either off work or on light duty restrictions by her treating doctors until Dr. Harsoor released her with a five-pound lifting restriction on May 30, 2014 and Petitioner was able to return to work. Respondent did not accommodate Petitioner's light duty restrictions until she received different light duty restrictions on May 30, 2014. Petitioner continued to work until her second work accident on June 17, 2014, which is thereafter the subject of the Commission's Decision in 14 WC 29673.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated February 4, 2021, is hereby reversed as stated herein.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner suffered a compensable accident that arose of and in the course of her employment on February 11, 2013 and that the conditions of her right upper extremity and cervical spine are causally related to said accident from February 11, 2013 through June 16, 2014.

IT IS FURTHER ORDERED that Respondent is liable for all reasonable and necessary medical expenses related to Petitioner's right upper extremity and cervical spine condition from the accident date of February 11, 2013 through June 16, 2014 pursuant to §8(a) and §8.2 of the Illinois Workers' Compensation Act.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $330.00 per week for 67 4/7 weeks, commencing on February 12, 2013 through May 30, 2014, as provided in §8(b) of the Act.

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 $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.

October 25, 2021

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

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

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

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O- 8/25/21
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ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC029673
Case Name	SOTO, ROSALBA v. DURABLE PACKAGING
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0536
Number of Pages of Decision	11
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Frank Gaughan
Respondent Attorney	Christopher Jarchow

DATE FILED: 10/25/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROSALBA SOTO,

Petitioner,

vs. NO: 14 WC 29673

DURABLE PACKAGING,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering all issues, and being advised of the facts and law, reverses the Decision of the Arbitrator and finds that Petitioner sustained a compensable accident arising out of and in the course of her employment on June 17, 2014 and that the condition of her right upper extremity and cervical spine is causally related to said accident through February 13, 2015. The present claim is consolidated with 13 WC 11146, which the Commission has addressed in a separately issued Decision.

I. Findings of Fact

Petitioner held a non-specified job title for Respondent with duties that included putting labels inside muffin pans as well as receiving and packaging aluminum trays. Petitioner's job required lifting of 10 to 15 pounds, although the aluminum muffin pans that she handled weighed less than an ounce each. On February 11, 2013, Petitioner alleged that she sustained right upper extremity and neck injuries after boxes fell off a skid onto her right upper extremity. Surveillance video of this accident was admitted into evidence as RX 7. The Commission has addressed the claim regarding the February 11, 2013 accident in a separate Decision for 13 WC 11146.

On February 12, 2013, Petitioner sought treatment at Marque Medicos with Dr. Fernando Perez, a chiropractor, and complained of neck, bilateral shoulder, and right wrist pain. Petitioner told Dr. Perez that she had been working near a skid that was stacked with heavy boxes containing aluminum plates when the boxes fell, striking her right shoulder and wrist. Although Petitioner reported that she was working without any physical difficulties prior to this accident, she

acknowledged a previous neck and back injury from a motor vehicle accident in 2011. Petitioner indicated that she had received medical attention following the motor vehicle accident but was thereafter discharged and returned to her normal activity level. Dr. Perez diagnosed Petitioner with cervical, shoulder, and right wrist pain that was related to her work injury on February 11, 2013. He then took Petitioner off work and referred her to Dr. Andrew Engel for pain management.

On February 13, 2013, Dr. Engel of Medicos Pain & Surgical Specialists diagnosed Petitioner with shoulder pain, cervicalgia, and wrist pain. He noted that although Petitioner had a previous history of neck pain from a motor vehicle accident, she had been working full duty pain-free prior to February 11, 2013. Dr. Engel opined that Petitioner's work accident on February 11, 2013 was the direct cause of her current pain complaints. He kept Petitioner off work and ordered physical therapy, which Petitioner began for her right shoulder on February 15, 2013.

On February 18, 2013, X-rays of the cervical spine, right hand, and right shoulder revealed unremarkable soft tissue structures with no fractures, dislocations, or joint pathology. However, the cervical X-ray also showed flattening of the cervical lordosis and the right hand X-ray indicated a small osseous cyst within the capitate. When Petitioner returned to Dr. Engel on March 6, 2013, it was recommended that she stop physical therapy for her right shoulder and instead pursue physical therapy for her cervical spine, which she later began on March 15, 2013.

At Respondent's request, Petitioner presented for a §12 examination with Dr. Prasant Atluri for her right upper extremity on March 7, 2013. Dr. Atluri found Petitioner's pain responses to be inconsistent when comparing distraction testing with direct examination, which suggested symptom magnification. He diagnosed Petitioner with right upper extremity pain of an unclear etiology and opined that Petitioner's findings were inconsistent with any mechanical pathology in her right upper extremity, although he could not exclude a cervical etiology. Dr. Atluri identified no work-related condition that required further treatment.

Petitioner then presented for another §12 examination with Dr. Gunnar Andersson on March 28, 2013. Although he found no positive nonorganic physical signs on examination, Dr. Andersson believed that Petitioner's history regarding her mechanism of injury was inconsistent with the video footage depicting the February 11, 2013 incident. He opined that there was nothing to suggest that Petitioner had an injury to her neck or shoulder and that her symptoms were not indicative of a severe underlying problem. As such, Dr. Andersson found that Petitioner's neck and shoulder pain was not work-related.

Thereafter, on April 13, 2013, a right shoulder MRI yielded unremarkable results. Dr. Engel agreed with the radiologist's report when he reviewed the MRI films on April 17, 2013 and indicated that Petitioner's neck pain was radiating to her right shoulder with weakness that was potentially a cervical radiculopathy. He ordered a cervical MRI, which was obtained on April 29, 2013. The MRI found minimal to mild cervical spondylosis most pronounced at C6-C7 with a tiny central disc protrusion at C5-C6 and a small broad-based central disc protrusion at C6-C7, borderline spinal stenosis at C6-C7 with no significant cervical neural foraminal stenosis, and straightening of the normal cervical lordosis that could be due to muscle spasm.

On May 2, 2013, Dr. Engel opined that the radiologist had under-read the C6-C7 herniation

and that Petitioner had a contained disc herniation that was causing central stenosis and deformation of the thecal sac. Dr. Engel further noted that Petitioner had shoulder weakness and a positive Spurling's sign. On May 10, 2013, an EMG/NCV of the bilateral upper extremities yielded normal results with no acute denervation of the cervical nerve roots, peripheral entrapment, or polyneuropathy. Shortly thereafter, on May 14, 2013, Petitioner began physical therapy for her right wrist. When Petitioner returned to Dr. Engel on May 23, 2013, her diagnoses included a cervical herniated disc, cervical facet syndrome, shoulder pain, and wrist pain. Dr. Engel indicated that Petitioner's past Spurling's test appeared to be a false positive given that her EMG/NCV was negative. Dr. Engel also reviewed Dr. Andersson's §12 report and agreed that Petitioner did not have any underlying problem that could be causing her pain. Nevertheless, he requested Petitioner's job video to review so that he could form an appropriate causal opinion.

Petitioner thereafter underwent right C4, C5, and C6 medial branch blocks on June 13, 2013. When she next saw Dr. Engel on June 19, 2013, Dr. Engel expressed concern that the C6-C7 herniation was the root of Petitioner's pain and referred her to Dr. Robert Erickson, a neurosurgeon. Dr. Engel further noted that Petitioner occasionally had numbness that radiated down her right arm into her fingers in a C8 distribution.

On July 3, 2013, a clinical evoked potential upper extremities test revealed significant evidence of right C6 and right C7 dermatomal conduction delays. The same day, Petitioner presented to Dr. Erickson, who noted that the SSEP testing showed right-sided abnormalities of a mild degree at both C6 and C7 that correlated with Petitioner's MRI report. Dr. Erickson's diagnosis was cervical radiculopathy at C6 and C7 due to disc disease from C5 to C7. He recommended physical therapy with cervical traction, which Petitioner began on July 18, 2013. Dr. Erickson also reviewed Petitioner's MRI scans on August 21, 2013 and found that they showed a small herniation at C5-C6 with a slightly larger herniation at C6-C7.

On October 3, 2013, Petitioner returned to Dr. Engel with neck pain radiating to her right shoulder and right wrist pain. Dr. Engel kept Petitioner off work and prescribed Ultram. However, Petitioner's consultations with Dr. Engel were discontinued by Dr. Perez on December 11, 2013, because Dr. Engel was no longer affiliated with Medicos Pain & Surgical Specialists. Instead, Dr. Perez referred Petitioner to a pain management consultation with Dr. Suneela Harsoor, who Petitioner saw on December 12, 2013. Petitioner told Dr. Harsoor that her neck, bilateral shoulder, and right wrist pain began on February 11, 2013 after her work injury. Dr. Harsoor diagnosed Petitioner with a cervical disc herniation and wrist joint pain.

Around this time, Dr. Erickson became ill and Petitioner began seeing Dr. Leonard Kranzler, who was taking over Dr. Erickson's patients. Petitioner first saw Dr. Kranzler at Northside Neurosurgery on January 8, 2014 and reported continued neck pain radiating down her right arm with numbness and tingling as well as posterior headaches. Dr. Kranzler recommended Holter Cervical Traction at home. He also kept Petitioner off work and prescribed Norco.

Petitioner thereafter underwent a cervical epidural injection on February 14, 2014. However, Petitioner reported worsening pain after the injection when she saw Dr. Kranzler on February 19, 2014. Dr. Kranzler indicated that Petitioner's MRI and SSEP testing results were very mildly abnormal. He recommended continued use of the Holter Cervical Traction and light

duty restrictions of no lifting greater than six to eight pounds nine times per day and no bending. On May 30, 2014, Dr. Harsoor also released Petitioner to light duty work with a five-pound lifting restriction. Petitioner returned to work but continued to complain of right arm pain, neck pain, and difficulty lifting items.

Then, on June 17, 2014, Petitioner had finished running a machine and was standing in front of a skid with product on it. Petitioner testified that after she cleaned off parts on the floor and stood up, she noticed trays moving toward the front of the skid. Petitioner testified that she turned her head to the left and squished down as the parts came down toward her. The parts were aluminum trays similar to cupcake holders or baking pans that weighed a couple ounces each, although many trays were grouped together in a stack that fell onto Petitioner's right side. Petitioner did not know exactly how many muffin pans were in the stack that hit her, but she estimated it to be more than 20 trays and noted that the stack was taller than her head. Petitioner specified that she was struck by the muffin trays on her right wrist, bicep, and shoulder. Moreover, Petitioner testified that when she moved her face to the left side and ducked down to avoid the falling trays, she experienced strong pain on the back of her neck that was worse than normal. This intervening accident on June 17, 2014 is the subject of the present Commission Decision.

Petitioner testified that the accident occurred around 12:30 p.m. and she reported it to Respondent around 2:15 p.m. Petitioner thereafter finished working her shift, but never returned to Respondent's business after the accident date. Petitioner's supervisor, Marcos Canales, testified that on June 17, 2014, Petitioner told him that some pans had fallen on her and she appeared to have a quarter-sized red mark on her forehead, but there was no injury or pain reported at that time. He testified that Petitioner did not tell him how many muffin pans had hit her and did not describe how the pans fell. Nevertheless, Mr. Canales testified that the types of pans that Petitioner said hit her were small and lightweight aluminum muffin pans that weighed a quarter of an ounce each.

Mr. Canales further testified that when Petitioner reported that the pans had fallen, he went to investigate and talked to the material handlers regarding the correct handling of the pans. He testified that he then instructed Petitioner to return to work since there was no injury reported. Nevertheless, Mr. Canales testified that he did not witness the June 17, 2014 incident, and as such, he did not know if Petitioner had ducked and suddenly twisted her neck as the trays started to fall. However, he testified that Petitioner did not report doing so to him.

Mr. Canales further testified that he did not fill out an accident report on June 17, 2014, because there was no reported injury at that time. Instead, he did not complete the accident report until August 19, 2014 at the instruction of his safety manager, who had informed him that Petitioner was now claiming to have suffered an injury back in June. Mr. Canales identified RX 5 as the accident witness statement that he drafted and signed on August 19, 2014.

After the June 17, 2014 incident, Petitioner returned to Dr. Harsoor on July 18, 2014 and reported that trays had fallen onto her head and right shoulder three weeks prior, causing her worsening pain and stiffening of her neck and shoulder. Dr. Harsoor diagnosed Petitioner with a cervical herniated disc, discogenic pain, and myofascial pain. She then administered cervical trigger point injections and released Petitioner to light duty work with a 10-pound restriction. However, Petitioner testified that her pain stopped her from going back to light duty work.

On August 7, 2014, Petitioner told Dr. Perez that her present complaints of neck and upper mid-back pain began on June 17, 2014 when a stack of trays fell and struck the right side of her upper back, neck, and head area. Petitioner stated that although she felt immediate pain, she continued working while anticipating that the pain would go away on its own. Petitioner also claimed that she had reported the injury to her supervisor, Marco, but Marco told her that a report was not necessary and so she continued working. Dr. Perez opined that Petitioner had cervical and thoracic pain that was directly related to her work accident on June 17, 2014. He took Petitioner off work and referred her to physical therapy as well as a pain management specialist. Petitioner thereafter began another round of cervical physical therapy on August 8, 2014. Petitioner advised the physical therapist that on June 17, 2014, she was unloading muffin trays at work when some of the trays fell onto her neck and shoulders. Petitioner indicated that her pain went down her whole right upper extremity.

On August 13, 2014, another clinical evoked potential upper extremities test found significant evidence of bilateral C6 and C7 dermatomal conduction delays. Thereafter, on August 15, 2014, cervical X-rays further revealed biomechanical alterations that were most likely indicative of a muscle spasm and/or other soft tissue injury. The findings further demonstrated a reversal of cervical lordosis with an anterior translation of the head. Nevertheless, the soft tissue structures appeared unremarkable with no evidence of fracture, dislocation, osseous, or joint pathology. A thoracic spine X-ray was also obtained and demonstrated degenerative disc disease.

On October 3, 2014, Petitioner complained to Dr. Harsoor of radiating right shoulder pain that had been symptomatic for the last 3.5 months following the June 17, 2014 injury. Dr. Harsoor diagnosed Petitioner with a shoulder injury from the June 17, 2014 accident and a cervical disc herniation, discogenic pain, and myofascial pain from the February 11, 2013 accident. Dr. Harsoor put a second cervical epidural steroid injection on hold, because Petitioner’s current shoulder pain was acute and severe. She also took Petitioner off work as she recovered from her shoulder injury, provided an orthopedic referral, and prescribed meloxicam and Flexeril. A few days later on October 8, 2014, Petitioner restarted physical therapy for her cervical spine.

Another clinical evoked potential upper extremities test was obtained on October 22, 2014 that again showed significant bilateral delays at C6 and C7. That same day, Dr. Erickson ordered a repeat cervical MRI, refilled prescriptions for Mobic and Flexeril, and kept Petitioner off work. Petitioner then returned to Dr. Harsoor on November 7, 2014 with complaints of right shoulder and neck pain radiating to her right fingers with numbness and tingling. Dr. Harsoor kept Petitioner off work while recommending a right shoulder MRI and second cervical injection.

On December 3, 2014, another clinical evoked potential upper extremities test noted significant evidence of bilateral delays at C6 and C7. Dr. Erickson believed that this SSEP testing showed a moderate delay on the right at C6 and mild delays bilaterally at C7 and on the left at C6. Dr. Erickson then opined that Petitioner might be a good candidate for an anterior discectomy and fusion at C5-C6. Shortly thereafter, on December 10, 2014, a cervical MRI found extensive spondylotic changes with numerous protrusions and disc-osteophyte complexes as well as moderate central canal stenosis at C6-C7.

On January 28, 2015, Dr. Erickson indicated that Petitioner had prominent neck pain and paresthesia radiating to the second, third, and fourth fingers on the right hand and the upper left arm. He stated that his most important neurological examination finding was diminished grip on Petitioner's right side. Dr. Erickson opined that Petitioner required an anterior cervical discectomy and fusion from C5 to C7 as a consequence of her injury on June 17, 2014. Petitioner testified that she did not undergo the recommended surgery, because insurance had not agreed to pay for it. However, on February 13, 2015, Dr. Harsoor canceled a second cervical epidural steroid injection, because Petitioner was being scheduled for the cervical surgery by Dr. Erickson. Dr. Harsoor also continued Petitioner's off-work restrictions at that time. Petitioner did not thereafter seek any further treatment with any of her medical providers.

Over seven months later, on September 24, 2015, Dr. Perez authored a note stating that Petitioner was discharged from any further treatment at Marque Medicos, because she had stopped returning to the facility for treatment of her work-related injury. Dr. Perez again discharged Petitioner on December 10, 2015 and stated that his facility had no further treatment to offer her.

Several years later, on March 22, 2018, Petitioner presented for another §12 examination with Dr. Frank Phillips and reported that heavy boxes had struck her right shoulder and wrist on February 11, 2013. Dr. Phillips found no evidence of a specific structural cervical injury and no objective findings to support Petitioner's subjective complaints. He further contended that Petitioner's cervical imaging revealed no acute pathology or neural compression and her EMG showed no cervical radiculopathy. Dr. Phillips opined that Petitioner lacked any current cervical diagnosis related to the February 11, 2013 and June 17, 2014 accidents, although he stated that Petitioner had not described any June 2014 injury to him. In light of the absence of any structural spine injury, he also contended that Petitioner's subjective cervical complaints were not causally related to either accident date. However, Dr. Phillips noted no clear evidence of symptom magnification or nonorganic pain signs.

Petitioner testified that today, she does not have her same pre-accident strength and cannot lift heavy objects secondary to pain in her right upper extremity and neck. Although Petitioner can take a half gallon of milk out of the refrigerator with her right hand, it is painful and she therefore uses her left hand to do so. Likewise, Petitioner removes pots of water from the stove using her left hand and cannot move a two-handed pot herself. Petitioner further indicated that she lacks the strength to carry her two younger children with her right arm and instead carries them with her left arm. Petitioner also notes neck pain and tingling in her arm when she lifts her children. Nevertheless, Petitioner does not have childcare and is able to take care of her five youngest children, who range in age from two to 16 years old, with her older daughter's help.

Petitioner further testified that she has not looked for employment since she stopped working for Respondent, because the jobs she applied to require lifting of more than 10 pounds. Petitioner indicated that she cannot do these jobs, because she does not want to feel the accompanying pain all day.

II. Conclusions of Law

Following a careful review of the entire record, the Commission reverses the Decision of

the Arbitrator and finds that Petitioner sustained a compensable accident arising out of and in the course of her employment on June 17, 2014.

Petitioner testified credibly that on June 17, 2014, she turned her head to the left and squished down to avoid being hit by trays that were falling off a nearby skid. Petitioner testified that she experienced immediate pain on the back of her neck that was worse than normal. She testified that the trays then fell onto her right side and neck. In the treatment records that followed, Petitioner consistently reported the same mechanism of injury to her treating doctors, as well as an increased worsening of her pain.

Although he contends that Petitioner failed to report any injury or demonstrate pain, Mr. Canales' testimony shows that Petitioner promptly told her supervisor about the incident of the trays falling onto her on June 17, 2014. Mr. Canales was aware of the incident, given that he immediately went to investigate and talk to the material handlers regarding their handling of the pans. Additionally, Mr. Canales testified that since he did not witness the June 17, 2014 incident firsthand, he did not really know if Petitioner had ducked and suddenly twisted her neck as the trays started to fall.

Moreover, on August 7, 2014, Petitioner told Dr. Perez that she had reported the injury to her supervisor, but she was told that a report was not necessary. Petitioner explained that although she felt immediate pain, she continued working while anticipating that the pain would go away on its own. When it did not, Petitioner sought medical attention and never returned to work for Respondent after completing her shift on the accident date. Petitioner's inability to continue working under light duty restrictions is indicative of her condition worsening after the intervening accident on June 17, 2014.

The Commission further finds that the condition of Petitioner's right upper extremity and cervical spine are causally related to the work accident on June 17, 2014 through her last date of treatment on February 13, 2015.

The §12 examinations of Dr. Andersson and Dr. Atluri occurred before the June 17, 2014 accident, and therefore, are not persuasive as to the present claim of 14 WC 29673. Instead, the issue of causation for the June 17, 2014 accident boils down to the opinions of Petitioner's treating doctors, Dr. Perez and Dr. Erickson, versus the opinions of the §12 examiner, Dr. Phillips.

On August 7, 2014, Dr. Perez opined that Petitioner's cervical pain was directly related to her work injury on June 17, 2014. Then, when Dr. Erickson recommended cervical surgery on January 28, 2015, he indicated that his surgical recommendation was a consequence of the injury that occurred on June 17, 2014. The post-accident recommendation for surgery is evidence that Petitioner's condition had worsened after the June 17, 2014 accident. The increased severity of Petitioner's right upper extremity was also recognized by Dr. Harsoor on October 3, 2014, when she put Petitioner's cervical epidural steroid injection on hold given the acuteness and severity of her shoulder pain after the June 17, 2014 injury.

Additionally, although Dr. Phillips found no current causation, he conceded that Petitioner had not even described the June 2014 injury to him. As such, Dr. Phillips does not appear to hold

the same level of knowledge regarding the alleged accident on June 17, 2014 as compared to Petitioner's treating doctors. Dr. Phillips' opinion is further weakened by the objective findings revealed on Petitioner's cervical MRI on December 10, 2014. The MRI found extensive spondylotic changes with numerous protrusions and disc-osteophyte complexes as well as moderate central canal stenosis at C6-C7. For these reasons, the Commission is not persuaded by Dr. Phillips' opinions. As such, and in consideration of the fact that Petitioner was no longer able to work light duty and was given a surgical recommendation after the June 17, 2014 accident, the Commission finds that Petitioner established causation for her right upper extremity and cervical conditions. However, this causal relationship ceased on February 13, 2015, which was the last date that Petitioner sought treatment with any of her medical providers.

Consistent with its causal finding, the Commission awards all reasonable and necessary medical expenses incurred for Petitioner's right upper extremity and cervical injuries from the June 17, 2014 accident date through February 13, 2015, the date Petitioner stopped treating. The Commission further awards temporary total disability benefits from August 7, 2014 through February 13, 2015. Following the accident, Petitioner was first taken off work by Dr. Perez on August 7, 2014 and was subsequently kept off work by her treating doctors through February 13, 2015. Petitioner did not thereafter pursue treatment for her injuries or obtain further off-work restrictions from any medical providers.

Regarding permanent partial disability, the Commission notes that pursuant to §8.1b, for accidents occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria with no single factor being the sole determinant of disability. The criteria to be considered includes: (i) the reported level of impairment pursuant to (a) [AMA "Guides to 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. 820 ILCS 305/8.1b(b).

Regarding criterion (i), no AMA impairment rating was provided. The Commission therefore assigns no weight to this factor.

Regarding criterion (ii), Petitioner did not have a specific job title but performed various activities at Respondent's direction, including putting labels inside muffin pans and packaging the aluminum trays. Following her first work accident on February 11, 2013, Petitioner returned to work in a light duty capacity after being given a five-pound lifting restriction by Dr. Harsoor on May 30, 2015. However, after her second work accident on June 17, 2014, Petitioner never returned to work for Respondent again. Petitioner further testified she had not looked for employment since she stopped working for Respondent, because the jobs she applied to required her to lift more than 10 pounds. Petitioner testified that she could not do this, because she did not want to feel pain all day long. The Commission assigns moderate weight to this factor.

Regarding criterion (iii), Petitioner was 36 years old at the time of the accident on June 17, 2014. Petitioner provided no testimony as to how her age specifically affected her disability. Nevertheless, the Commission acknowledges that Petitioner faces numerous more years in the workforce. The Commission assigns some weight to this factor.

Regarding criterion (iv), there was no direct testimony regarding Petitioner's future earning capacity. Although Petitioner stopped working for Respondent, she was never given any permanent work restrictions by her treating doctors. Instead, she stopped treating before she was placed at MMI or instructed to present for an FCE. A labor market survey was also not conducted, and Petitioner indicated that she had not looked for employment since she stopped working for Respondent. The Commission therefore assigns no weight to this factor.

Regarding criterion (v), in between the February 11, 2013 accident and June 17, 2014 accident, Petitioner treated with a cervical epidural injection, C4 to C6 medial branch blocks, physical therapy, prescription medication, work restrictions, and a Holter Cervical Traction machine. After the June 17, 2014 accident, Petitioner treated with cervical trigger point injections, more physical therapy, prescription medication, and work restrictions. A recommendation for cervical surgery was also made.

Petitioner testified that she no longer has the same strength as she did prior to her accident and cannot lift heavy objects secondary to ongoing right upper extremity and neck pain. Petitioner experiences pain when she attempts to take a half gallon of milk out of the refrigerator with her right hand, so she now uses her left hand to do so. Petitioner further testified that she lacks the strength to carry her young children with her right arm and instead carries them with her left arm. She also gets neck pain and tingling in her arm whenever she lifts her children. Petitioner further testified that she uses her left hand to remove pots of boiling water from the stove and cannot remove two-handed pots without assistance.

Despite her ongoing difficulties, Petitioner stopped treating for her injuries on her own accord on February 13, 2015 without being released with permanent restrictions or placed at MMI. Upon consideration of all above factors, the Commission finds that Petitioner sustained a loss of 12.5% PAW, which consists of a loss of 7.5% PAW for the cervical injuries and 5% PAW for the right shoulder injuries.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated February 4, 2021, is hereby reversed as stated herein.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner suffered a compensable accident that arose of and in the course of her employment on June 17, 2014 and that the condition of her right upper extremity and cervical spine are causally related to said accident from June 17, 2014 through February 13, 2015.

IT IS FURTHER ORDERED that Respondent is liable for all reasonable and necessary medical expenses related to Petitioner's right upper extremity and cervical spine condition from the accident date of June 17, 2014 through February 13, 2015 pursuant to §8(a) and §8.2 of the Illinois Workers' Compensation Act.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $330.00 per week for 27 2/7 weeks, commencing on August 7, 2014 through February 13, 2015, as provided in §8(b) of the Act.

IT IS FURTHER ORDERED that for Petitioner's ongoing right upper extremity and cervical conditions, Respondent shall pay the sum of $330.00 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 total loss of 12.5% PAW, which consists of 7.5% PAW for the cervical injuries and 5% PAW for the right shoulder injuries.

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 $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.

October 25, 2021

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

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

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

DLS/met
O- 8/25/21
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ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	09WC021883
Case Name	CHAVEZ, ALFONSO v. PRIMARY STAFFING
Consolidated Cases	09WC021884
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0537
Number of Pages of Decision	8
Decision Issued By	Marc Parker, Commissioner

Pro Se Petitioner	Alfonso Chavez
Respondent Attorney	Michael Doerries

DATE FILED: 10/26/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alfonso Chavez,

Petitioner,

vs. NO: 09 WC 21883
(Consol'd with 09WC 21884)

Primary Staffing,

Respondent.

DECISION AND OPINION ON REVIEW

A Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of the Arbitrator's denial of Petitioner's Petition to Reinstate, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator and writes additionally to clarify the Arbitrator's Decision, which is attached hereto and made a part hereof.

The 60-day time limit for filing a Petition for Reinstatement under Commission Rule 9020.90(a) is jurisdictional in nature. *TTC Ill., Inc. v. Illinois Workers' Comp. Comm'n*, 396 Ill. App. 344, 354 (2009). Petitioner's failure to timely file a Petition to Reinstate following the Arbitrator's dismissal of his claim for want of prosecution resulted in a final judgment with respect to his rights to recover workers' compensation benefits arising from the claim. *Farrar v. Illinois Workers' Comp. Comm'n*, 2016 IL App (1st) 143129WC ¶14. Therefore, the Arbitrator's denial of Petitioner's Petition to Reinstate was proper.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 2, 2020 is hereby affirmed and adopted.

The bond requirement in Section 19(f)(2) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

October 26, 2021

/s/ *Marc Parker*
Marc Parker

MP:dk
o 10/21/21

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

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

STATE OF ILLINOIS)
)
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
DECISION

ALFONSO CHAVEZ
Employee/Petitioner

Case # **09 WC 21883**

09 WC 21884

v.

PRIMARY STAFFING and JACOBSON COMPANIES
Employer/Respondent

The *petitioner* filed a petition or motion for **Reinstatement** on **February 19, 2019**, and properly served all parties. The matter came before me on **October 15, 2019 and November 21, 2019** in the city of **Chicago**. After hearing the parties' arguments and due deliberations, I hereby *deny* the petition.

A record of the hearing *was* made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Petitioner testified pro se via the use of interpreter, Maria Duncker. Petitioner testified he had been represented in the past by attorneys Richard Victor and Anita DeCarlo at different times before ultimately retaining attorney Arturo Jauregui and Anselmo Duran to handle the cases at bar. Petitioner testified that his benefits were initially being denied due to an issue of mistaken identity as to whether the Petitioner was actually who he said he was, and the process of resolving this issue led to Petitioner ending his relationship with attorneys Victor and DeCarlo and hiring attorney Jauregui, who assigned the cases to his colleague, Anselmo Duran. Petitioner indicated that due to the lack of benefits he was desperate financially and in 2012 went to live in Mexico because he couldn't afford to remain in the U.S. He testified he would always return to the U.S. when his workers' compensation attorney indicated his presence was necessary. At some point he claimed a lack of response from the Jauregui firm until February or March of 2013, when he said he then spoke to attorney Jauregui, who indicated that attorney Duran was no longer with the firm but that the firm would continue to work on his cases.

Petitioner testified that in 2013, the Respondent scheduled a Section 12 examination for him which, after rescheduling, was eventually to take place on 10/15/13. He testified that he had a flight scheduled to return to Chicago from Mexico on 10/10/13, but he never made it because the Mexican Federal Police took him from his house without an arrest warrant and "disappeared" him for about 2 months where no one knew his whereabouts. He testified he was being moved from prison to prison until he finally was able to contact the US embassy in Hermosillo, Mexico and someone from the Embassy went to visit him there. At that point he drafted a letter to his brother, Cesar Chavez, indicating he was appointing Cesar to act on his behalf if anything needed to be done and he testified he asked Cesar to bring it to court for him so the Commission would know about his situation in Mexico.

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On 10/15/19, the hearing proceeded with Petitioner's noted testimony. Petitioner's brother, Cesar Chavez, also testified, as well as attorney Duran. Mr. Jauregui did not appear for the hearing date and Petitioner opted to proceed without his testimony. Attorney Doerries appeared on all noted dates on behalf of Respondent Primary Staffing, and attorney Spinazzola appeared on behalf of Respondent Jacobson Companies.

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While attorney Duran did take the stand, discussion was had between he and the Petitioner regarding issues related to attorney-client privilege, and after that discussion no further relevant testimony was obtained. The hearing was continued to 11/21/19, and at that time the parties elected to close proofs.

Arbitrator's Exhibit 1 is the Petitioner's Petition to Reinstate and to Dismiss Attorney. As noted, the attorney dismissal was previously granted. As to the Petition to reinstate, it alleges that the two claims were dismissed on 8/25/14 and that the Petitioner received the dismissal order on 8/26/14. The document

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Px6 is a 12/26/12 letter from attorney Jauregui to attorney DeCarlo requesting payment of outstanding medical expenses. Px7 is a 2/6/14 letter from attorney Thomas of Cacchillo Law Group to attorney Jauregui requesting information regarding Petitioner's 2/4/14 hearing in Mexico. (Px6 & 7).

Rx5 & 6 are the Fee Petitions filed by attorneys DeCarlo (2/3/11) and German (7/9/13), which were entered and continued to disposition. (Rx5 & 6).

The final document submitted into evidence is the Respondent's Response to Petitioner's Petition to Reinstate. This document noted the Petitioner filed his Applications for Adjustment of Claim in the noted cases on 5/29/09, that the matters were dismissed by Arbitrator Thompson-Smith on 8/25/14, and that a Petition to Reinstate was not filed until 2/19/19. It also cites Rule 7020.90(a) indicating that a party has 60 days from the date of dismissal to file a Petition to Reinstate, and case law indicating that this is a jurisdictional issue that results in a final judgment if the Petition is not so presented. Case law was also cited indicating that "incarceration alone is not a valid basis to reinstate a claim." Further, this response notes that the case had been languishing from 2009 to 2014, and that the Petitioner was represented by counsel at the time of the dismissals. (Rx7).

The Arbitrator denies the Petitioner's Petition. The Arbitrator empathizes with the Petitioner's circumstances in terms of his incarceration in Mexico, as he testified credibly and presented his case admirably as a pro se litigant. That said, ultimately, the evidence in support of the Petition is lacking. The evidence supports some key facts, including that the Petitioner was represented by counsel prior to his cases being dismissed, at the time of the dismissal and subsequent to the dismissal. The Arbitrator notes that the facts surrounding the dismissal by the prior arbitrator in these matters are unclear. However, the Petitioner's cases were already five years old and above the red line when they were dismissed for want of prosecution. Letters were entered into evidence which appear to have been transmitted between Petitioner and his attorney as well as his brother, Cesar Chavez, through the U.S. Embassy in Mexico. It is unclear exactly what was actually received and when. Attorney Jauregui's lack of presence at the hearing left some factual scenarios open-ended for purposes of the pending Petition. However, it appears clear that the Petitioner was represented by counsel through the U.S. Embassy, and per the 3/20/14 letter from attorney Jauregui, he and Petitioner's Mexican legal representation were in contact very close in time to the dismissal. Therefore, this is not a case where the Petitioner disappeared and was unrepresented when his cases were dismissed. He was represented by legal counsel throughout.

The Petitioner now is ten years beyond the time of the initial injuries, with any treatment protocol and any entitlement to TTD complicated by the passage of time and his

incarceration. While he claims the incarceration was a mistake, the Arbitrator simply has no evidence in this regard beyond the Petitioner's testimony. This may or may not be true, but regardless it was reasonable at the time of the dismissal that the Arbitrator and possibly the attorneys believed the Petitioner could be incarcerated for an extended period of time, and while some of the letters appear to indicate hope he would be released in 2014, he instead remained in jail for five years. The Arbitrator also takes note of the legal citations of Respondent's counsel in support of the objection to the Petition. The Arbitrator would also be hard-pressed to find that the Petitioner's lack of ongoing treatment, issues in conflict from the start of the case, and the Petitioner's inability to appear for any Section 12 examinations during and after 2014 did not result in a significant level of prejudice to the Respondent's defenses to these claims. Overall, the Petitioner has failed to provide a sufficient basis under the Act and the law and case law of Illinois to reinstate his claims almost five years after their dismissal for want of prosecution.

Unless a *Petition for Review* is filed within 30 days from the date of receipt of this order, and a review perfected in accordance with the Act and the Rules, this order will be entered as the decision of the Workers' Compensation Commission.

Signature of arbitrator

August 26, 2020
Date

SEP 2 - 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	09WC021884
Case Name	CHAVEZ, ALFONSO v. JACOBSON COMPANIES
Consolidated Cases	09WC021883
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0538
Number of Pages of Decision	8
Decision Issued By	Marc Parker, Commissioner

Pro Se Petitioner	Alfonso Chavez
Respondent Attorney	Anthony J. Cacchillo, Matthew Kurschinski

DATE FILED: 10/26/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alfonso Chavez,

Petitioner,

vs.

NO: 09 WC 21884
(Consol'd with 09WC 21883)

Jacobson Companies,

Respondent.

DECISION AND OPINION ON REVIEW

A Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of the Arbitrator's denial of Petitioner's Petition to Reinstate, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator and writes additionally to clarify the Arbitrator's Decision, which is attached hereto and made a part hereof.

The 60-day time limit for filing a Petition for Reinstatement under Commission Rule 9020.90(a) is jurisdictional in nature. *TTC Ill., Inc. v. Illinois Workers' Comp. Comm'n*, 396 Ill. App. 344, 354 (2009). Petitioner's failure to timely file a Petition to Reinstate following the Arbitrator's dismissal of his claim for want of prosecution resulted in a final judgment with respect to his rights to recover workers' compensation benefits arising from the claim. *Farrar v. Illinois Workers' Comp. Comm'n*, 2016 IL App (1st) 143129WC ⁋14. Therefore, the Arbitrator's denial of Petitioner's Petition to Reinstate was proper.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 2, 2020 is hereby affirmed and adopted.

The bond requirement in Section 19(f)(2) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

October 26, 2021

/s/ *Marc Parker*
Marc Parker

MP:dk
o 10/21/21

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

68

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

STATE OF ILLINOIS)

)

COUNTY OF **COOK**)

☐	Injured Workers' Benefit Fund (§4(d))
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ILLINOIS WORKERS' COMPENSATION COMMISSION
DECISION

ALFONSO CHAVEZ Case # **09 WC 21883**
Employee/Petitioner

v. **09 WC 21884**

PRIMARY STAFFING and JACOBSON COMPANIES
Employer/Respondent

The ***petitioner*** filed a petition or motion for **Reinstatement** on **February 19, 2019** , and properly served all parties. The matter came before me on **October 15, 2019 and November 21, 2019** in the city of **Chicago**. After hearing the parties' arguments and due deliberations, I hereby ***deny*** the petition.

A record of the hearing ***was*** made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Petitioner testified pro se via the use of interpreter, Maria Duncker. Petitioner testified he had been represented in the past by attorneys Richard Victor and Anita DeCarlo at different times before ultimately retaining attorney Arturo Jauregui and Anselmo Duran to handle the cases at bar. Petitioner testified that his benefits were initially being denied due to an issue of mistaken identity as to whether the Petitioner was actually who he said he was, and the process of resolving this issue led to Petitioner ending his relationship with attorneys Victor and DeCarlo and hiring attorney Jauregui, who assigned the cases to his colleague, Anselmo Duran. Petitioner indicated that due to the lack of benefits he was desperate financially and in 2012 went to live in Mexico because he couldn't afford to remain in the U.S. He testified he would always return to the U.S. when his workers' compensation attorney indicated his presence was necessary. At some point he claimed a lack of response from the Jauregui firm until February or March of 2013, when he said he then spoke to attorney Jauregui, who indicated that attorney Duran was no longer with the firm but that the firm would continue to work on his cases.

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The Arbitrator denies the Petitioner's Petition. The Arbitrator empathizes with the Petitioner's circumstances in terms of his incarceration in Mexico, as he testified credibly and presented his case admirably as a pro se litigant. That said, ultimately, the evidence in support of the Petition is lacking. The evidence supports some key facts, including that the Petitioner was represented by counsel prior to his cases being dismissed, at the time of the dismissal and subsequent to the dismissal. The Arbitrator notes that the facts surrounding the dismissal by the prior arbitrator in these matters are unclear. However, the Petitioner's cases were already five years old and above the red line when they were dismissed for want of prosecution. Letters were entered into evidence which appear to have been transmitted between Petitioner and his attorney as well as his brother, Cesar Chavez, through the U.S. Embassy in Mexico. It is unclear exactly what was actually received and when. Attorney Jauregui's lack of presence at the hearing left some factual scenarios open-ended for purposes of the pending Petition. However, it appears clear that the Petitioner was represented by counsel through the U.S. Embassy, and per the 3/20/14 letter from attorney Jauregui, he and Petitioner's Mexican legal representation were in contact very close in time to the dismissal. Therefore, this is not a case where the Petitioner disappeared and was unrepresented when his cases were dismissed. He was represented by legal counsel throughout.

The Petitioner now is ten years beyond the time of the initial injuries, with any treatment protocol and any entitlement to TTD complicated by the passage of time and his

incarceration. While he claims the incarceration was a mistake, the Arbitrator simply has no evidence in this regard beyond the Petitioner's testimony. This may or may not be true, but regardless it was reasonable at the time of the dismissal that the Arbitrator and possibly the attorneys believed the Petitioner could be incarcerated for an extended period of time, and while some of the letters appear to indicate hope he would be released in 2014, he instead remained in jail for five years. The Arbitrator also takes note of the legal citations of Respondent's counsel in support of the objection to the Petition. The Arbitrator would also be hard-pressed to find that the Petitioner's lack of ongoing treatment, issues in conflict from the start of the case, and the Petitioner's inability to appear for any Section 12 examinations during and after 2014 did not result in a significant level of prejudice to the Respondent's defenses to these claims. Overall, the Petitioner has failed to provide a sufficient basis under the Act and the law and case law of Illinois to reinstate his claims almost five years after their dismissal for want of prosecution.

Unless a *Petition for Review* is filed within 30 days from the date of receipt of this order, and a review perfected in accordance with the Act and the Rules, this order will be entered as the decision of the Workers' Compensation Commission.

Signature of arbitrator

August 26, 2020
Date

SEP 2 - 2020

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ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	12WC018434
Case Name	VANTREASE-HENLEY, KELLI v. MERCY HOSPITAL MEDICAL CENTER
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0540
Number of Pages of Decision	35
Decision Issued By	Thomas Tyrrell, Commissioner

Petitioner Attorney	Peter Lekas
Respondent Attorney	Karen Haarsgaard

DATE FILED: 10/27/2021

/s/Thomas Tyrrell, Commissioner

Signature

21IWCC0540

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

Kelli Vantrease-Henley,

Petitioner,

vs. NO: 12 WC 018434

Mercy Hospital Medical Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, prospective medical treatment, temporary total disability ("TTD"), and permanent partial disability ("PPD"), 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 affirms the Decision of the Arbitrator on the issues of causation, prospective medical treatment, and TTD.

As it pertains to medical expenses, the Commission modifies the Decision of the Arbitrator to award additional dates of service with Dr. Tennant on October 24, 2011 and October 31, 2011. While these two records do not reference the undisputed accident, these two dates of service were for complaints to the right shoulder immediately following said accident.

As it pertains to permanent disability ("PPD"), the Commission views the level of disability differently than the Arbitrator. In analyzing the factors found in §8.1b, the Commission places greater weight on (v) the evidence of disability corroborated by the treating medical records. During arthroscopy on May 10, 2012, Dr. Ho identified minor fraying and intrasubstance tear; no full-thickness tears were identified. At the time of Petitioner's release from care by Dr. Ho, she had full range of motion of the right shoulder. While she testified she guards her right shoulder and does not use it the way a normal person would, this is not corroborated by the treating medical records, nor her reports to Dr. Forsythe on July 19, 2018 that she had 0/10 pain. The Commission finds that, as a result of the injuries sustained, Petitioner suffered permanent partial disability to the person as a whole to the extent of 12.5% loss of use thereof, pursuant to Section 8(d)2 of the

Act.

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 on May 20, 2019, is modified as stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner temporary total disability benefits of $249.52/week from October 25, 2011 through September 24, 2012 and from December 17, 2012 through March 31, 2013, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner medical expenses associated with the care Dr. Ho rendered on January 16, 2012, February 24, 2012, April 30, 2012, and December 17, 2012, as well as for the care rendered by Dr. Tennant on October 24, 2011 and October 31, 2011, subject to the fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $249.52 per week for a period of 62.5 weeks, as provided in § 8(d)2 of the Act, for the reason that the injury sustained to the right shoulder caused the loss of use of 12.5% of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive 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 $23,200.00. 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.

October 27, 2021

o: 10/19/2021
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
CORRECTED

VANTREASE-HENLEY, KELLI Case# **12WC018434**
Employee/Petitioner

MERCY HOSPITAL MEDICAL CENTER
Employer/Respondent

On 5/20/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.35% 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:

2902 LAW OFFICES OF PETER G LEKAS
5357 W DEVON AVE
CHICAGO, IL 60646

2461 NYHAN BAMBRICK KUNZIE & LOWRY
KAREN A HAARSGAARD
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602-4195

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

KELLI VANTREASE-HENLEY,
Employee/Petitioner

Case # **12 WC 18434**

v.

Consolidated cases: **D/N/A**

MERCY HOSPITAL MEDICAL 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 **MOLLY MASON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **March 9, 2018 and April 22, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **10/20/2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner established causation as to the need for the 2012 right shoulder arthroscopy and the post-operative care that Dr. Ho rendered prior to April 1, 2013. The Arbitrator also finds that Petitioner failed to establish a causal connection between the October 20, 2011 work accident and her claimed cervical spine condition of ill-being. The Arbitrator further finds that Petitioner failed to establish causation as to the need for the second right shoulder surgery performed by Dr. Shi in 2016.

In the year preceding the injury, Petitioner earned $**12,975.04**; the average weekly wage was $**249.52**.

On the date of accident, Petitioner was **49** years of age, ***married*** with 0 dependent children.

Petitioner ***has in part*** received reasonable and necessary medical services.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $249.52/week during two intervals: from October 25, 2011 through September 24, 2012 and from December 17, 2012 through March 31, 2013, as provided in Section 8(b) of the Act. Respondent is entitled to credit for the $8,151.15 in temporary total disability benefits it paid prior to trial. Arb Exh 1.

Medical benefits

Based on the foregoing causation-related findings, and having reviewed the OPTUM payment print-out (PX 9), the Arbitrator finds Respondent liable for the expenses associated with the care Dr. Ho rendered on January 16, 2012, February 24, 2012, April 30, 2012 and December 17, 2012, subject to the fee schedule. For the reasons set forth in the attached decision, the Arbitrator declines to award the claimed Athletico bill. PX 8.

Permanent Partial Disability: Person as a whole

Respondent shall pay Petitioner permanent partial disability benefits of $ **249.52** /week for **87.5** weeks, because the injuries sustained caused the **17.5** % 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

5/14/19 [corrected 5/20/19]
Date

MAY 2 0 2019

Kelli Vantrease-Henley v. Mercy Hospital Medical Center
12 WC 18434

Summary of Disputed Issues

There is no dispute that Petitioner sustained an accident on October 20, 2011, while working as a registrar for Respondent. Respondent also agrees that Petitioner was temporarily totally disabled from October 25, 2011 through September 24, 2012. Respondent paid benefits during this period. Arb Exh 1. The disputed issues include causal connection, whether Petitioner was married and had one dependent child as of the accident, medical expenses, a second interval of temporary total disability and nature and extent. Arb Exh 1.

Arbitrator's Findings of Fact

Petitioner testified she lives in Irving, Texas. She is currently 55 years old. T. 3/9/18, p. 12.

Petitioner testified that, as of the October 20, 2011 accident, she was married and had one child under 18. T. 3/9/18, p. 12. Her son was born on June 23, 1993. T. 3/9/18, p. 53.

Petitioner testified she worked as a registrar for Respondent as of October 20, 2011. Her duties included registering patients for laboratory work, X-rays and Emergency Room treatment. She was based in the Emergency Room as of October 20, 2011. She pushed a "COW," or "computer on wheels," from cubicle to cubicle while obtaining information from Emergency Room patients. She described the "COW" as difficult to push. As she was attempting to maneuver the "COW" on October 20, 2011, she experienced pain in her right shoulder radiating down her arm. She asked her supervisor why the "COW" was so difficult to push. Her supervisor suggested that she try a different "COW." She switched but "it didn't make a difference." T. 3/9/18, pp. 14-15.

Petitioner testified her right arm was "completely dead" when she woke up on October 21, 2011. She called her supervisor, Beth Griffith, and reported this to her. Griffith then asked whether she was coming to work. She replied "yes" and reported to work that day. She could not use her right arm at all and had to use her left hand to move that arm. She did not return to work after October 21, 2011. T. 3/9/18, pp. 15-16.

Petitioner testified she initially underwent treatment with a chiropractor, Dr. Tennant. She first saw Dr. Tennant on October 24, 2011. The doctor manipulated her arm, trying to get the feeling back. Over the following two months, she continued seeing Dr. Tennant two or three times per week. T. 3/9/18, p. 17.

Dr. Tennant's note of October 24, 2011 contains no mention of work or a work-related accident. The doctor noted complaints of 0/0 pain in the low back, neck, left knee and midback and a complaint of 5/10 pain in the right shoulder blade. He also noted tenderness to palpation in the right shoulder tendons. PX 2.

A MercyWorks status discharge sheet dated October 25, 2011 references an accident date of October 20, 2011 and a diagnosis of "R shoulder strain." A physician released Petitioner to restricted work with no use of the right arm. The physician prescribed therapy but noted that Petitioner was "already seeing chiropractor." PX 1.

Petitioner underwent right shoulder X-rays on October 26, 2011. The radiologist described the films as unremarkable. RX 4.

Dr. Tennant's next note, of October 31, 2011, also contains no mention of work or a work-related accident. He documented complaints of 3/10 pain in the right shoulder blade and right buttock. PX 2.

Dr. Tennant's chart contains patient information and "workers' compensation payment agreement" forms dated November 1, 2011. On the patient information form, Petitioner indicated she was experiencing right shoulder and chest pain secondary to a work accident of October 20, 2011. PX 2.

On November 1, 2011, Dr. Tennant noted that Petitioner reported being injured at work on October 20, 2011 and having difficulties with activities of daily life since the injury. He described Petitioner's symptoms as coming on immediately. He noted complaints of 5/10 right shoulder and right-sided chest pain. He also noted a past history of low back pain, lower leg or knee pain and shoulder pain. PX 2.

On November 4, 2011, Cynthia Daniel, a Respondent human resources employee, wrote to Petitioner, noting she had been off work since October 26, 2011, due to a serious medical condition stemming from a work injury. Daniel advised Petitioner she was not eligible for FMLA leave and indicated she was being "separated from employment" effective that date. Daniel informed Petitioner the separation was "considered voluntarily" and she was thus eligible for re-hire should she re-apply for employment in the future. PX 11.

Petitioner continued seeing Dr. Tennant thereafter. On November 8, 2011, the doctor noted that Petitioner was using a sling. PX 2.

On November 12, 2011, Dr. Tennant noted complaints of 4/10 right shoulder and right-sided chest pain. He recommended that Petitioner undergo an MRI scan "to look for any tendon tears." PX 2.

Dr. Tennant's itemized bill reflects that he saw Petitioner again on November 15, 2011 but no treatment note of that date is in PX 2. The note following the November 12, 2011 note is dated May 28, 2013.

Petitioner testified she underwent a right shoulder MRI on December 1, 2011. The interpreting radiologist noted a hook-shaped osteophyte at the acromioclavicular junction impinging on the supraspinatus muscle/tendon. He indicated this "may cause impingement syndrome and may be the reason for patient's pain." He also noted a prominent cyst in the superolateral aspect of the humeral head which could be due to "geode/degenerative change versus old Hill-Sachs deformity." RX 4,

A MercyWorks status discharge sheet dated December 6, 2011 reflects a diagnosis of "R shoulder impingement." A physician referred Petitioner to Dr. Heller and imposed restrictions of no use of the right arm. PX 1.

On December 12, 2011, Petitioner saw Dr. Heller, an orthopedic surgeon affiliated with Midland Orthopedic Associates. Dr. Heller described Petitioner as right-handed. He noted that she reported injuring her right shoulder while pushing a cart at work on October 19, 2011. He also noted the

subsequent chiropractic care and MRI. He indicated that, two or three years earlier, Petitioner had undergone an injection for a non-work-related right shoulder condition.

On initial examination, Dr. Heller noted limited motion secondary to guarding, no crepitus or locking, no tenderness of the AC joint and symptoms typical of mild bicipital tenosynovitis with Speed and Yerguson maneuvers. He indicated it was difficult to perform strength or impingement testing "due to lack of motion and guarding." He interpreted the MRI as showing degenerative changes with a cyst and subacromial spurring. He described these as "long standing changes" that pre-existed the work accident. He saw no evidence of an acute injury. He diagnosed a right shoulder strain. He related the symptoms of bicipital tenosynovitis to the work accident. He administered an injection into the long head biceps sheath. He recommended that Petitioner discontinue the chiropractic care and start formal physical therapy. He released Petitioner to sedentary duty and directed her to return to him after three weeks of therapy. RX 4.

On December 14, 2011, a physician at MercyWorks released Petitioner to sedentary duty and prescribed physical therapy. PX 1.

Petitioner testified she then began seeing Dr. Ho at the University of Chicago. She testified that Dr. Tennant referred her to Dr. Ho.

Dr. Ho's initial note of January 16, 2012 sets forth a consistent history of the October 20, 2011 accident. The doctor noted that Petitioner denied having a significant amount of pain immediately after the accident but, by October 22nd, was having a "significant amount of disability in using her right arm and shoulder and was unable to return to work." The doctor also noted the care rendered by Dr. Tennant and the results of the MRI. He indicated that Dr. Heller had recommended therapy in December 2011 but that Petitioner had deferred this since she first wanted to seek another opinion.

Dr. Ho described Petitioner as complaining of pain "mainly over the superior anterior portion of the shoulder with occasional radiation over the posterior portion of her arm."

Dr. Ho described Petitioner's past medical history as significant for two cortisone injections in 2007, most likely performed by Dr. Terry.

On right shoulder examination, Dr. Ho noted forward flexion to 160 degrees, adduction to 90 degrees, external rotation to 55 degrees, internal rotation to the belt line, some pain and moderate weakness with Jobe's testing and minimal pain over the AC joint and biceps tendon. He indicated that X-rays did not show any significant amount of arthritis in the shoulders. He interpreted the MRI as showing some inter substance rotator cuff tearing and mild AC arthropathy.

Dr. Ho's impression was "right shoulder rotator cuff tendonitis with possible biceps tendonitis as well as AC joint arthropathy."

Dr. Ho indicated he agreed with Dr. Heller's recommendation of physical therapy. He did not recommend any surgery at that point. He indicated Petitioner could return to him as needed. PX 4.

Petitioner testified she underwent therapy at Athletico thereafter. [No records from Athletico are in evidence, although a Respondent examiner, Dr. Deutsch, addressed a February 13, 2012 therapy evaluation note from Athletico during his deposition, RX 1, p. 19.] During this period, she was unable to

raise her right arm and felt pain in her neck and shoulders. She also experienced migraine headaches. The therapy did not help much.

At Respondent's request, Petitioner saw Dr. Kornblatt for purposes of a Section 12 examination on February 15, 2012. Dr. Kornblatt is affiliated with the Illinois Bone & Joint Institute. He recorded the following history in his report:

> "The claimant is a 49-year-old right-hand dominant female who was working as a registrar at Mercy Hospital when she states she made a quick move with a cart and felt a pop in her right shoulder on October 20, 2011. She has been off of work since the injury. She states she was terminated from the job 9 days after the injury. She continues to be unemployed and continues to have complaints of right shoulder pain."

Dr. Kornblatt noted that Petitioner reported having undergone two right shoulder injections about ten years earlier. He indicated she described herself as asymptomatic thereafter until the work injury.

On examination, Dr. Kornblatt noted a "full, painless range of motion of the cervical spine including flexion, extension, rotation to the right and rotation to the left." He noted no deficits on left shoulder examination. On right shoulder examination, he noted a limited range of motion, a positive impingement sign, tenderness over the anterior and superior aspects of the shoulder, no evidence of instability and satisfactory strength. He interpreted the MRI as "consistent with bursal surface supraspinatus tendon changes with prominent subchondral cyst at the superolateral humeral head" along with "some degenerative changes at the AC joint" and "evidence of impingement of the supraspinatus tendon."

Dr. Kornblatt noted that Petitioner had been attending therapy for four weeks, under Dr. Ho's direction. He described this treatment as reasonable and necessary. He noted that Petitioner was not responding to this treatment and that "arthroscopic surgery will be necessary." He found Petitioner capable of light duty with no overhead activity and lifting limited to about 5 pounds with respect to the right shoulder. RX 2.

On February 24, 2012, Petitioner returned to Dr. Ho and reported increased right shoulder pain after starting therapy.

At this visit, Dr. Ho reviewed a right shoulder MRI from 2007 along with the more recent 2011 MRI. He indicated the 2007 MRI showed a posterior labral tear and associated glenoid cyst but no rotator cuff pathology. He interpreted the more recent MRI as showing a substantial intra substance tear of the supraspinatus. On right shoulder re-examination, he noted pain with elevation above 90 degrees, a markedly positive drop arm test and anterior pain with drawer testing. He recommended a rotator cuff repair and subacromial decompression. PX 4.

Dr. Ho operated on Petitioner's right shoulder on May 10, 2012. In his operative report, he noted some neovascularization of the biceps tendon but no fraying. He also noted some minor fraying but no detachment of the posterior labrum. He further documented some minor fraying of the undersurface and bursal surface of the supraspinatus, as well as a type 2 acromion and some prominence of the distal clavicle. PX 4.

On May 25, 2012, Petitioner filed an Application alleging a right shoulder injury of October 20, 2011.

Petitioner testified she underwent therapy at a different Athletico facility postoperatively. T. 3/9/18, pp. 19-20. [No records concerning this therapy are in evidence.] Her symptoms did not improve. T. 3/9/18, p. 20. She continued experiencing pain and could not use the arm. She told Dr. Ho about this but he "just kept sending [her] to therapy." T. 3/9/18, p. 38.

Petitioner testified she experienced vomiting after the right shoulder surgery. She informed Dr. Ho's nurse, Barb, of this. Barb tried changing her medication but her symptoms persisted. In June 2012, she was hospitalized due to gastritis and vertigo. It was at this point she was started on Norco. T. 3/9/18, p. 42.

Records in RX 7 reflect that Petitioner saw an internist, Dr. Nepomuceno, on July 21, 2012, in follow-up from an Emergency Room visit. Dr. Nepomuceno noted that Petitioner was admitted to St. James Hospital from June 6 to June 8, 2012 due to dizziness, nausea and vomiting. The doctor also noted that Petitioner "recently underwent right shoulder surgery [and] was taking narcotics for pain relief which could have contributed to some of her symptoms." She noted no abnormalities on examination. She described Petitioner's neck as supple and exhibiting a normal range of motion. She prescribed Ambien for sleep and directed Petitioner to return in six months for repeat laboratory studies. RX 7.

Petitioner returned to Dr. Ho's office on August 16, 2012 and saw a resident, Dr. Sisko. The doctor described Petitioner as regaining strength and motion secondary to therapy. He noted that her therapist was recommending four more weeks of therapy. On re-examination, he noted no tenderness over the biceps tendon or AC joint, active abduction to 120 degrees, forward flexion to 160 degrees, external rotation to about 45 degrees, internal rotation to T9, 4/5 strength with abduction and "still some mild pain with Jobe's testing." He prescribed four more weeks of therapy, with an emphasis on strengthening, and prescribed a few more Percocet tablets to assist with sleeping. PX 4.

Petitioner testified that Dr. Ho released her to return to work on September 24, 2012. She did not return to Respondent because Respondent terminated her before that date. T. 3/9/18, p. 21. She did not begin working anywhere else at that point.

Dr. Ho's note of September 24, 2012 reflects that Petitioner had finished therapy, reported "minimal shoulder pain" and was "anxious to be released to work." On right shoulder examination, Dr. Ho noted full and painless active elevation, 90 degrees of abduction and abducted external rotation, good strength on Jobe's testing and excellent resisted external rotation strength. He described Petitioner as "doing very well." He released Petitioner to unrestricted work and directed her to transition to home exercises and return in six weeks for "routine final check-up." RX 8.

Petitioner returned to Dr. Ho on November 5, 2012 and complained of increased pain in the trapezius area, worse on the left than the right. The doctor described Petitioner as having "no complaints regarding her right shoulder." On examination, he noted a full, pain-free range of motion of both shoulders, some mild muscle spasm in both trapezius muscles and tenderness to palpation, more on the left than right. He described shoulder strength testing as normal. He indicated Petitioner's cervical spine demonstrated "a negative Spurling's test and a full pain-free range of motion." His

impression was "trapezius muscle spasm, most likely secondary to some residual shoulder weakness and compensation due to her rotator cuff injury." He indicated that, while the right shoulder had "healed completely," Petitioner might benefit from additional therapy to further strengthen the rotator cuff and address the trapezius spasms. He wrote out a slip prescribing four weeks of deep tissue massage and modalities of bilateral trapezius muscles. He described Petitioner as "otherwise at MMI with regard to her shoulder." PX 4. RX 8.

Petitioner returned to Dr. Ho on December 17, 2012 and complained of "painful knots in the trapezius areas of both shoulders." She reported deriving only temporary relief from therapy. She described her left shoulder as worse than the right.

On examination, Dr. Ho noted no deformity on either shoulder and tenderness to palpation over the trapezius muscles bilaterally. He prescribed Flexeril and indicated Petitioner might need bilateral shoulder injections. He took Petitioner off work "because of her shoulder pain." PX 4.

Petitioner testified that, on December 17, 2012, Dr. Ho took her off work and prescribed Flexeril and therapy. She resumed attending therapy but noticed no improvement. T. 3/9/18, p. 23. No therapy records from this time period are in evidence.

At Respondent's request, Dr. Kornblatt re-examined Petitioner on January 2, 2013. In his report of that date, Dr. Kornblatt noted his original examination and his endorsement of Dr. Ho's surgical recommendation. He noted that Petitioner had undergone surgery on May 10, 2012, followed by several months of therapy. He also noted that Petitioner had recently returned to Dr. Ho, after being released to full duty, and had been taken off work again secondary to complaints of "knots" about the periscapular region of both shoulders. He indicated that Petitioner was currently undergoing massage therapy at Dr. Ho's recommendation. He described Petitioner as "feeling considerably better" but still complaining of some periscapular pain in both shoulders. He also noted that Petitioner had been terminated by Respondent and was attending school and looking for work.

On re-examination, Dr. Kornblatt noted a full range of cervical spine motion, no evidence of muscle spasms on periscapular examination, excellent strength and a negative impingement sign in both shoulders.

Dr. Kornblatt described the May 2012 right shoulder surgery as appropriate. He saw no evidence of any significant pre-existing condition or injury. He attributed Petitioner's current complaints to cervical strain, noting these complaints began in November 2012, more than a year after the work injury. He saw no causal relationship between the work injury and those complaints. He did not recommend any additional care with respect to the work injury. He found Petitioner capable of resuming her previous registrar job, noting he had reviewed a description of that job. RX 2.

On January 14, 2013, Dr. Ho wrote to Scott Clark, a workers' compensation claims examiner affiliated with Sedgwick. In his letter, Dr. Ho indicated he was responding to Clark's letter of January 10th and had had an opportunity to review Dr. Greer's [presumably Dr. Kornblatt's] examination report of January 2, 2013. He described Petitioner as eight months out from her right shoulder arthroscopy. He indicated that, while he had anticipated Petitioner would be at maximum medical improvement at the six-month point, she was continuing to complain of pain "in the trapezius areas of both shoulders" at her last visit, on December 17, 2012. He also noted that, as of that visit, Petitioner felt unable to resume full duty. He indicated he agreed with this, based on Petitioner's pain and weakness. He stated

he had started Petitioner on Flexeril and suggested repeat subacromial injections. He then responded to "Dr. Greer":

> "Dr. Greer [sic] found that [Petitioner's] current shoulder pain is not likely related to her original injury and subsequent surgery. In my opinion this is not clear. She has not yet achieved full pain-free normal use of her shoulder following surgery. We will on the other hand [sic] her bilateral shoulder pain may be due to an unrelated problem such as cervical disc disease.
>
> At the very least, I recommend continuing with the treatment plan prescribed to the patient including Flexeril [and] physical therapy.
>
> To determine whether this might be related to her original work-related injury of her right shoulder, I might recommend a repeat MRI of the right shoulder. The subacromial injection might also serve as an impingement test to determine whether the rotator cuff and ongoing impingement is indeed the source of her current trapezius pain noted in both of her shoulders.
>
> Again, I am only requesting continued treatment for the injured right shoulder consisting of physical therapy and consideration for future subacromial injection and a future MRI. Her current work restrictions could be based on a new functional capacity evaluation if you feel this is necessary at this time."

PX 4.

A payment print-out from OPTUM, Petitioner's husband's group carrier, reflects that Petitioner underwent care for "cervicalgia" at Accelerated Rehabilitation from January 28, 2013 through March 21, 2013. PX 9. No records from Accelerated Rehabilitation are in evidence.

Petitioner returned to Dr. Ho on January 28, 2013. The doctor noted that Petitioner had been attending therapy. He described the shoulder as "nearly completely resolved now" but indicated Petitioner was still experiencing bilateral trapezius pain. He then revisited causation:

> "Of note, [Petitioner] originally complained of bilateral shoulder pain after the initial injury. It is quite possible the trapezius or her neck were strained at the time of the injury, although we have been focusing mainly on the right shoulder since she came to see us. The trapezius muscles certainly could have been aggravated by the subsequent surgery and rehabilitation of her right shoulder."

On re-examination, Dr. Ho noted a full range of right shoulder motion, some residual rotator cuff weakness with Jobe's testing, a negative Spurling's test and some tenderness and spasm in both trapezius muscles. Due to the "residual weakness in the shoulder" and the trapezius complaints, Dr. Ho recommended six more weeks of therapy. PX 4.

On February 18, 2013, Petitioner saw an internist, Dr. Nepomuceno. The doctor's note reflects that Petitioner was seen "for follow-up of her shingles, which is much improved." The doctor also indicated that Petitioner "needs letter filled out to resume daycare." On examination, she noted no abnormalities other than a shingles-related rash that was "drying up." She described Petitioner's neck as supple and exhibiting a normal range of motion. She referred Petitioner to an allergist for evaluation of chronic rhinitis. RX 9.

Petitioner returned to Dr. Ho on April 1, 2013. The doctor noted that the right trapezius pain had "for the most part resolved" but that Petitioner was still complaining of pain in the left trapezius area. He also noted that "it has been at least a year since her shoulder injuries." On examination of the left trapezius, he noted an area of point tenderness, consistent with spasm and a trigger point. He also noted a full range of cervical spine motion. He injected the left trapezius trigger point with Kenalog and recommended that Petitioner follow up on an "as needed" basis. PX 4.

Petitioner testified that the April 1, 2013 injection did not help. T. 3/9/18, p. 24. Her therapist told her she had knots in her trapezius muscles that were "the size of golf balls." T. 3/9/18, p. 25.

Petitioner returned to Dr. Tennant on May 28 and May 30, 2013. On each of these dates, Petitioner complained of 5/10 pain in both shoulders and the right side of her chest. PX 2.

Petitioner returned to Dr. Ho on July 1, 2013. The doctor noted a complaint of bilateral trapezius pain, left greater than right. He indicated that Petitioner denied radicular complaints and reported only transient relief from past trapezius-related therapy and massage therapy.

On examination, Dr. Ho noted mild tenderness to palpation over the left and right trapezius muscles. He also noted a full and painless active range of motion of both shoulders and "near full flexion and extension of her neck." He described Spurlng's testing as negative. He obtained cervical spine X-rays and interpreted the films as showing "disc disease at C5-C6 with mild loss of lordosis." He advised Petitioner that "the cervical spine may be the source of the trapezius pain." He prescribed additional therapy, to address the shoulder and cervical spine, along with a Medrol Dosepak. He indicated he would consider prescribing a cervical spine MRI if Petitioner failed to improve. PX 4.

The OPTUM payment print-out (PX 9) reflects that Petitioner underwent additional care for cervicalgia and shoulder pain at Accelerated Rehabilitation between July 9, 2013 and August 13, 2013. No records from Accelerated Rehabilitation are in evidence.

Petitioner testified she returned to Dr. Ho on September 9, 2013. On September 18, 2013, she underwent a cervical spine MRI at the doctor's recommendation. T. 3/9/18, pp. 25-26.

On September 9, 2013, Dr. Ho noted persistent left trapezius pain as well as numbness and tingling radiating down into the left hand. On cervical spine re-examination, he noted "a positive Spurlng's on the left reproducing her radicular symptoms." He ordered a cervical spine MRI and recommended that Petitioner see Dr. Mok. PX 4.

Based on the OPTUM print-out, it appears Petitioner underwent the recommended cervical spine MRI on September 18, 2013. PX 9.

Petitioner first saw Dr. Mok on September 25, 2013. The doctor noted a history of the October 20, 2011 right shoulder injury and subsequent arthroscopy. He also noted that Petitioner remained off work and was experiencing pain in the bilateral trapezius muscles of her neck, both shoulders and occipital area. He indicated that Petitioner reported deriving only temporary relief from therapy.

On examination, Dr. Mok noted a full range of neck motion, decreased sensation to light touch over the C7 and C8 dermatomes of the left hand and 5/5 strength. He interpreted cervical spine X-rays as showing "advanced disc space narrowing with subchondral sclerosis and retrolisthesis of C5 and C6. He interpreted the cervical spine MRI as showing disc bulging at C4-C5 and C5-C6 with bilateral mild foraminal stenosis at C5-C6.

Dr. Mok viewed Petitioner's occipital and axial neck pain as "likely referred from the C5-C6 level," based on the advanced degenerative changes at that level. He found it difficult to correlate the bilateral stenosis at C5-C6 with Petitioner's complaint of left hand numbness. He noted that Petitioner wanted to avoid surgery and that surgery "should be considered very carefully." He arranged for Petitioner to see a pain specialist. PX 5.

Petitioner returned to Dr. Mok on November 14, 2013 to discuss surgical treatment options and "whether this was a workplace injury." Dr. Mok addressed causation as follows: "Although the radiographic findings suggest a degenerative process, the fact that [Petitioner] became symptomatic which has [sic] been persistent since the incident at work suggests that this is likely work-related." He noted that Petitioner was also complaining of left thumb pain and difficulty extending the thumb due to a palpable knot. He assessed Petitioner as having "trigger thumb" and directed her to have this taken care of by a hand specialist prior to undergoing any cervical spine surgery. He noted that Petitioner also asked about opioid pain medication, which Dr. Ho had prescribed. He recommended she continue taking this medication until the surgery, at which point he would prescribe for six months. He advised Petitioner of the risks associated with the contemplated C4-C5, C5-C6 anterior cervical discectomy and fusion with instrumentation and use of allograft. PX 5.

On January 15, 2014, Dr. Mok performed the contemplated surgery. In his operative report, he noted "advanced foraminal stenosis C5-C6 bilaterally." He applied a hard neck collar at the conclusion of the procedure. PX 5.

Petitioner testified she "felt better for a short period of time" following the surgery. At Dr. Mok's recommendation, she wore a cervical collar for about six weeks and took Norco for pain. She then started another course of therapy. She testified that her neck pain, trapezius pain and migraines returned during the first therapy session. When she followed up with Dr. Mok, she told him her symptoms had returned. She continued seeing Dr. Mok thereafter.

On February 27, 2014, Dr. Mok noted that Petitioner's left shoulder pain had improved but that she was experiencing neck weakness and headaches. He described the headaches as "present since her injury." He obtained X-rays which showed the implants and allograft to be in satisfactory position. He directed Petitioner to discontinue the collar and start physical therapy. PX 5.

Petitioner returned to Dr. Mok on April 3, 2014, having started therapy in the interim. The doctor noted that Petitioner had previously been doing well but became symptomatic after starting therapy and was now "back to square zero with complaints similar to pre-op." He obtained X-rays and prescribed a CT scan to check for pseudarthrosis. PX 5.

Petitioner saw Dr. Mok again on April 10, 2014, having undergone the recommended CT scan in the interim. The doctor interpreted the scan as showing some incorporation of the graft "but lucent line at C4 interior endplate that is chronic appearing." He told Petitioner the findings were "concerning for pseudarthrosis." He gave Petitioner the options of waiting further, using a bone stimulator or undergoing more surgery. He refilled her Norco prescription. PX __.

Petitioner began using a bone stimulator thereafter. On June 25, 2014, she returned to Dr. Mok and complained of bilateral arm pain, worse on the right, as well as hand and right shoulder pain. The doctor reviewed X-rays and informed Petitioner that it appeared she had developed pseudarthrosis that is symptomatic at the ACDF site. He prescribed cervical spine and right shoulder MRIs and indicated Petitioner might need revision surgery. PX 5.

Pay summary records in RX 6 reflect Petitioner's earnings and periodic bonuses from Family Health Network between the pay period ending September 20, 2014 and the pay period ending April 18, 2015.

On January 15, 2015, Petitioner returned to Dr. Mok. Petitioner reported no improvement of her neck pain and indicated she was still experiencing bilateral upper extremity radicular pain. Dr. Mok noted she had stopped using the bone stimulator.

On re-examination, Dr. Mok noted tenderness to palpation along the middle and cervical spine, pain with neck range of motion, intact sensation and 5/5 strength. He obtained cervical spine X-rays. He interpreted the films as showing "some improvement in the fusion construct" and no evidence of hardware failure. He recommended a CT scan to check for bony bridging. PX 5.

The cervical spine CT scan, performed without contrast on January 17, 2015, showed postoperative findings relating to the fusion with "incomplete interbody osseous fusion" and "no evidence of hardware failure." PX 5.

Petitioner also underwent a cervical spine MRI on January 26, 2015. This study showed no significant compression of the spinal canal or neural foramina of the cervical spine. PX 5.

On February 20, 2015, Dr. Mok met with Petitioner. He explained that the CT scan showed a pseudarthrosis and the other studies showed no other pathologies. He recommended revision surgery using a posterior approach. He also noted "bilateral symptomatic trigger thumbs" which had "failed an injection." He recommended that Petitioner see Dr. Angeles for this condition. PX 5.

On March 9, 2015, Petitioner returned to Dr. Ho and complained of worsening right shoulder pain during the preceding two months. Dr. Ho noted the intervening care rendered by Drs. Mok and Angeles.

On right shoulder re-examination, Dr. Ho noted no atrophy, forward flexion to 170 degrees, abduction to 90 degrees, external rotation to 45 degrees, internal rotation to the lumbar spine, pain and 4+/5 strength on Jobe's testing, positive impingement signs, negative Spurling sign, 4/5 strength with the deltoids at C5 and subjective decreased sensation in the C7 distribution.

Dr. Ho attributed Petitioner's right shoulder pain to continued impingement. He administered an injection and indicated Petitioner could return after concluding her other treatment. PX 4.

Dr. Mok performed a revision cervical spine fusion on September 4, 2015. He used an anterior rather than posterior approach at Petitioner's election. He placed Petitioner in a cervical collar at the conclusion of the procedure. PX 5.

Petitioner testified the surgery helped to a degree but she "still had a lot of pain." T. 3/9/18, pp. 31-32.

On August 13, 2015, Petitioner saw Dr. Reddy of Southland Orthopedics for treatment of left knee pain and locking. The doctor noted that the pain dated back to 2014 and that Petitioner had been using crutches. He obtained left knee X-rays which showed severe degenerative joint disease in the medial compartment with almost complete loss of the medial joint space. He recommended a total knee replacement and urged Petitioner "to use crutches all the time to minimize pain and other complications of altered gait." PX 3.

On August 25, 2015, Petitioner filed an Amended Application alleging cervical spine as well as right shoulder injuries of October 20, 2011. PX 10.

On September 22, 2015, Petitioner returned to Dr. Mok. She reported some low back pain for which she had seen a chiropractor. She also complained of shoulder pain and neck pain of about one week's duration. She denied performing any lifting and reported wearing the cervical collar. Dr. Mok re-examined Petitioner and obtained new X-rays which showed the hardware to be in an appropriate position. Dr. Mok described Petitioner as doing well overall. He indicated the neck pain was normal "at this early point post-operatively." He prescribed Flexeril and a bone stimulator. He directed Petitioner to continue wearing the collar for another four weeks. PX 5.

On February 3, 2016, Petitioner saw Dr. Aribindi of Southland Orthopedics. Petitioner complained of numbness of her right hand as well as her left index finger and thumb following the September 2015 revision surgery. The doctor noted that previous EMG testing "revealed findings consistent with mild median nerve neuropathy at the wrists in addition to chronic neurogenic changes in the right biceps related to her history of prior cervical radiculopathy and C5-C6 cervical discectomy/fusion." He also noted that Petitioner had undergone right and left thumb trigger release surgery the previous year.

On examination, Dr. Aribindi noted good neck motion, no tenderness or swelling about the right shoulder or elbow, positive Tinel's over the median nerve on the right, positive Phalen's bilaterally, a ganglion cyst over the volar radial aspect of the right distal forearm/wrist, tenderness over the A1 pulley region of the middle finger and subjective diminished sensation about all the fingertips of the right hand.

Dr. Aribindi diagnosed bilateral carpal tunnel syndrome, right worse than left, and pain/triggering of the right middle finger. He recommended the use of wrist splints at night. He injected the right middle finger and recommended range of motion finger exercises. PX 3.

On March 9, 2016, Petitioner saw Dr. Shi, a physician affiliated with the University of Chicago. The doctor noted an "extensive history of right shoulder pain that was previously treated with an

arthroscopic subacromial decompression in 2012." The doctor described the pain as "persistent." He indicated Petitioner might have a SLAP tear, based on his examination. He contemplated an MRI but prescribed therapy instead, noting that Petitioner wanted to take a more conservative approach. PX 6.

Petitioner testified she underwent eight weeks of therapy after her initial visit to Dr. Shi. [A bill from Athletico shows that the therapy started March 22, 2016 and ended May 11, 2016. PX 8.] She testified she remained symptomatic and experienced "freezing" of the shoulder. Her husband had to help her get out of bed. T. 3/9/18, pp. 34-36.

Petitioner returned to Dr. Shi on May 11, 2016, and reported only a little improvement from the therapy. She expressed interest in undergoing an MRI. The doctor ordered an MR arthrogram. Petitioner underwent this study on June 23, 2016. PX 6.

On June 24, 2016, Dr. Shi administered a right glenohumeral joint injection. PX 6.

At Respondent's request, Petitioner saw Dr. Deutsch for purposes of a Section 12 examination on July 29, 2016. In his report of that date, Dr. Deutsch indicated he reviewed records from Dr. Tennant, Dr. Ho, Dr. Kornblatt, Ingalls Hospital and Dr. Mok in connection with his examination. He also noted that Petitioner denied working after the October 20, 2011 accident and reported receiving Social Security disability benefits. He described Petitioner's "main complaint" as bilateral hand tingling and numbness. He also noted triggering of both thumbs, chronic headaches, some neck pain, vertigo and gastritis. He described Petitioner as relating all of these problems to the work accident.

Dr. Deutsch described Petitioner's neck as supple. He described sensory as "normal in all four extremities except for some numbness in the entire right side of the body." On cervical spine examination, he noted rotation of 60 degrees bilaterally, negative Spurling's and minimal pain to light palpation. On thoracic spine examination, he noted tenderness to palpation in the right thoracic area and pain with passive motion of the right shoulder. On lumbar spine examination, he noted negative straight leg raising, mild tenderness to palpation of the lower back, flexion to 90 degrees and extension to 15 degrees. He described Waddell's testing as 5/5 negative.

Dr. Deutsch found no causal relationship between the work accident and Petitioner's cervical spine condition. He noted that Petitioner's radicular symptoms and cervical spine MRI "did not occur until almost two years after" the accident. He also noted there was "no mechanism of injury for any type of cervical spine injury based on [Petitioner's] description of injuring her shoulder while pushing a paper cart." He described the September 18, 2013 cervical spine MRI as showing "no evidence of any spine injury." He described Dr. Mok's causation finding as based on an inaccurate history, with the doctor assuming that Petitioner's neck complaints started after the accident.

Dr. Deutsch found Petitioner at maximum medical improvement and capable of full duty with respect to her cervical spine condition. Deutsch Dep Exh 1.

Petitioner testified she last saw Dr. Mok on September 13, 2016. T. 3/9/18, p. 32. He told her to return to him as needed. Before he released her, she complained to him of some shoulder pain. He referred her to Dr. Shi, another orthopedic surgeon at the University of Chicago.

Dr. Mok's final note of September 13, 2016 reflects that Petitioner reported having undergone more chiropractic care. The doctor noted that she reported "almost complete resolution of all of her

pain." He also noted that she was no longer complaining of hand numbness. He released Petitioner from treatment on a PRN basis. PX 5.

Petitioner returned to Dr. Shi on October 21, 2016. The doctor indicated the MR arthrogram showed "a degenerative labral tear versus partial-thickness supraspinatus tear." He noted that Petitioner derived two months of relief following the June injection and was interested in a second injection. PX 6.

On October 26, 2016, Petitioner returned to Dr. Shi and told him she wanted to move forward with "something more definitive" than a repeat injection. On re-examination, the doctor noted forward flexion to about 100 degrees, abduction to 90 degrees, external rotation to 45 degrees, negative Neer and Hawkins, some tenderness over the biceps tendon and an equivocal Speed's test. The doctor recommended a right shoulder arthroscopy and possible rotator cuff repair. PX 6.

Dr. Shi operated on Petitioner's right shoulder on November 7, 2016, performing an arthroscopic debridement of the glenohumeral joint, a subacromial decompression and a biceps tenotomy. In his operative report, he documented superior and posterior degenerative labral tears, anterior labral fraying, moderate glenohumeral synovitis and very significant subacromial bursitis. PX 6.

Petitioner testified her right shoulder was "much better" following the November 7, 2016 surgery. T. 3/9/18, pp. 36-37.

On December 30, 2016, Dr. Shi described Petitioner as "doing well" six weeks out from surgery. He prescribed physical therapy. PX 6.

In his note of February 24, 2017, Dr. Shi indicated that, while Petitioner was "not 100%", she was very happy with her progress and was continuing to attend therapy. On re-examination, he noted forward flexion to 150 degrees with minimal pain and 5/5 strength in the rotator cuff musculature. He prescribed Flexeril and renewed the physical therapy prescription. He instructed Petitioner to return to him as needed. PX 6.

Petitioner testified she has not returned to Dr. Shi since February 24, 2017. T. 3/9/18, pp. 36-37.

Dr. Mok testified by way of evidence deposition on July 14, 2017. PX 7. Dr. Mok testified he obtained his medical license in 2003, after graduating from Columbia University's medical school. PX 7, p. 4. He did his residency in orthopedic surgery at the University of California, graduating in 2010. He did an extra year of training, with a focus on spine surgery, thereafter. He then served as a spine surgeon in the U.S. Army for three years. He has been affiliated with the University of Chicago since 2013. PX 7, p. 5. He obtained board certification in orthopedic surgery in 2012. PX 7, p. 5. He has been an assistant professor at the University of Chicago since 2013. PX 7, p. 6. Mok Dep Exh 1.

Dr. Mok testified his practice is primarily degenerative, meaning that he treats patients who have spinal problems and pain. He spends about 20% of his time treating cervical spine problems and 80% treating lumbar spine problems. PX 7, p. 7. He performs surgery twice a week. He generally performs about 200 surgeries per year. About 20% of those surgeries are cervical or lumbar spine fusions. PX 7, p. 7.

Dr. Mok testified he initially saw Petitioner on September 25, 2013. He needs to rely on his notes while testifying about the care he rendered to Petitioner. PX 7, pp. 9-10. Based on the fact that he sent Dr. Ho a copy of his initial note, he assumes Dr. Ho referred Petitioner to him. PX 7, p. 10. His note reflects he reviewed a cervical spine MRI taken on September 18, 2013. The note does not reflect that he reviewed any other records concerning Petitioner's prior care. PX 7, p. 11.

Dr. Mok testified that Petitioner complained of pain in her neck, shoulders and occipital area. Petitioner told him this pain started on October 20, 2011, while she was at work. PX 7, p. 11.

Dr. Mok testified that, after examining Petitioner, he concluded her pain was "primarily due to C5 to C6 but that she also had some issues at C4 to C5." The diagnosis was stenosis, The C4-C5 disc appeared to be bulging. PX 7, pp. 13-14. At that time, she and he were in "mutual agreement that we were going to avoid surgery." He recommended she see a pain specialist but he does not know whether she saw one. PX 7, pp. 12-14. On that date, he did not address Petitioner's ability to work. PX 7, p. 14.

Dr. Mok testified that, when he next saw Petitioner, on November 14, 2013, she had a knot in the base of her thumb. He recommended she see one of his colleagues, a hand surgeon. She told him she wanted to proceed with cervical spine surgery. He agreed that surgery was a "valid treatment option." PX 7, pp. 14-16. However, he wanted her to have her hand addressed beforehand. PX 7, p. 16.

Dr. Mok testified that Petitioner's neck condition was "likely work related" because she was "asymptomatic before the injury" and reported that her symptoms started after the injury. PX 7, p. 16.

Dr. Mok testified he performed a two-level anterior discectomy and fusion on January 15, 2014. PX 7, pp. 16-18. Petitioner probably was not capable of working on that date. PX 7, p. 18.

Dr. Mok testified he next saw Petitioner on January 28, 2014. Petitioner was using the hard collar and complained of pain in the top of her head. He did not specifically address work status but, in his practice, a patient who has recently undergone a neck fusion is not capable of resuming work. PX 7, p. 19. Petitioner was also likely unable to work as of the next visit, February 27, 2014. Many patients are not able to resume working at that point. PX 7, p. 21. He prescribed therapy at that visit. PX 7, p. 21.

Dr. Mok testified that, on April 3, 2014, Petitioner told him she was not doing well and was "back to square zero," in terms of her pre-operative symptoms having returned. PX 7, p. 22. He obtained an X-ray, which showed that the spacer at C4-C5 did not appear to be incorporating into the bone. This might be an explanation for her pain. PX 7, pp. 22-23. This is known as "pseudarthrosis." He was concerned at this point because Petitioner had previously been doing well. PX 7, p. 23. He ordered a cervical spine CT scan, which showed some incorporation of the bone graft. At the next visit, on April 10, 2014, he discussed the alternatives of using a bone stimulator versus revision surgery. He left the decision up to Petitioner. PX 7, pp. 24-25.

Dr. Mok testified that Petitioner had a "multitude of complaints" at the next visit, on June 24, 2014. He diagnosed pseudarthrosis based in part on the X-rays, which showed a lucency, or space, between the spacer and bone. The spacer and bone were "not melding together" as you would expect with a fusion. PX 7, p. 25. He prescribed MRIs of the cervical spine and right shoulder. The right shoulder MRI showed "no problem." PX 7, p. 27.

Dr. Mok testified he did not see Petitioner again until January 15, 2015. On that date, Petitioner complained of neck pain and pain shooting down both arms. She had discontinued the collar and was no longer using the bone stimulator. He obtained an X-ray which actually showed improvement in the fusion at both the C4-C5 and C5-C6 levels. PX 7, p. 28. He recommended a cervical spine CT scan, which showed that the pseudarthrosis problem was at the C5-C6 level. He had previously been concerned about the C4-C5 level but most non-unions occur at the distal level so the C5-C6 non-union was consistent. PX 7, p. 29. A cervical spine MRI performed on January 26, 2015 showed no significant nerve compression. PX 7, pp. 29-30. He obtained this MRI to try to evaluate the cause of Petitioner's radiating arm pain. PX 7, p. 30.

Dr. Mok testified he discussed the need for a revision fusion with Petitioner on February 19, 2015. He recommended a posterior approach but Petitioner later requested an anterior approach. PX 7, pp. 31-34. He did not address Petitioner's work capacity but, in general, if she was in so much pain she needed surgery, he would typically have kept her off work. PX 7, p. 31. Petitioner underwent a bilateral occipital nerve block on May 4, 2015, to try to decrease the pain in the back of her head. PX 7, p. 32.

Dr. Mok testified he performed revision surgery on September 4, 2015, to address the non-union at C5-C6. Petitioner would not have been capable of returning to work as of that date. PX 7, p. 36. On September 22, 2015, he recommended that Petitioner continue using the collar 24/7 for four weeks and also use a bone stimulator. In general, he would not have recommended a return to work at that point. PX 7, p. 37.

Dr. Mok testified that, on October 20, 2015, Petitioner had pain around the hard collar and was barely able to tolerate the collar. Petitioner also had pain in the trapezius area, which is between the neck and shoulders. PX 7, p. 39. He decided she could discontinue the collar, except while sleeping. In general, he would not have recommended a return to work at this point. PX 7, pp. 39-40.

Dr. Mok testified that, as of December 1, 2015, Petitioner had complaints of headaches and pain in the trapezius area. He reviewed the MRI with her again and recommended a muscle relaxant. He also recommended that Petitioner see a neurologist to look for any explanation of her symptoms "other than the spine." PX 7, p. 41. X-rays taken that day showed the fusion was progressing "better than expected." PX 7, p. 42.

Dr. Mok testified that Petitioner complained of triggering in her right middle finger and numbness in both hands on March 1, 2016. She also complained of pain in the right shoulder and the shoulder blade. Petitioner had already seen Dr. Mass and Dr. Angelese and wanted to see someone else. He referred her to Dr. Mica. A repeat cervical spine X-ray showed a successful fusion at both C4-C5 and C5-C6. PX 7, pp. 42-43.

Dr. Mok testified that, on June 7, 2016, Petitioner had "pain in multiple parts of her body," including the right shoulder and arm, both hands, left foot and bilateral trapezius area. Petitioner described the trapezius pain as going up the back of her skull. PX 7, pp. 44-45. She had been diagnosed with carpal tunnel syndrome via EMG. He recommended she see Dr. Mica concerning this condition. He also suggested she continue seeing Dr. Shi, a shoulder specialist she had opted to see rather than returning to Dr. Ho. He arranged for her to see a specialist for her second toe pain. He recommended she continue with normal activities as much as possible. PX 7, p. 45. In general, when he refers to "normal activities," those activities include work. PX 7, p. 46.

Dr. Mok testified that, when he last saw Petitioner, on September 13, 2016, she reported her spine pain and hand numbness had resolved, due to chiropractic treatment. PX 7, p. 46.

Dr. Mok identified Mok Dep Exh 2 as a report he authored on December 30, 2015. In this report, he opined that since Petitioner reported becoming symptomatic after an incident at work, that suggested the symptoms were a work-related exacerbation of a degenerative condition. PX 7, p. 48. This is still his opinion. PX 7, p. 48.

Dr. Mok testified that the cervical spine can cause pain that is either referred to the shoulder or it can cause radicular pain to the shoulder. "Sometimes the body doesn't know how to interpret neck pain and it tells you that it's coming from one of your shoulders." The other possibility is that compression of nerves on the right or left can cause shoulder pain on the right or left. PX 7, p. 49.

Dr. Mok testified he would not have recommended surgery unless it was warranted. According to his documentation, Petitioner's symptoms were due to a work-related injury. PX 7, p. 50. The treatment, i.e., two surgeries, was causally related to that injury. PX 7, p. 50.

Under cross-examination, Dr. Mok acknowledged he did not document the exact mechanism of Petitioner's work injury. If a patient reported being asymptomatic before a work injury and symptomatic afterward, he would take the patient's word at face value. PX 7, p. 52. He did not review any records from Park Forest Chiropractic, Dr. Heller, Mercy Occupational or Dr. Ho. PX 7, p. 53. In terms of the timing of the onset of symptoms, he relied on Petitioner's reporting. PX 7, p. 53. Cervical stenosis is a degenerative condition that can be aggravated. Any kind of sudden motion involving the neck can cause an exacerbation. PX 7, p. 54. Following a trauma, neck symptoms can appear immediately or "in a more delayed fashion." PX 7, p. 55. If they did not appear until a year after the trauma, they would not be related to that trauma. PX 7, pp. 55-56. He is not aware that Dr. Ho indicated Petitioner's cervical symptoms were not related to the work accident. Dr. Ho is a good physician. PX 7, p. 56.

Dr. Mok testified that Petitioner had hand symptoms consistent with C7-C8 at the initial visit. However, not all patients' C7 and C8 nerve roots come from C7 and C8. They can sometimes exit the spine at C5-C6 or C4-C5. Petitioner had decreased sensation to light touch over the C7 and C8 dermatomes of her left hand. That would be in the index through small fingers. PX 7, p. 57. Carpal tunnel usually involves the thumb and index finger, i.e., the radial aspect of the hand. It is usually not related to neck pain. PX 7, p. 58.

Dr. Mok testified that, based on his MRI review, he felt the degree of Petitioner's stenosis was mild. A surgical recommendation is based in part on the degree of stenosis but it is also based on the severity of symptoms and the measures the patient has tried beforehand. PX 7, p. 58. He cannot be sure Petitioner followed his recommendation of seeing a pain specialist. He did not recommend surgery until six weeks after he made this recommendation. PX 7, pp. 59-60. He is aware Petitioner had nerve blocks with Dr. Anitescu and also underwent therapy. After being asked to assume Petitioner's job with Respondent was sedentary, Dr. Mok testified that even a sedentary job can involve prolonged computer usage, which could be difficult for a patient with neck and shoulder problems. PX 7, p. 61. As of the initial visit of September 25, 2013, he did not have an opinion as to whether Petitioner could work. Otherwise, his records would reflect this. PX 7, pp. 61-62. A patient with a sedentary job who undergoes a two-level fusion would typically be allowed to return to work within three to six months

after the surgery, if the surgery is successful. PX 7, pp. 62-63. He cannot explain the gap in care between June 2014 and January 2015. He did not address the issue of work capacity on June 24, 2014. PX 7, p. 62. He did not review any post-operative therapy notes in preparation for the deposition but he likely reviewed them in order to approve any therapy plan. PX 7, p. 64. Petitioner complained of left-sided neck pain on November 14, 2013. He is aware Petitioner underwent right shoulder surgery. When Petitioner first presented, her shoulder pain was bilateral. A patient's symptoms will often have some degree of variability. Radiculopathies can primarily appear in the shoulder or arm without any significant neck involvement. PX 7, pp. 65-66. He sees patients whose shoulder arthroscopies were unsuccessful because most of the pain was really coming from the neck. PX 7, p. 67. The foraminal stenosis at C5 to C6 could cause radicular pain. PX 7, p. 67. He would expect Petitioner to be off work after the revision surgery. PX 7, p. 67. He also allowed Petitioner to return to bowling as of March 1, 2016. Petitioner could return to work if she was capable of returning to bowling. PX 7, pp. 67-68. Bowling could aggravate a pre-existing degenerative condition. PX 7, p. 68. His note does not reveal why Petitioner did not want to go back to Dr. Ho. He does not independently recall why. PX 7, pp. 68-69. As of June 7, 2016, Petitioner's cervical problems had resolved. The referrals he made that day had nothing to do with the cervical spine. PX 7, p. 69. Petitioner has not returned to him since September 13, 2016. PX 7, p. 69. He drafted the December 30, 2015 report at Petitioner's request, for purposes of litigation. When he tries to determine when symptoms started, he relies heavily on his patient's history. PX 7, pp. 70-71.

On redirect, Dr. Mok testified he released Petitioner to bowling about six months after the revision surgery. This falls within the three- to six-month time frame he identified earlier. Shoulder complaints could come from the cervical spine. This is akin to having a heart attack but experiencing it as arm pain. PX 7, p. 73. When fetuses develop, the cells that helped form the cervical spine travel to the shoulder or scapula. This is why you often see scapular pain or shoulder pain that is referred from the shoulder. PX 7, p. 74. The trapezius is not part of the cervical area. It is a muscle that covers the cervical spine as well as a large part of the mid back. PX 7, p. 74. A patient could experience trapezial pain due to a cervical spine issue. Generally, neck pain described by a patient includes trapezial pain. You can also experience trapezial pain due to a shoulder injury. PX 7, p. 75. You do not have to lift 1,000 pounds to injure your upper back. Sometimes very trivial movements can result in injuries. PX 7, p. 75. The doctor testified he is not appearing as an expert and has no opinion as to whether pushing a cart with uneven wheels could cause a cervical spine injury. However, a sudden motion could cause a problem. PX 7, pp. 75-76.

Under re-cross, Dr. Mok testified he is not aware of any cervical spine care Petitioner underwent before she came to him. PX 7, p. 77.

At Respondent's request, Petitioner underwent an examination by Dr. Forsythe of Midwest Orthopaedics on July 19, 2018. In his report of that date, Dr. Forsythe indicated he reviewed the right shoulder MRI reports, along with records from Drs. Tennant, Ho and Shi, in connection with his examination. He indicated that Petitioner denied undergoing any right shoulder care before the October 20, 2011 accident. He also noted that Petitioner reported experiencing significant relief following the second right shoulder arthroscopy. He described Petitioner as rating her right shoulder pain at a "0/10 on average." He stated she noted "soreness while carrying heavy items" and rated her right shoulder function as 80% of normal subjectively.

Dr. Forsythe noted that Petitioner demonstrated "mild symptom magnification" during his examination. He also noted guarding and an "inconsistent range of motion."

Dr. Forsythe found it more likely than not that the second right shoulder surgery was causally related to the work accident. He found Petitioner capable of resuming full duty as a registrar.

Dr. Forsythe also performed an AMA Guides impairment rating, using a Class 1 diagnosis of "right shoulder impingement syndrome." He rated the combined upper extremity impairment at 4% and the whole person impairment at 2%. RX 3.

After reviewing Dr. Kornblatt's 2013 report, Dr. Mok's March 1, 2016 office visit note, the MRI and MR arthrogram images and Petitioner's "deposition" [presumably trial testimony], Dr. Forsythe issued an addendum on February 18, 2019. In light of this supplemental documentation, he opined that the second right shoulder surgery would not be work-related if the two cervical spine surgeries were not work-related. He attributed the need for the second surgery to "compensatory pain following the cervical spine surgery." He indicated that, regardless of causation, there was no reason for Petitioner to not be working between October 8, 2012 and the second right shoulder surgery of November 7, 2016, "specifically as it relates to her right shoulder." RX 3.

Petitioner denied injuring her right shoulder or undergoing any right shoulder care before the accident of October 20, 2011. T. 3/9/18, pp. 37-38. She did, however, have neck problems before the accident. In approximately 2003, she experienced neck pain. She saw a doctor on one occasion but cannot recall his name. She believes she underwent testing. The doctor told her she had a bulging disc but that this was common and she did not need to worry so long as she was not experiencing problems using her hand. T. 3/9/18, p. 39. Other than that one visit, she had no additional neck treatment before October 20, 2011. T. 3/9/18, pp. 39-40.

Records in RX 5 reflect that Petitioner underwent care at Park Forest Chiropractic on multiple occasions between January 20, 2011 and July 12, 2011. The initial note of January 20, 2011 references a complaint of right buttock pain radiating to the right knee. All the subsequent notes, beginning January 22, 2011, also reference significant complaints referable to the neck. On February 8, 2011, Dr. Tennant indicated he reviewed an MRI study of September 29, 2009 which showed "multiple levels of disc bulging and stenosis" in the cervical spine. By June 2011, Dr. Tennant was describing Petitioner's neck pain as "getting better." In the last note, dated July 12, 2011, he noted a rating of 2/10 neck pain.

Petitioner acknowledged undergoing treatment for hand problems. She decided against undergoing care at the University of Chicago for these problems. She called her insurance carrier and received a referral to Dr. Parks at Swedish Covenant Hospital. She underwent an EMG and was told she had nerve damage. She was also told that nothing could be done to eliminate this damage. She was given medication. T. 3/9/18, pp. 40-41.

Petitioner testified she never resumed working for Respondent after October 21, 2011. She did work as a customer service representative for Family Health Network for about six months but sometimes had to leave early, due to vertigo. Then she began experiencing locking of her thumb and middle finger. Family Health Network terminated her after she learned she needed to undergo surgery for the locking. T. 3/9/18, p. 43. RX 6.

Petitioner testified she applied for Social Security disability benefits after being terminated by Family Health Network. The government found her to be disabled and she began receiving benefits. T. 3/9/18, pp. 42-43. She is still receiving those benefits. She moved to Texas on October 19, 2017 and

began seeing Dr. Patel, a neurologist. She provided Dr. Patel with her scans and X-rays. He told her she had nerve damage and was experiencing spasms. He prescribed Valium, which she continues to take three times daily. This medication helps tremendously. T. 3/9/18, pp. 44-45.

Petitioner testified her neck, shoulder and trapezius symptoms started immediately after the accident. T. 3/9/18, p. 45. When she started therapy at Athletico, at Dr. Ho's direction, the therapists were only working on her shoulder. She kept telling them her trapezius muscles hurt. She was on the verge of going to the Emergency Room one day but instead decided to demand that the therapists address her trapezius. After she made this demand, the therapists began addressing her trapezius. She started therapy at the Athletico facility in Matteson but switched to the one near South Suburban. T. 3/9/18, p. 46.

Petitioner testified she experiences right shoulder pain some days. She is right-handed but guards her right shoulder and does not use it the way a normal person would. If she does not take her Valium, she experiences pain in her trapezius muscles. This pain goes down to her shoulder blades. Her right hand and her left thumb and index finger are completely numb. She had no problems with either hand before the October 20, 2011 accident. T. 3/9/18, p. 48.

Petitioner testified she received workers' compensation benefits from the date of the accident until Dr. Ho released her, following the first right shoulder surgery. She has not since received any additional workers' compensation benefits. T. 3/9/18, p. 49.

Petitioner recalled being examined by Dr. Kornblatt on one occasion. She saw another doctor at a clinic but does not recall his name. More recently, she saw Dr. Deutsch but he did not physically examine her. He talked to her for five minutes and then walked out. T. 3/9/18, p. 50. She did not undergo any X-rays at Dr. Deutsch's office. T. 3/9/18, p. 51.

Under cross-examination, Petitioner testified she was originally represented by an attorney other than Mr. Lekas. She signed an Application for Adjustment of Claim while that attorney was representing her. The Application states she had no children under 18 as of the accident but that is not correct. She has a son who was born on June 23, 1993. T. 3/9/18, p. 53. She provided Dr. Deutsch with a history of her work accident. She does not know whether he had access to her records. She has seen his report. If the report sets forth the various dates of treatment, she would not know whether he reviewed her records. She first saw Dr. Kornblatt on February 15, 2012. After that examination, her surgery was approved. She may have seen him a second time. She is not sure exactly when she worked for Family Health Network. Her duties there included working on a computer, assisting customers with insurance-related questions and keyboarding. She spent all day keyboarding. They elevated her computer for her because she had difficulty looking down. T. 3/9/18, pp. 55-57. She worked full-time and earned about $16 per hour. It was during this time that she noticed her fingers were locking. T. 3/9/18, p. 57. She began working for Respondent in April 2011. After Dr. Ho released her to work, following the first right shoulder surgery, she did not contact anyone at Respondent about returning to work because she was "not able to work." T. 3/9/18, p. 58. Before she first saw Dr. Ho, she saw a doctor at Respondent's referral. This doctor [Dr. Heller] injected her right shoulder. She does not recall telling this doctor that she had been having right shoulder problems for two to three years. T. 3/9/18, p. 59. She does not recall undergoing a shoulder injection two to three years before the accident. T. 3/9/18, p. 59. She has been involved in quite a few automobile accidents. One such accident occurred on December 27, 2006. Another occurred on July 3, 2010. She remembers experiencing "neck issues" due to air bag deployment before the accident of October 20, 2011. She underwent some chiropractic

care for those issues. T. 3/9/18, p. 60. She has not been involved in any automobile accidents since October 20, 2011. As of October 20, 2011, her primary care physician was Dr. Nepomuceno. She had seen this physician for a couple of years. Just before she started working at Respondent, she had some jaw problems. Her mouth "moves out of place." She thinks the condition she had is called "EMJ" [sic]. Dr. Nepomuceno referred her to a neurologist for treatment of this condition. T. 3/9/18, pp. 61-62. She was diagnosed with borderline diabetes when she first saw Dr. Nepomuceno in 2009. There have been times when she has had to take medication to control her diabetes. T. 3/9/18, p. 62. There have been no times since the work accident when she was not compliant with the medication. T. 3/9/18, p. 62. She does not remember undergoing shoulder injections by Dr. Michael Terry in 2007. If Dr. Ho indicated this in his records, he was incorrect. She does not recall ever seeing Dr. Terry. T. 3/9/18, p. 64. Respondent referred her to Dr. Heller. Dr. Ho then treated her but she was following Respondent's protocol. T. 3?9/18, p. 64. She was in a bowling league for 10 to 15 years before the work accident. She bowled once a week for about 32 weeks out of the year. She did not resume bowling after Dr. Ho released her but she has bowled since the work accident. She "tried" bowling but "it didn't work." Now that she is on medication, she is able to bowl on an occasional basis but not every week. She believes she resumed bowling after the second neck surgery. Dr. Patel, the neurologist she is currently seeing, is affiliated with Baylor Hospital. T. 3/9/18, p. 66. He provides no treatment other than the Valium. Her primary care physician is Dr. Zhang, who is also at Baylor. Dr. Zhang referred her to Dr. Patel. After the first shoulder surgery, she underwent treatment for her fingers. She also underwent left knee surgery during this time. She is no longer pursuing any care for her right shoulder. She did not return to Dr. Ho after she began seeing Dr. Mok because she felt as if he did not listen to her trapezius complaints and she did not understand why he released her to work when she was in serious pain. T. 3/9/18, p. 68. It is not correct that she felt pretty good when Dr. Ho released her. She was complaining about her trapezius muscles, which is why he referred her to Dr. Mok. She is currently seeing Dr. Patel for her neck. The Valium helps her spasming but it makes her lethargic. T. 3/9/18, p. 69. When she uses the term "freeze" in reference to her shoulder, she means that her shoulder would hurt and lock. After the first shoulder surgery, she wanted to follow through with the University of Chicago but became disenchanted. She filed a complaint with the University's patient relations department due to the lack of care. She has not tried to work since she began receiving Social Security disability benefits. T. 3/9/18, p. 70. The migraines are better than they used to be. She did not drive from Texas to attend the hearing. She traveled via airplane. T. 3/9/18, p. 71.

On redirect, Petitioner testified she bowls every now and then but is not in a league. She saw Dr. Patel twice. After he told her there was nothing that could be done for her nerve damage, he prescribed Valium and then told her to obtain refills from her primary care physician. She is also taking Flexeril but is not sure who prescribed that. T. 3/9/18, p. 72. She still has hand issues. T. 3/9/18, pp. 72-73.

In addition to the exhibits previously described, Respondent offered into evidence Dr. Deutsch's evidence deposition of August 9, 2017. Dr. Deutsch testified he obtained board certification in neurosurgery in approximately 2007. He has been the co-director of the Rush Spine Center for the past ten years. RX 1, p. 5. Deutsch Dep Exh 1.

Dr. Deutsch testified he specializes in spine surgery. He regularly performs cervical and lumbar discectomies and fusions. RX 1, p. 6.

Dr. Deutsch testified he reviewed Dr. Kornblatt's 2013 independent medical examination report, along with records from Dr. Tennant, Dr. Ho and Dr. Mok, in connection with his July 29, 2016

examination of Petitioner. He typically reviews an examinee's records after conducting an examination. RX 1, pp. 6-7.

Dr. Deutsch testified he took a history from Petitioner. Petitioner told him she was injured on October 20, 2011, while pushing a cart that did not roll easily. Petitioner indicated she experienced right arm numbness and pain, along with cervical pain, "from that point on." RX 1, p. 8. Petitioner described the treatment to date and denied working after the accident. She voiced a "bunch of different complaints, including dizziness, chronic headaches, gastritis and vertigo," all of which she related to the work accident. RX 1, p. 9. She indicated she was anticipating more surgery on her fingers. RX 1, p. 9.

Dr. Deutsch opined that vertigo is "unrelated to the cervical spine." RX 1, p. 9.

Dr. Deutsch described Petitioner's past medical history as significant for borderline diabetes, a hysterectomy and left knee surgery. RX 1, p. 9.

Dr. Deutsch testified that his examination of Petitioner was normal except for complaints of numbness on the right side of the body, tenderness to palpation in the upper thoracic area, some neck pain and a well-healed cervical incision. He examined the thoracic and lumbar areas, in addition to the cervical spine, to be comprehensive. RX 1, p. 10. He also performed Waddell's testing, to determine whether Petitioner was exaggerating her symptoms. The testing was negative, "partly because" Petitioner was complaining of "ten things other than neck pain." Petitioner did not exaggerate her neck pain. RX 1, p. 11.

Dr. Deutsch testified that, in looking at the records, it was obvious Petitioner complained of right shoulder pain early on but the neck complaints "didn't start until one or two years after the accident." Those complaints are "definitely not related to" the work accident. RX 1, p. 11. Additionally, Petitioner's cervical spine MRI and X-rays showed "chronic degenerative changes" and "no evidence of any acute injury." Dr. Kornblatt did not relate Petitioner's neck symptoms to the accident. RX 1, p. 12.

Dr. Deutsch opined that it is "not really" possible to aggravate an underlying degenerative condition. Degenerative changes can change over time, as can symptoms, but a new injury is not necessarily an aggravation. For there to be a relationship, pain should start "immediately or at least within a day of the accident." RX 1, p. 12.

Dr. Deutsch testified that, if a person such as Petitioner developed right shoulder symptoms while pushing a cart, with those symptoms persisting during the first year after this incident, it is not possible for the person to develop left-sided neck symptoms secondary to the incident thereafter. Additionally, "unless something hits you in the head or neck, you shouldn't have any sort of neck issues." RX 1, pp. 13-14.

Dr. Deutsch found Petitioner to be at maximum medical improvement relative to her cervical spine. He also opined that Petitioner requires no restrictions relative to her cervical spine. RX 1, p. 14.

Under cross-examination, Dr. Deutsch testified that Petitioner told him her cervical complaints started on the date of the work accident. He recorded this in his history. RX 1, p. 15. He puts stock in the history Petitioner provided. RX 1, p. 15.

Dr. Deutsch testified that most of the time it is pretty obvious whether a patient's pain is intraarticular, or joint-related, or radicular. There are times, however, when it can be difficult to tell. RX 1, p. 16. Some people have diffuse pain, like fibromyalgia. RX 1, p. 16. If no significant injury has occurred, it could possibly be difficult to tell whether to attribute pain to a neck or shoulder condition. RX 1, p. 17. When he examined Petitioner, he noted no positive Waddell's signs with respect to the cervical spine. RX 1, p. 17. The scalene and trapezius muscles are around the shoulder and neck. If a patient complained of pain in those muscles, it could be indicative of a cervical strain, not a cervical spine problem. RX 1, pp. 17-18. He reviewed some therapy notes but does not recall whether he reviewed notes from Athletico. He then looked at an Athletico therapy evaluation note dated February 13, 2012. [This note is not in evidence.] This gives some indication of issues with the scalene and trapezius muscles. RX 1, p. 19. The therapist noted decreased mobility in the upper trapezius and scalene muscles. The note does not really document a complaint of cervical pain. RX 1, pp. 19-20. In his experience, when people have neck pain they make it quite clear that it is neck pain rather than decreased mobility. RX 1, p. 20. It is his testimony that a person cannot aggravate a degenerative spine condition. RX 1, p. 20. All people have some spine degeneration after a certain age. They can have injuries that are sometimes termed aggravations but he thinks these injuries are separate. To suddenly have symptoms from something that has existed for a long time does not occur. RX 1, p. 21. He was not present at the time of Petitioner's accident. He relied on Petitioner's history as to the mechanism of injury. He has tried to push a cart that had wheels going sideways. He would not agree that this could cause an injury. RX 1, p. 22.

Arbitrator's Credibility Assessment

The Arbitrator has some concerns about Petitioner's credibility.

Petitioner denied undergoing any right shoulder treatment before the October 20, 2011 accident. T. 3/9/18, p. 38. This testimony is not consistent with Dr. Ho's records. In his initial note of January 16, 2012, Dr. Ho indicated that Petitioner underwent right shoulder cortisone injections in 2007. In his note of February 24, 2012, he interpreted a 2007 right shoulder MRI as showing a posterior labral tear and glenoid cyst. PX 4.

Petitioner's testimony concerning her pre-accident neck treatment was also inconsistent with the documentary evidence. She claimed to have seen one doctor for her neck in approximately 2003. She acknowledged undergoing some testing at that time but denied any subsequent neck-related care prior to the October 20, 2011 accident. Records in RX 5 reflect that Petitioner underwent chiropractic care for neck pain (and other complaints) between January 22, 2011 and July 12, 2011, with Dr. Tennant noting gradual improvement during that period.

Petitioner denied experiencing any improvement after the 2012 right shoulder arthroscopy. This denial is inconsistent with Dr. Ho's post-arthroscopy records. On September 24, 2012, Dr. Ho described Petitioner as reporting "minimal shoulder pain" and "anxious to be released to return to work." He released her to unrestricted duty and indicated she was "doing very well." PX 4.

Drs. Mok and Deutsch noted that Petitioner reported an immediate onset of neck as well as right shoulder pain immediately after the October 20, 2011 accident. When Petitioner first described the accident, on direct examination, she did not testify to this. She indicated she experienced an immediate onset of right shoulder and arm pain, followed by a sensation of "deadness" in her right arm. T. 3/9/18, pp. 14-15. The initial chiropractic records do not reference any neck complaints. PX 2. The

MercyWorks records reflect right shoulder diagnoses. PX 1. Dr. Heller noted no neck or trapezial complaints in December 2011. Dr. Ho noted no neck or trapezial complaints between January and September 2012. PX 4. Dr. Kornblatt, who examined Petitioner on February 15, 2012, noted no cervical spine abnormalities on examination. RX 2. Dr. Nepomuceno, an internist who saw Petitioner on July 21, 2012, described Petitioner's neck as supple. RX 7.

Petitioner denied working in any capacity (other than at Family Health Network) between October 2011 and the March 9, 2018 hearing but RX 9 reflects that, on February 18, 2013, she told Dr. Nepomuceno she "need[ed] a letter filled out to resume daycare." Petitioner did not testify to being a daycare provider at any point after the work accident but the Arbitrator can think of no other reason why she would need a doctor's release "to resume daycare."

Dr. Forsythe, who examined Petitioner in July 2018, noted mild symptom magnification. RX 3.

Arbitrator's Conclusions of Law

Did Petitioner establish a causal connection between the undisputed work accident of October 20, 2011 and any claimed current condition of ill-being?

Respondent stipulated to accident and paid certain temporary total disability and medical benefits. Respondent disputes causation as to Petitioner's claimed cervical spine condition and the need for the second right shoulder surgery, performed in November 2016.

As noted earlier, Petitioner initially testified to an abrupt onset of right shoulder and arm pain following the accident. T. 3/9/18, p. 14. Later in the hearing, she claimed she also experienced an abrupt onset of neck and trapezial pain. T. 3/9/18, p. 45. As noted above, all of the initial treatment records in evidence mention complaints confined to the right shoulder and arm. Drs. Tennant, Heller and Ho did not document complaints to any other body part before November 5, 2012. On that date, Dr. Ho indicated that Petitioner had "no complaints regarding her right shoulder" but pain in the trapezius that was worse on the left. The note contains no mention of neck complaints. The doctor prescribed additional therapy "to further strengthen the rotator cuff" and address the trapezius. The Arbitrator views the need for this therapy as related to the work accident, because it was for the right rotator cuff, at least in part, but does not view the subsequent cervical spine care as accident-related. When Dr. Ho prescribed a cervical spine MRI on September 9, 2013, almost two years after the work accident, it was because Petitioner was experiencing left-sided radicular upper extremity symptoms. It was on this date that Dr. Ho first described Spurling's as positive, again on the left. PX 4. The Arbitrator finds the care Dr. Ho provided prior to April 1, 2013 to be causally related to the undisputed work accident. As of April 1, 2013, the right-sided shoulder and trapezius complaints were essentially resolved. PX 4.

Petitioner testified that the therapists who saw her at Athletico, early on, addressed only her right shoulder until she "insisted" they also address her trapezial pain. It is not possible for the Arbitrator to test the veracity of this testimony against the therapy records because no therapy records are in evidence. The only therapy note the Arbitrator is aware of is a February 13, 2012 note from Athletico shown to Dr. Deutsch during his deposition. Under cross-examination, Dr. Deutsch acknowledged that this note mentions complaints of trapezius and scalene pain. He went on to state that it "does not really mention neck pain." Dr. Mok, Petitioner's cervical spine surgeon, declined to answer the question of whether the mechanism of injury described by Petitioner could have caused a

cervical spine condition. He nevertheless found causation but indicated he was relying solely on Petitioner's history in so doing. He described Petitioner as telling him she had no symptoms before the accident and had neck and shoulder complaints immediately afterward. Had he reviewed the records relating to the treatment Petitioner underwent during the year after the accident, he would have seen they do not mention the neck.

Based on the foregoing, the Arbitrator finds that Petitioner failed to establish causation as to the need for the initial cervical spine fusion and the revision surgery. The Arbitrator assigns no weight to Dr. Mok's causation opinion because the doctor based that opinion on the incorrect assumption that neck complaints were documented from the outset.

The Arbitrator further finds that Petitioner failed to establish causation as to the second right shoulder surgery. This surgery did not take place until five years after the work accident. Given that significant gap, along with the intervening employment and the fact that Petitioner's right shoulder problems date back to at least 2007, the Arbitrator is unable to conclude that the need for the 2016 surgery stemmed from the accident. When Dr. Ho saw Petitioner in 2015, having not seen her for about two years, he did not clearly link her complaint of recently worsening right shoulder pain to the work accident. PX 4. He saw her during a time when Dr. Reddy was recommending constant crutch usage for a significant left knee condition. Dr. Shi's records contain no mention of the work accident. Dr. Shi expressed awareness of the 2012 arthroscopy but there is no indication he otherwise reviewed Petitioner's past records. He never addressed causation. He documented degenerative posterior labral pathology in his operative report. PX 6. According to Dr. Ho, the pre-accident 2007 right shoulder MRI showed the same pathology. [See Dr. Ho's note of February 24, 2012, in which he compared the 2007 right shoulder MRI images with the 2012 images.] When Dr. Ho performed the arthroscopy, on May 10, 2012, he repaired the rotator cuff, not the labrum. PX 4.

Although the Arbitrator agrees with Dr. Forsythe's ultimate conclusion that the second right shoulder surgery was not related to the work accident, she does not adopt the doctor's reasoning. Dr. Forsythe expressed no awareness of the results of the 2007 right shoulder MRI. It appears this MRI showed the same labral problems that Dr. Shi operated on in 2016.

<u>Was Petitioner married and did she have one dependent child as of October 20, 2011?</u>

Petitioner testified she was married and had one son under the age of eighteen as of the October 20, 2011 accident. She later clarified her son was born on June 23, 1993, which would have made him eighteen as of the accident.

The electronic hospital records in evidence describe Petitioner as married. PX 4.

The Arbitrator finds that Petitioner was married and had no children under age eighteen as of the accident.

<u>Is Petitioner entitled to temporary total disability benefits?</u>

At the hearing, the parties essentially agreed to an initial period of disability, through September 24, 2012, although Petitioner claimed this period started on October 21, 2011 while Respondent claimed it started on October 25, 2011. Petitioner claimed a second period running from December 17, 2012

through February 24, 2017 (the date of her last visit to Dr. Shi). Arb Exh 1. Petitioner never amended this claim, despite acknowledging her subsequent employment by Family Health Network. RX 6.

Based on the foregoing causation-related findings, along with the records from MercyWorks and Dr. Ho, the Arbitrator finds that Petitioner was temporarily totally disabled during two intervals: from October 25, 2011 (the date a doctor at MercyWorks imposed a restriction of no right arm usage) through September 24, 2012 (the date Dr. Ho released Petitioner to unrestricted duty) and from December 17, 2012 (the date Dr. Ho took Petitioner off work again and recommended additional shoulder care) through March 31, 2013 (the day before Dr. Ho described Petitioner's right trapezius complaints as essentially resolved). Respondent is entitled to credit for the $8,151.15 in benefits it paid, per the parties' stipulation. Arb Exh 1.

The Arbitrator recognizes that Respondent's examiner, Dr. Kornblatt, found Petitioner capable of full duty on January 2, 2013. RX 2. The Arbitrator elects to rely on Dr. Ho rather than Dr. Kornblatt insofar as Petitioner's work capacity and need for additional post-operative care is concerned. Dr. Kornblatt examined Petitioner on two occasions while Dr. Ho treated her over an extended period. The massage therapy and other conservative care that Dr. Ho recommended between November 5, 2012 and April 1, 2013 was, at least in part, related to the right shoulder, as he explained in the letter he sent to adjuster Scott Clark on January 14, 2013. PX 4.

Is Petitioner entitled to reasonable and necessary medical expenses?

As noted earlier, Petitioner offered into evidence a print-out of very substantial medical expenses paid by OPTUM, her husband's group carrier. PX 9. This print-out relates to treatment of various health conditions rendered between October 22, 2011 and September 25, 2017. The print-out is accompanied by a stack of health insurance claim forms. The Arbitrator has attempted to correlate the payments with the available medical records.

Based on the foregoing causation-related findings, the Arbitrator finds the care rendered by Dr. Ho on January 16, February 24, April 30 and December 17, 2012 (with OPTUM paying $110.52, $182.50, $11.04 and $11.04 toward this care) to be reasonable, necessary and related to the undisputed work accident. The Arbitrator declines to find the chiropractic care rendered by Dr. Tennant in October 2011 to be related to the work accident since none of the doctor's October 2011 notes mention the accident. It appears Petitioner first informed Dr. Tennant of the accident on November 1, 2011. The Arbitrator is unable to address the various 2013 payments to Accelerated Rehabilitation since no records from this facility are in evidence.

Petitioner also claims a $580.00 balance from Athletico relating to physical therapy rendered from March 22, 2016 through May 11, 2016 and from November 30, 2016 through March 2, 2017. PX 8. Respondent objected to this claim based on the lack of correlating therapy records. Having previously found that Petitioner failed to prove causation as to the second right shoulder surgery, the Arbitrator declines to award the charges for the therapy rendered, per Dr. Shi, between March 22, 2016 and May 11, 2016. The Arbitrator also declines to award the remaining charges, based on PX 9, which reflects that the therapy rendered between November 30, 2016 and March 2, 2017 was for the left knee, a wholly unrelated body part.

What is the nature and extent of the injury?

Because the undisputed accident occurred after September 1, 2011, the Arbitrator looks to Section 8.1b of the Act for guidance in assessing permanency. That section sets forth five factors to be considered in determining nature and extent, with no single factor predominating. With respect to the first factor, any AMA Guides impairment rating, the Arbitrator assigns some weight to Dr. Forsythe's rating but notes the doctor conducted this rating after Petitioner underwent a second surgery that the doctor did not view as causally related. The Arbitrator also assigns some weight to Petitioner's occupation (registrar) and age (49) as of the accident. Petitioner's job with Respondent required some maneuvering of a wheeled cart, as she described at the hearing. Petitioner testified she sometimes has difficulty reaching with her right shoulder. The Arbitrator assigns no weight to the fourth factor, future earning capacity. After the accident, Petitioner went on to perform a somewhat higher-paying job for a different employer. With respect to the fifth and final factor, evidence of disability corroborated by the treatment records, the Arbitrator notes the 2012 right shoulder MRI, Dr. Ho's operative findings, the fact that Petitioner's right shoulder complaints resurfaced in November 2012 and Dr. Ho's post-operative records.

Having considered the foregoing, along with Petitioner's testimony that she is right-handed, the Arbitrator finds that Petitioner established permanency equivalent to 17.5% loss of use of the person as a whole, equivalent to 87.5 weeks of benefits under Section 8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC017762
Case Name	MCKENZIE, LISA v. CHICAGO TRANSIT AUTHORITY
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0541
Number of Pages of Decision	15
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Mark Fromm
Respondent Attorney	Elizabeth Meyer

DATE FILED: 10/27/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LISA MCKENZIE,

Petitioner,

vs. NO: 19 WC 017762

CHICAGO TRANSIT AUTHORITY,

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, causal connection, temporary disability, and permanent disability and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms and adopts the Arbitrator's Decision except to modify the permanent disability analysis and to correct a scrivener's error. The Commission notes that there is a scrivener's error in the second sentence in the first paragraph of the Arbitrator's Decision under section "C" in the "Conclusions of Law" that is inconsistent with the Order and the evidence. Therefore, the Commission strikes the words "the Arbitrator finds that Petitioner failed to prove that an accident arose" and substitutes the words "the Petitioner sustained her burden of proving that an accident occurred" in that sentence. The second sentence in the first paragraph under section "C" in the "Conclusions of Law" now reads, "In this case, the Petitioner sustained her burden of proving that an accident occurred that arose out of and in the course of her employment."

Permanent Disability

The Commission agrees with the Arbitrator's award of permanent partial disability, however, notes the omission of the analysis arriving at that conclusion by using the criteria

found in 820 ILCS 305/8.1b. According to §8.1b(b) of the Act, for injuries that occur after September 1, 2011, in determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

(i) The reported level of impairment pursuant to AMA guidelines;
(ii) The occupation of the injured employee;
(iii) The age of the employee at the time of the injury;
(iv) The employee's future earning capacity; and
(v) Evidence of disability corroborated by the treating medical records.

In considering the degree to which Petitioner is permanently partially disabled as a result of the work-related accident, the Commission weighs the five factors in Section 8.1b(b) of the Act as follows:

(i) No AMA impairment rating was submitted by either party, so this factor is given no weight.

(ii) Petitioner was employed as a rail operator/Blue Line train driver and she returned to work in her prior capacity. Thus, this factor is assigned greater weight.

(iii) Petitioner was 29 years old at the time of the accident, relatively young in her work life with many years of work life remaining until retirement. This factor is assigned some weight.

(iv) There is no evidence of reduced future earning capacity in the record thus this factor is assigned no weight.

(v) Regarding evidence of disability corroborated by the treating medical records, as a result of the work-related accident of June 10, 2019, Petitioner was diagnosed with post-traumatic stress disorder following an incident in which she administered CPR and mouth to mouth resuscitation to a co-worker until police arrived at the scene. The co-worker was not revived after extensive treatment by emergency medical technicians throughout which Petitioner was present. Immediately after the accident and beyond Petitioner experienced anxiety, depression, nervousness, and was mentally distraught, consistently crying and was diagnosed with Post-Traumatic Stress Disorder by the physician at Concentra. (PX1) Petitioner also had symptoms of sleep disturbance, fatigue, concentration difficulty, flashbacks, social isolation/avoidance and was diagnosed by Dr. Daniel Kelley with Acute Stress Disorder and Adjustment Disorder causally related to Petitioner's accident on June 10, 2019. (PX2) Petitioner further testified that continued to see Dr. Kelley for cognitive behavioral therapy until her release on August 5, 2019. She further testified that she still does not sleep. (T. 36) Dr. Kelley's last entry noted that Petitioner evidenced significant progress in her emotional/psychological functioning. She reported a decrease in depressive and anxiety symptoms. She further verbalized a significant decrease in negative cognitive ruminations. (PX2) This factor is assigned greater weight.

Petitioner testified at Arbitration that the last time she sought treatment for psychological issues was August 5, or 6th of 2019 and she had been back operating the train full-time since mid-August 2019 after retraining. (T. 41)

Based on the Section 8.1b(b) factors and the record taken as a whole, the Commission finds Petitioner sustained permanent partial disability to the extent of 3% loss of use of the person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on January 8, 2021, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $896.70 per week for a period of 7-5/7 weeks, commencing June 11, 2019 through August 4, 2019, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $807.03 per week for a period of 15 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 3% loss of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay for medical services provided by Concentra and Dr. Daniel Kelley as provided under §8(a) and §8.2 of the Act.

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

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

Based upon the named Respondent herein, no bond is set by the Commission. *820 ILCS 305/19(f)(2)*. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court. Or *820 ILCS 305/19(f)(1).*

October 27, 2021

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

KAD/bsd
O10/19/21
42

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0541

McKENZIE, LISA
Employee/Petitioner

Case# **19WC017762**

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

On 1/8/2021, 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:

0314 KUMLIN & FROMM
MARK L FROMM
205 W RANDOLPH ST SUITE 1645
CHICAGO, IL 60606

0515 CHICAGO TRANSIT AUTHORITY
ELIZABETH L MEYER
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

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

LISA McKENZIE
Employee/Petitioner

Case # **19** WC **17762**

v.

Consolidated cases: _____

CHICAGO TRANSIT AUTHORITY
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 **McLaughlin**, Arbitrator of the Commission, in the city of **Chicago**, on **10/1/20**. 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 [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **June 10, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**70,411.08**; the average weekly wage was $**1,345.06**.

On the date of accident, Petitioner was **29** 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 $**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 permanent partial disability benefits of $807.03 per week for 15 weeks because the injury sustained caused the 3% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $896.70 per week for 7 5/7 weeks, commencing June 11, 2019 through August 4, 2019, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the Petitioner.

Respondent shall pay for medical services provided by Concentra and Dr. Daniel Kelley as provided in Section 8(a) of the Act and pursuant to the Medical Fee Schedule.

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.

12/05/2020

Signature of Arbitrator Date

JAN - 8 2021

FINDINGS OF FACT

At the time of the hearing Petitioner Lisa McKenzie was 31 years old. She worked for Respondent Chicago Transit Authority as a full-time rail operator for the last 5 years. Her main employment requirement's were operating the Blue Line train from Forest Park to O'Hare Airport and back to Forest Park. (T. 9-11).

Petitioner denied undergoing any psychological treatment prior to her work-related accident of June 10, 2019. (T. 22-23). She never experienced sleeplessness, nightmares, flashbacks or anxiety before June 10, 2019.

Petitioner testified that on June 10, 2019 she had just completed a trip and a half, operating the Blue Line train from Forest Park to O'Hare to Forest Park and back to O'Hare. After returning to O'Hare, and while she was on the clock, she was in the training/break room eating her lunch. At which time a transmission came over her radio stating that a co-worker was ill on a train at the O'Hare terminal. At that time Petitioner testified that another co-worker went down to the train to see what occurred. The co-worker returnrd to the break room and advised Petitioner that a rail operator by the name of Danny was ill in the cab of the train. Petitioner testified that she could see from outside the breakroom that a person was holding a towel to the head and face of this ill rail operator. After observing this, the Petitioner ran down the stairs from the breakroom and onto the train to see if she could render assistance to her fellow co-worker. Petitioner testified that upon entering the cab of the train, she observed that the train operator, Danny, was unconscious and not breathing. (T. 14). Petitioner and the other person who was attending to Danny, then placed him on the floor of the train where Petitioner began to perform CPR in the form of chest compressions and mouth to mouth resuscitation. (T. 14). Petitioner continued performing CPR on her fellow employee until the police arrived on the scene however Danny did not regain consciousness. (T. 17).

Petitioner was stuck in the cab of the train while the police and eventually the paramedics worked on him. During this time, Petitioner became nervous, anxious, crying and distraught, knowing that Danny was

unconscious and not breathing. Petitioner even testified that she could see the flatline on the monitor of the machine the police and paramedics were using. (T. 19).

Petitioner testified that after Danny was put on a stretcher and removed from the train, she was finally able to get off and was crying and shaking non-stop. She testified that her general manager was at the scene and offered comfort to her. He took her out of service immediately and told her to go back to the breakroom. Shortly after returning to the breakroom Petitioner learned that her co-worker had died. (T. 20-21).

Petitioner testified that she returned to the Forest Park Terminal and was then sent to Concentra by the Respondent for medical treatment. (T. 21). Petitioner gave a history to the doctor at Concentra that she had to perform CPR on her co-worker this morning and that he eventually died. (PX. #1). Petitioner testified as a result of this, she was mentally distraught, feeling sad, anxious, depressed and having crying spells all of which occur constantly. (PX. #1). After being examined by the doctor, Petitioner was advised to seek a psychiatric referral and to return to Concentra for a follow-up on June 11, 2019. (PX. #1).

Petitioner testified that she followed-up at Concentra on June 11, 2019. On this follow-up Petitioner advised the doctor that she was crying all day and could not sleep at night. Dr. Taiwo at Concentra observed her depressed mood and took her off of work until cleared by psychology and diagnosed her with Post-Traumatic Stress Disorder. (PX. #1).

Petitioner testified she first saw Dr. Daniel Kelley, a Psychologist, on June 12, 2019. She related to Dr. Kelley that she presented for psychological services secondary to emotional/psychological distress subsequent to a work incident on June 10, 2019, in which, while working as a C.T.A. train operator, she performed CPR, including mouth to mouth resuscitation, on a co-worker, who subsequently died. (PX. #2). During Dr. Kelley's clinical interview, he observed Petitioner being anxious and her thought process was mild to moderately disorganized. Petitioner was tearful and tremulous as she recounted the June 10, 2019 work incident. She stated that since the incident she has been having sleep disturbances, concentration difficulty, agitation, crying, anxiety, heart pounding, flashbacks and social isolation and avoidance. (PX. #2)

Dr. Kelley administered various tests to Petitioner at both the initial visit and subsequent visit on June 14, 2019. (T. 26). These tests revealed that she was suffering intrusive experiences, anxiety, hyperarousal,

depression, crying, agitation, loss of energy, sleep disturbance and concentration difficulty. (PX. #2). Based on these tests, Dr. Kelley had a preliminary diagnosis of Acute Stress Disorder and recommended cognitive-behavioral therapy to address her symptomatology and facilitate her coping skills and return to work. Dr. Kelley also recommended consideration for a medical consultation and she was taken off work due to the safety-sensitive nature of her employment. (PX. #2).

Petitioner further testified that she continued to treat with Dr. Kelley two times per week for cognitive-behavioral therapy until her release from care on August 5, 2019. (T. 27) (PX. #2). Each session lasted 30-45 minutes. During the sessions, Petitioner discussed her symptoms with the doctor. While she was staying in her house, avoiding crowds, the doctor taught her breathing exercises and coping strategies. Talking with Dr. Kelley has helped her tremendously. The doctor kept her off work until her release on August 5, 2019.

Petitioner testified that her life has changed since this incident. She noticed she wasn't herself, nor enjoying things. She stated she started pushing herself away from people and did not want to be around anyone other than her son. (T. 29-30). Also, due to her anxiety, Petitioner saw her primary care physician for this condition and was prescribed Sertraline. (T. 33) (PX. #2).

Petitioner further testified that when she returned to work after completing her psychotherapy, she was nervous as to what it was going to feel like. (T. 34). Petitioner also experienced flashbacks and anxiety attacks regarding the events that took place on the day of the accident, June 10, 2019. (T. 35). Petitioner testified that when she does experience these symptoms she begins to pray, read, and do the breathing exercises that Dr. Kelley told her to do. (T. 36). Petitioner also testified that she has sleeping difficulty due to the flashbacks regarding the accident. (T. 36).

Petitioner testified that she has not received any temporary total disability nor have any of her medical bills been paid by the Respondent. (T. 38). Petitioner denied undergoing any psychological treatment prior to her work-related accident of June 10, 2019. (T. 22-23). She never experienced sleeplessness, nightmares, flashbacks or anxiety before June 10, 2019.

CONCLUSIONS OF LAW

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

The burden is on the Petitioner to prove an accident "arose out of" and "in the course of" her employment with Respondent. In this case, the Arbitrator finds the Petitioner failed to prove that an accident arose that arose out of and in the course of her employment.

Generally, an injury "arises out of " employment if, at the time of the occurrence, the employee was performing acts she was instructed by the employer to perform, those she might be reasonably expected to perform, or acts which she had a common law or statutory duty to perform. *Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill.2d 52 (1989). The phrase "in the course of" refers to the time, place, and circumstances under which the accident occurred. *Orsini v. Industrial Comm'n,* 117 Ill.2d. 38 (1987). Finally, an injury is received "in the course of" one's employment when it occurs within the period of employment, at a place the employee may reasonably be in the performance of her duties, and while she is fulfilling those duties or engaged in something incidental thereto. *Scheffler Greenhouses, Inc. v. Industrial Comm'n,* 66 Ill.2d 361 (1977).

In the instant case, Petitioner testified she was a rail operator for the Respondent, Chicago Transit Authority. *Transcript at 9.* On the day in question, 6/10/2019, she had completed one and a half round trips from Forest Park to O'Hare on the Blue Line and was at the O'Hare Blue Line station on her lunch break in what is considered the employee break room/training room. *Id at 12.* She also testified she had a radio as part of her job, that over the radio came a call that another employee "needed medical," and that one of her co-workers went downstairs to see what was going on. *Id at 13.* The coworker came back upstairs and

said they needed to call 911. *Id.* At trial, Petitioner went on to testify that after going out to the balcony overlooking the tracks and seeing a coworker by the name of Danny Cruz in the motor cab of a train and being told he was not conscious, she ran downstairs. When she got to the train, she had other coworkers lay Mr. Cruz on the floor of the cab and began doing chest compressions and mouth-to-mouth resuscitation until officers came. *Id at 13-14.* Petitioner testified further about what happened after the officers and paramedics arrived, including that she looked through Mr. Cruz's bag for medications, that Mr. Cruz was taken off the train on a stretcher once paramedics showed up and she could get out of the cab and off the train, and that she was ultimately taken out of service on that day. *Id at 16, 19, 21.*

In Illinois, psychological injuries are compensable when a claimant suffers a "sudden, severe, emotional shock traceable to a definite time, place and cause, which causes psychological injury or harm though no physical trauma was sustained. Pathfinder Co. vs. Industrial Commission, 62 Ill. 2d 556 (1976).

In the case at bar, Petitioner witnessed personally and in close proximity, a fellow co-worker become ill. Petitioner rendered CPR to this co-worker, who eventually died. Petitioner testified that she immediately became nervous, distraught, crying and scared. The shock she experienced was sudden, severe and traceable to a definite time and place. Based on the Petitioner's credible testimony, the medical records provided, and the applicable case law, the Arbitrator finds Petitioner's accident was foreseeable, related to and arose out of her employment.

F. Is Petitioner's current condition of ill-being casually related to the injury?

The Arbitrator finds that Petitioner established a causal connection between the accident and her claimed psychological condition of ill-being. In so finding, the Arbitrator relies on Petitioner's credible testimony and medical records from Dr. Kelley and Concentra. There is no evidence that Petitioner had any psychological problems before the incident. After the incident, she experienced anxiety, depression, nervousness, mentally distraught, consistent crying and was diagnosed with Post-Traumatic Stress Disorder by the doctor at

Concentra. Petitioner also had symptoms of sleep disturbance, fatigue, concentration difficulty, flashbacks, social isolation/avoidance and was diagnosed by Dr. Kelley with Acute Stress Disorder and Adjustment Disorder causally related to Petitioner's accident on June 10, 2019.

Further, no evidence has been presented by the Respondent to rebut the psychological opinion of Dr. Kelley and the doctor from Concentra. The Arbitrator finds their opinions to be credible.

Based upon all of the evidence, the Arbitrator finds the Petitioner's present condition of ill-being is causally related to her 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?

The Petitioner testified that she began having treatment for psychological trauma right after her incident at work on June 10, 2019. She was sent to Concentra on that date and followed-up there on June 11, 2019. On the June 11, 2019 visit she was referred by Dr. Taiwo of Concentra to see a psychologist. (PX. #1). Petitioner further testified that she sought treatment with Dr. Daniel Kelley on June 12, 2019 and continued to see him for cognitive behavioral therapy until her release on August 5, 2019. (PX. #2). This treatment was undisputed by the Respondent.

The Arbitrator notes that Petitioner submitted evidence from Concentra (PX. #1) and Dr. Daniel Kelley (PX. #2), which consisted of medical records and medical bills. Petitioner testified that Respondent has not paid the aforesaid medical bills from these providers.

Based upon Petitioner's testimony, records from Concentra and Dr. Daniel Kelley, the Arbitrator finds the Respondent liable for the bills from Concentra for $257.12 and Dr. Daniel Kelley for $3,865.00.

K. What amount of compensation is due for temporary total disability?

Petitioner claims temporary total disability benefits from June 11, 2019 through August 4, 2019. Both medical providers from Concentra and Dr. Daniel Kelley prescribed no work for the Petitioner from those dates until her release. (PX. #1 and 2). Dr. Kelley has seen Petitioner on a regular basis since her first appointment

on June 12, 2019. Dr. Kelley viewed Petitioner's condition as significant to warrant her to be off work as well as the safety-sensitive nature of her employment. Respondent offered no medical evidence suggesting Petitioner is capable of working.

Based upon Petitioner's injuries and persistent symptoms, coupled with Dr. Kelley's prescription to remain off work, the Arbitrator finds that Petitioner is entitled to temporary, total disability benefits for 7 5/7 weeks. It is undisputed that her average weekly wage is $1,345.06, two-thirds of which is $896.70. The Arbitrator finds that Petitioner is entitled to two-thirds of her average weekly wage for 7 5/7 weeks in the amount of $6,917.40.

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

The Arbitrator finds that as a result of Petitioner's June 10, 2019 work accident, she pursued a course of treatment to address her psychological injury. This consisted of Cognitive-Behavioral Therapy and medications.

Petitioner testified that prior to June 10, 2019, she never experienced any psychological problems which required her to seek treatment. She further testified that she was able to perform her job duties as a rail operator without any difficulties at all before June 10, 2019. Petitioner further testified that as a result of her work accident on June 10, 2019, she suffered anxiety, social avoidance, depression, crying spells, flashbacks and mentally distraught, which affect her normal daily activities. She also testified that once returning to her job as a rail operator after her treatment, she experienced sadness, crying spells, anxiety and trouble sleeping, when she relives the event which took place on June 10, 2019.

Based on the testimony of the Petitioner and the medical records reviewed with respect to the Petitioner's psychological injury as a result of the June 10, 2019 work related accident, the Respondent shall pay Petitioner, a sum of $807.03 per week for a period of 15 weeks as provided in Section 8(d)2 of the Act, because the Petitioner sustained 3% loss of a person as a whole.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC033984
Case Name	COLLINS, MINDY v. MAXIM HEALTHCARE SERVICES, INC
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0542
Number of Pages of Decision	19
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	R. Mark Cosimini
Respondent Attorney	Robert Nelson

DATE FILED: 10/27/2021

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mindy Collins,

Petitioner,

vs. No. 17 WC 33984

Maxim Healthcare Services, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission notes the Arbitrator's decision states the case was tried "pursuant to Sections 19(b) and 8(a)" of the Act, and "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." However, the case was tried on all issues, and the Arbitrator awarded permanent partial disability benefits, among other things. Accordingly, the Commission strikes the 19(b) language.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 16, 2020, is hereby corrected, affirmed and adopted.

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

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

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

October 27, 2021

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

SJM/sk
o-10/13/2021
44

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0542

COLLINS, MINDY
Employee/Petitioner

Case# **17WC033984**

MAXIM HEALTHCARE SERVICES INC
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:

0384 NELSON & NELSON ATTY AT LAW
ROBERT C NELSON
420 N HIGH ST PO BOX Y
BELLEVILLE, IL 62222

0000 RUSIN & MACIOROWSKI LTD
MARK COSIMINI
2506 GALEN DR SUITE 108
CHAMPAIGN, IL 61821

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

Mindy Collins
Employee/Petitioner
v.
Maxim Healthcare Services, Inc.
Employer/Respondent

Case # **17** WC **033984**

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 Jeanne AuBuchon**, Arbitrator of the Commission, in the city of **Collinsville**, on **October 27, 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. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [x] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other ______

FINDINGS

On **08/23/17**, 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 **$21,197.63**; the average weekly wage was **$770.66**.

On the date of accident, Petitioner was **41** 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 **$10,689.00** for TTD, $**0.00** for TPD, $0.00 for maintenance, and $**0.00** for other benefits, for a total credit of **$10,689.00**.

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

ORDER

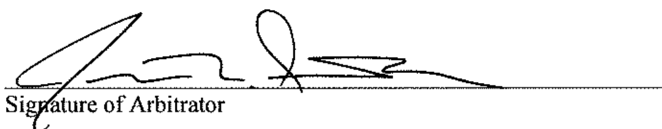
Respondent shall pay reasonable and necessary medical services as listed in Petitioner's Exhibit 12 pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act. The Respondent shall hold the Petitioner harmless and shall receive credit for medical expenses paid.

Respondent shall pay Petitioner temporary total disability benefits of $513.26 per week for 45 4/7ths weeks, commencing 08/23/17 through 01/15/18 and 05/15/18 through 11/05/18, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $462.40/week for 99.45 weeks, because the injuries sustained caused the 15% loss of the left arm (37.95 weeks) and 30% loss of the left hand (61.5 weeks), as provided in Section 8(e) of the Act.

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

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



Signature of Arbitrator

12/14/2020
Date

DEC 1 6 2020

PROCEDURAL HISTORY

This matter proceeded to trial on October 27, 2020, pursuant to Sections 19(b) and 8(a) of the Illinois Workers' Compensation Act (hereinafter "the Act"). The issues in dispute are: 1) the causal connection between the accident and the Petitioner's left arm condition; 2) the Petitioner's average weekly wage; 3) liability for medical bills; 4) entitlement to TTD benefits from August 24, 2017 through January 24, 2018, and from May 15, 2018 through November 5, 2018; and 5) the nature and extent of the Petitioner's injury.

FINDINGS OF FACT

At the time of the accident, the Petitioner, who was 41 years old, was employed by the Respondent, Maxim Healthcare Services, as a licensed practical nurse in home healthcare. (T. 20) On August 23, 2017, she was caring for a 15- or 16-year-old male client who was in need of "total care," meaning that he was incontinent and could not reposition his body, dress himself or verbally communicate. (T. 32-33) The client was over six feet tall, weighed 150 pounds and was difficult to deal with. (T. 33)

On the morning of August 23, 2017, the Petitioner was putting full-length leg braces on the patient, who was resisting her, when she heard her arm pop and experienced pain shooting between her shoulder and elbow, tingling between her elbow and hand and numbness in her fingers. (T. 35-37) She denied any prior difficulty with her left arm before the accident. (T. 18-19)

Later that day, the Petitioner saw Nurse Practitioner Mariah Charles at Pinckneyville Community Hospital Family Medical Center, where she complained of pain from her left shoulder to her elbow. (PX5) X-rays were taken that showed no abnormalities. (Id.) The Petitioner followed up with N.P. Charles on August 28, 2017, and complained of discomfort and numbness

in her left hand. (Id.) She was referred for an MRI that was taken on September 25, 2O17, and showed only mild chondromalacia of the shoulder. (Id.) The Petitioner followed up with N.P. Charles again on September 27, 2017, and complained of pain and weakness in her left arm. (Id.) She was referred for physical therapy, which she did not do because she did not receive authorization. (Id.) N.P. Charles wrote the Petitioner off work from August 24, 2017, until October 19, 2017, and gave a work restriction thereafter that the Petitioner was not to use her left arm in any way until further evaluation. (Id.)

Another MRI was conducted on October 13, 2017, with negative results. (Id.) After another follow up on October 18, 2017, the Petitioner was again referred for physical therapy. (Id.) The Respondent denied the requests for physical therapy on October 26, 2017. (RX4) On November 8, 2017, the Petitioner returned to Family Medical Center complaining of worsening symptoms – neck pain, stiffness and spasms. (PX5)) At this visit it was revealed that the referrals for physical therapy had been denied. (Id.) An MRI of the Petitioner's neck showed no abnormalities. (Id.) The Petitioner was prescribed Baclofen and Tramadol, which she reported as working wonders (Id., T. 43)

On November 29, 2017, the Petitioner saw Dr. Jay Keener, an orthopedic surgeon at Washington University, who diagnosed the Petitioner with possible cubital tunnel syndrome caused by the accident on August 23, 2017. (PX7) He recommended that the Petitioner use a splint at night, that she undergo a nerve conduction study and that she participate in physical therapy. (Id.) He also ordered the Petitioner to be off work. (Id.) The results of the nerve conduction study were normal, except that there was a suggestion of ulnar nerve subluxation. (Id.) Dr. Keener also found a positive Tinel's sign. (Id.)

The Petitioner underwent a Section 12 examination on January 15, 2018, by Dr. Mitchell Rotman at The Orthopedic Center of St. Louis. (RX5, Deposition Exhibit 2) Dr. Rotman reviewed the Petitioner's medical records, imaging studies and nerve conduction and ultrasound tests. (Id.) He examined the Petitioner and found no evidence of a left upper extremity injury that could be related to the incident on August 23, 2017. (Id.) He opined that the Petitioner may have had cubital tunnel symptoms but the incident she described was not a mechanism that would have aggravated or caused a cubital tunnel condition. (Id.) Dr. Rotman found the Petitioner to be at maximum medical improvement with regards to a left arm strain. (Id.) He determined that no further treatment would be required, that there was no evidence of impairment and that the Petitioner could return to full duty with no restrictions. (Id.)

The Petitioner attempted to return to work, but the scheduler told her she could not come back until the Respondent "had heard from workmen's comp." (T. 51) That delayed her return to work by about a week. (T. 51-52, 58) She continued to have problems with lifting and twisting with the left arm. (T. 59)

Dr. Keener referred the Petitioner to Dr. Susan Mackinnon, a surgeon at Washington University who specializes in nerve surgery. (PX13 at 10) Dr. MacKinnon saw the Petitioner on May 3, 2018, and diagnosed the her as having an acute stretch injury along the ulnar nerve from the brachial plexus to the hand. (PX8, PX13 at 12-14) Dr. MacKinnon found a positive Tinel's sign at the elbow, indicating nerve irritation. (PX13 at 12) Dr. MacKinnon believed that she could relieve the Petitioner's pain if she took some tension and pressure off the ulnar nerve. (Id. at 14) At her deposition on November 16, 2018, Dr. Mackinnon explained in detail the mechanism behind an acute ulnar nerve injury that would be consistent with the incident the Petitioner

described. (Id. at 11, 26, 45-50) She stated that a negative nerve conduction study would not necessarily indicate the kind of injury the Petitioner suffered. (Id. at 14-15)

Dr. MacKinnon operated on the Petitioner on May 15, 2018, at which time she transposed the left ulnar nerve and released a tendinous band that was compressing the nerve. (PX8) During the surgery, Dr. MacKinnon found that the Petitioner had an unusually narrowed ulnar nerve and that when the nerve was stretched at the time of the incident, the nerve became stuck on the tendinous band. (PX13 at 17) After the surgery, Dr. Mackinnon prescribed physical therapy. (PX8) Dr. MacKinnon excused the Petitioner from work for two weeks, beginning May 15, 2018. (PX8)

During the course of her treatment with Dr. Mackinnon, the Petitioner moved to Florida, where she underwent physical therapy at Andrews Institute Rehabilitation. (RX7). However, the Petitioner suffered complications from the surgery. The pain in her elbow resolved, but she lost function in half of her hand, experienced numbness and tingling and developed a claw hand. (T 52-53) After an electrical study, Dr. Mackinnon found that the Petitioner's nerve had worsened and diagnosed an abnormality. (PX13 at 18) Dr. Mackinnon conducted a second surgery on August 24, 2018, in which she performed a nerve release, decompression, nerve grafts and nerve transfers. (PX8) Following the surgery, she prescribed additional physical therapy. (Id.)

The Petitioner received follow-up treatment and physical/occupational therapy with Dr. Raymond Noellert at Sacred Heart Hand Center in Pensacola, Florida. (T. 58, PX9) Dr. Mackinnon released the Petitioner for work on October 3, 2018, but gave restrictions of limited typing with her left arm and lifting no more than five pounds with her left arm. (PX8) Dr. Mackinnon finally released the Petitioner for full duty work on November 5, 2018. (Id.)

The Petitioner underwent another Section 12 examination with Dr. Rotman on August 19, 2019. (RX5, Deposition Exhibit 3) Although he acknowledged "a big improvement" that the Petitioner experienced from the surgeries, his opinion remained unchanged from his examination on January 15, 2018. (Id.) He opined that the Petitioner's elbow issues stemmed from abnormalities intrinsic to her anatomy – a shallow cubital tunnel and tight fascial bands. (Id.) Dr. Rotman states that the Petitioner would have been better off if she had followed his advice rather than have surgery, but he also states that he had no issues with the surgeries and acknowledged Dr. MacKinnon's opinion that the Petitioner required the ulnar nerve procedure. (Id.)

Dr. Rotman testified by way of deposition on December 17, 2019. (RX5) He testified consistently with the opinions in his reports. However, cross-examination revealed some shortcomings in Dr. Rotman's evaluation. These include not asking the Petitioner when she first experienced numbness or tingling (Id. at 48, 52-53) and finding a negative Tinel's sign when doctors before and after his first evaluation found a positive Tinel's sign (Id. at 49, 51)

The Petitioner testified at arbitration that she still had problems with her left hand and arm such as lifting, gripping, pulling and one side of her hand being colder than the other. (T. 60-62) She also had difficulty with fine motor skills, typing and household chores that require the use of two hands. (T. 60-63, 74) She was unable to intubate a baby (T. 62-63) However, she had improved and was under no restrictions. (T. 72)

The Petitioner testified that she first began working for the Respondent in 2007 and was rehired in 2015. (T. 20) She said that when she was rehired, representatives of the Respondent informed her that her position was full time – at least 32 hours per week – and that she usually worked 36-48 hours per week. (T. 23-24) The number of days she worked varied depending on the needs of the client. (Id.) Some clients required four days a week, some five and some three.

(T. 24). In addition, the number of hours worked in a day varied. (PX2) From August 2016 until the latter part of October 2016, the Petitioner was working a four-day work week. (PX17). From October 2016 through January 2017, the she was working with a client who required care three days per week. (Id.) The Petitioner testified that the Respondent did not give her as many hours as she wanted. (T. 26) In January 2017, the Petitioner was receiving fewer hours and went to work for another home healthcare provider (Advantage), but remained employed by the Respondent if they needed her. (T. 31, PX17) From January 2017 until the middle of June 2017, the Petitioner was working an average of five days per week for Advantage. No documentation was offered regarding the Petitioner's wages while working for Advantage. In June 2017, she went back to work full time for the Respondent at an average of 40 hours per week, four days per week. (PX17) Throughout the year preceding the accident, the Petitioner was paid minimum wage for in-service training. (PX2)

The Respondent's area field manager, Kristen Simmonds, testified at arbitration that Maxim classifies employees as internal and external workers. (T. 94) Internal workers are guaranteed 40 hours per week, while external workers – like the Petitioner – are not guaranteed 40 hours per week and are not considered full-time employees. (T. 94-96) However, she stated that an external worker might work full time. (T. 105-106) Ms. Simmonds testified that overtime is not mandatory and must be approved by a recruiter or office manager. (T. 98, 100)

CONCLUSIONS OF LAW

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

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

An accident need not be the sole or primary cause as long as employment is a cause of a claimant's condition. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 205 (2003). An employer takes its employees as it finds them. *St. Elizabeth's Hospital v. Illinois Workers' Compensation Comm'n,* 371 Ill. App. 3d 882, 888 (2007). A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm'n,* 92 Ill. 2d 30, 36 (1982).

The Petitioner had pre-existing conditions – a shallow cubital tunnel and tight fascial bands – that apparently were dormant until the accident occurred, as the Petitioner was having no issues with her left arm prior to the incident on August 23, 2017. From Dr. Mackinnon's testimony, the full nature of the Petitioner's injury did not become apparent until she performed the surgery to transpose the Petitioner's ulnar nerve. At that time, Dr. Mackinnon discovered the Petitioner's ulnar nerve became stuck on a tendinous band that had to be released to ease the Petitioner's symptoms.

Dr. Rotman differed with Dr. Mackinnon in several respects – most importantly whether the mechanism of injury caused the Petitioner's arm issues and whether the surgery was necessary. Throughout his deposition, Dr. Rotman simplified the alleged mechanism of injury, stating that the Petitioner was lifting her patient's leg and felt a pop. Although Dr. Rotman testified that the Petitioner did not tell him if there was a struggle with the patient in getting the leg brace on, the Petitioner has consistently stated that her patient was fighting and resisting her. Dr. Mackinnon took this information into consideration when offering her opinion that there was a stretch injury caused by a sudden pull on the Petitioner's arm. The Arbitrator finds it to be significant that two doctors found a positive Tinel's sign, but Dr. Rotman did not.

Although Dr. Rotman persisted in his view that the Petitioner's condition was not related to the incident in 2017, he acknowledged that the surgeries helped the Petitioner and that he had no issues with the surgeries. In his second report, he appeared to defer to Dr. MacKinnon's opinion that the Petitioner required the ulnar nerve procedure. Dr. Rotman also emphasized the negative nerve condition study as part of his rational for opining that there was no acute ulnar nerve injury. However, Dr. Mackinnon explained that the negative results were not indicative of absence of an injury. In considering the doctors' reports and deposition testimony overall, the Arbitrator finds Dr. Mackinnon's opinions to be more compelling.

The Petitioner's testimony was credible, and there was no evidence of malingering. She continued to have problems with arm pain, weakness and numbness after the accident. The Petitioner had no prior issues with her left arm, and there was no evidence of an intervening cause for her pain and numbness. She never wavered in her complaints. Although it took time, she finally found a doctor who could help her. There are occasions where the true extent of an injury cannot be decerned by testing but only after surgery is undertaken. It appears that this is one of those occasions.

Therefore, the Arbitrator finds that the Petitioner's condition was causally related to the accident of August 23, 2017.

Issue G: What were the Petitioner's earnings?

Section 10 of the Act provides methods for calculating average weekly wage depending on four different circumstances. Because the Petitioner lost five or more calendar days during the 52 weeks preceding the injury, the second method is appropriate, whereby the earnings during that 52 weeks is divided by the number of weeks and parts thereof remaining after the time so lost has

been deducted. The issue in this case is determining the number of days that comprised the Petitioner's work week and calculating the number of "lost" days.

In this case, the calculation is complicated by the fact that the number of days in the Petitioner's "normal" work week and her hourly wage varied depending on the client she was serving and the level of care for that client. In addition, the number of hours she worked per day varied. In order to calculate the average weekly wage, the Arbitrator used Petitioner's Exhibits 2 and 17. The Arbitrator first broke down the one-year prior to the accident into separate periods based on the differing hourly rates and number of days assigned to work each week. Second, the Arbitrator counted the total number of days actually worked in that entire time period. Next, the Arbitrator took the total amount the Petitioner earned during each period – excluding overtime – and divided that sum by the number of days worked to determine the average daily wage earned. Then, the Arbitrator multiplied the average daily wage earned by the number of days worked and the lost days. The Arbitrator divided that figure by the number of weeks in that period to come up with the average weekly wage for that period. Lastly, the Arbitrator averaged the average weekly wage amounts for the entire year and found that the average weekly wage for the year preceding the accident was $770.66. These calculations are summarized in the chart below.

Pay Dates Number of Weeks	Hourly	Normal Days/Week Total Days Worked*	Ave. Daily Wage Earned	"Lost Days"	AWW
8/27/16 – 10/15/16 8 weeks	$24.00	4 17	$237.18	15	$948.72
10/22/16 – 1/21/17 14 weeks	$21.00	3 31	$217.62	11	$652.86
1/28/17 – 2/25/17 5 weeks	$21.00	3 0	$217.62**	15	$652.86
3/4/17 – 6/10/17 15 wks (w/ Advantage)	$21.00***	3 0	$217.62***	45	$652.86
6/17/17 – 6/24/17 2	$22.00	4 8	$206.25	0	$825.00
7/1/17-8/26/17 9	$23.50	4 34	$216.17	2	$864.68

			AVERAGE AWW		$770.66

*Does not include overtime
**Because no wages were earned, used average from prior period
***Because no proof of concurrent earnings with Advantage, used data from prior period with Respondent

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

The 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).

As stated above, it took time for the Petitioner to find a doctor who could diagnose and treat her condition. The initial surgery was effective in treating the Petitioner's pain. Unfortunately, there were complications requiring the second surgery to attempt to restore the Plaintiff to pre-accident health.

Furthermore, it is incongruous to say at this juncture that conservative treatment would have been more appropriate than surgery when the Respondent failed to approve the physical therapy recommended by Dr. Keener at the outset. The inaction by the Respondent essentially drove the Petitioner to the point of seeking Dr. Mackinnon's expertise and the resulting surgery to resolve her elbow issues.

For those reasons, The Arbitrator finds that the treatment received was reasonable and necessary, and the Respondent has not paid the bills for this treatment. Therefore, the Respondent is ordered to pay the medical expenses contained in Petitioner's Exhibit 12 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: What temporary benefits are in dispute? (TTD)

According to the Request for Hearing (AX1), the parties dispute temporary total disability benefits for the period of August 24, 2017 through January 24, 2018, and from May 15, 2018 through November 4, 2018.

An employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 118 (1990).

Pinkneyville Family Medical Center wrote the Petitioner off work from August 24, 2017, until October 19, 2017, and gave a work restriction thereafter that the Petitioner was not to use her left arm in any way until further evaluation. The Respondent could not accommodate this restriction. Dr. Keener ordered the Petitioner off work on November 29, 2017. On January 15, 2018, Dr. Rotman determined the Petitioner could return to work without restrictions. It took approximately another week for the Respondent to clear the Petitioner to return to work. Dr. Mackinnon excused the Petitioner from work for two weeks beginning May 15, 2018. Due to the complications from the first surgery, the Petitioner was unable to work until her release by Dr. Mackinnon on November 5, 2018.

Therefore, the Petitioner was entitled to TTD benefits from August 24, 2017 through January 24, 2018, and from May 15, 2018 through November 4, 2018. The Respondent is entitled to a credit of $10,689.00 in TTD benefits paid.

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.** Dr. Rotman gave the Petitioner an AMA rating of 0%. Based on the findings above in which little weight was given to Dr. Rotman's opinions, the Arbitrator gives this factor little weight as well.

(ii) **Occupation.** The Petitioner continues to work as in the healthcare field and faces the same physical challenges as she did prior to the accident. Therefore, the Arbitrator places significant weight on this factor.

(iii) **Age.** The Petitioner was 41 years old at the time of the injury. She has many work years left during which time she 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's testimony and corroboration by the medical records showed that she continues to have problems with her left arm and hand, especially as a result of the surgical complications. The Arbitrator puts significant weight on this factor.

Therefore, the Arbitrator finds the Petitioner's temporary total disability to be 15 percent of the left arm and 30 percent of the left hand.

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	15WC002209
Case Name	BAILEY, SYMMORRON v. UNIVERSITY OF ILLINOIS AT CHICAGO
Consolidated Cases	16WC024503
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0543
Number of Pages of Decision	13
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Richard Victor
Respondent Attorney	Brad Antonacci

DATE FILED: 10/28/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SYMMORRON BAILEY,

Petitioner,

vs. NO: 15 WC 2209

UNIVERSITY OF ILLINOIS AT CHICAGO,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on February 5, 2020 is hereby affirmed and adopted.

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

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

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

October 28, 2021

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

o: 10/21/21
CMD/kcb
045

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BAILEY, SYMMORRON
Employee/Petitioner

Case# **15WC002209**
16WC024503

UNIVERSITY OF ILLINOIS AT CHICAGO
Employer/Respondent

On 2/5/2020, 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 1.52% 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:

1920 BRISKMAN BRISKMAN & GREENBERG
RICHARD VICTOR
351 W HUBBARD ST SUITE 810
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

Symmorron Bailey
Employee/Petitioner

Case # **15** WC **002209**

v.

Consolidated cases: **16WC024503**

University of Illinois at Chicago

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 **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **12/19/19 & 1/21/20**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **12/19/14**, 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 $**47,236.80**; the average weekly wage was $**908.40**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **4** 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 $.

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

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services of $12,420.57, as provided in Sections 8(a) and 8.2 of the Act.

Permanent Partial Disability with 8.1b language (For injuries after 9/1/11)

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 (i) of §8.1b(b), the Arbitrator notes that no opinion comporting with the specific requirements of §8.1b(a) was submitted into evidence. However, the Arbitrator has considered the doctor's comments as a factor in the evaluation of Petitioner's permanent partial disability as required by §8.1b(b)(i).

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 animal care technician 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.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 39 years old at the time of the accident.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes no diminished earnings.

Based on the above factors, and the record taken as a whole, the Arbitrator finds the award of permanent partial disability is deferred to and contained in the Decision of Arbitrator in 16WC024503.

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

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

David A. Kane
Signature of Arbitrator

February 5, 2020
Date

FEB 5 - 2020

21IWCC0543

FINDINGS OF FACT - 15 WC 002209

Petitioner testified that he has worked for Respondent as an animal care technician for 19 years. Petitioner testified that his job duties involved physically caring for animals, lifting, pushing and pulling bags of feed, cages and disposing of trash. Petitioner testified that on December 19, 2014 at about noon, he was taking out trash through the back door and in doing so his left thumb was caught between the door and door jab, causing him to yank his left arm twice to pull out his thumb. Petitioner testified he immediately experienced pain in his left thumb. Petitioner testified that about 3 hours later, after returning home, he started to experience a lot of pain in his left shoulder. Petitioner testified that after resting at home over the weekend, he spoke in person to the assistant department head, Dr. Thomas Park, at Respondent 3 days later. Petitioner testified at that time, he informed Dr. Park that he was throwing out trash on December 19, 2014 and his left thumb was caught in the door, causing him to yank his left arm twice to pull it out. Petitioner then related he started to experience a lot of pain in his left shoulder 3 hours later after returning home, which persisted over the weekend. Petitioner testified that he was directed to seek treatment at University Health Service.

Petitioner was seen at University Health Service on December 22, 2014. The University Health Service records of that date reflect a history that on December 19, 2014, Petitioner was taking out trash and his left thumb was caught in the door jab, and later that day he experienced left shoulder pain. Petitioner on cross-examination denied telling the physicians that he could not attribute his shoulder pain to the accident. Petitioner was also seen at University Health Service on January 28, 2015.

Those records reflect that Petitioner had no prior left shoulder pain, and that his symptoms had persisted since the December 19, 2014 accident (PX 3).

Petitioner testified that due to his persistent left shoulder pain, he sought treatment at Illinois Orthopedic Network (ION) on January 21, 2015. The ION records reflect a history of the December 19, 2014 accident taking out trash, Petitioner having caught his left thumb in the door, and developing left shoulder pain shortly thereafter. Petitioner received a course of physical therapy on his left shoulder from January 21, 2015 to March 4, 2015. Petitioner was sent for MRI's on January 29, 2015 on his left hand, which was negative, and his left shoulder which showed a type II acromion labrum and biceps tendinitis and negative for rotator cuff tear. Petitioner was placed on work restrictions and was initially discharged on March 16, 2015.

Petitioner testified he continued to perform his regular job duties for Respondent thereafter, but still has the same left shoulder pain, which was worsening over time after doing the normal lifting required by his job duties. Petitioner testified the worsening left shoulder pain caused him to return to ION for further treatment on June 2, 2015. Petitioner was again placed on work restrictions, prescribed medications, and received two cortisone injections. Petitioner was again discharged at full-duty on August 24, 2015. Dr. Sampali opined that Petitioner's left shoulder condition was caused by the December 19, 2014 accident (PX 1,2,4).

Petitioner testified that following the August 24, 2015 discharge, he continued to have persistent left shoulder pain while performing his normal job duties for Respondent, which was tolerable until he re-injured the left shoulder while working for Respondent on March 15, 2016.

CONCLUSIONS OF LAW

C – ACCIDENT

Based on Petitioner's undisputed and unrebutted testimony and the history contained in the records of the University Health Service records, the Arbitrator finds Petitioner had an accident to his left thumb and left shoulder on December 19, 2014 which arose out of and in the course of his employment for Respondent.

E – TIMELY NOTICE GIVEN TO RESPONDENT

Based on Petitioner's undisputed and unrebutted testimony that he notified his assistant department head, Dr. Park, that he injured his left thumb and left shoulder in the December 19, 2014 accident on December 22, 2014 the Arbitrator finds that Petitioner provided timely notice of the accident to Respondent.

F – CAUSAL CONNECTION

Based on Petitioner's testimony as to the mechanism of the December 19, 2014 accident, and the records of University Health Service and ION, and the lack of evidence of any prior left shoulder symptoms, the Arbitrator finds that Petitioner's left shoulder condition from December 19, 2014 until his re-injury of March 15, 2016, is causally related to the December 19, 2014 accident.

J – MEDICAL EXPENSES

Based on the findings of the Arbitrator regarding accident and causal connection, the Arbitrator awards the bills per the fee schedule of IWP of $391.83 (PX 1), Preferred Open MRI of $4,200.00 (PX 2), University Health Service of $202.42 (PX 3), and Illinois Orthopedic Network of $11,826.32 (PX 4).

L – NATURE AND EXTENT

The Arbitrator defers any award of permanent and partial disability to the Decision of the Arbitrator in 16WC024503 for the March 15, 2016 re-injury to the left shoulder.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC024503
Case Name	BAILEY, SYMMORRON v. UNIVERSITY OF ILLINOIS AT CHICAGO
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0544
Number of Pages of Decision	15
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Richard Victor
Respondent Attorney	Brad Antonacci

DATE FILED: 10/28/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SYMMORRON BAILEY,

Petitioner,

vs. NO: 16 WC 24503

UNIVERSITY OF ILLINOIS AT CHICAGO,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on February 5, 2020 is hereby affirmed and adopted.

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

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

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

October 28, 2021

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

o: 10/21/21
CMD/kcb
045

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BAILEY, SYMMORRON
Employee/Petitioner

Case# **16WC024503**
15WC002209

UNIVERSITY OF ILLINOIS AT CHICAGO
Employer/Respondent

On 2/5/2020, 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 1.52% 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:

1920 BRISKMAN BRISKMAN & GREENBERG
RICHARD VICTOR
351 W HUBBARD ST SUITE 810
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

Symmorron Bailey
Employee/Petitioner

Case # **16** WC **24503**

v.

Consolidated cases: **15WC002209**

University of Illinois at Chicago

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 **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **12/19/19 & 1/21/20**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **3/15/16**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**44,424.64**; the average weekly wage was $.**854.32.**

On the date of accident, Petitioner was **40** years of age, ***single*** with **4** 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 $.

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

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services of $46,477.65, as provided in Sections 8(a) and 8.2 of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $569.54/week for 23 1/7 weeks, commencing 7/11/16 through 12/20/16, as provided in Section 8(b) of the Act.

Permanent Partial Disability with 8.1b language (For injuries after 9/1/11)

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 (i) of §8.1b(b), the Arbitrator notes that no opinion comporting with the specific requirements of §8.1b(a) was submitted into evidence. However, the Arbitrator has considered the doctor's comments as a factor in the evaluation of Petitioner's permanent partial disability as required by §8.1b(b)(i).

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 animal care technician 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.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 40 years old at the time of the accident.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes no diminished earnings.

Petitioner is entitled to have and receive from Respondent the sum of $512.59 per week for a period of 50 weeks, as the injuries sustained caused the partial disability of said Petitioner to the extent of 10% under section 8(d)2 of the Act.

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

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

David A. Kane
Signature of Arbitrator

February 5, 2020
Date

FEB 5 - 2020

FINDINGS OF FACT – 16WC24503

Petitioner testified that on March 15, 2016, he was performing his normal job duties for Respondent, and was lifting heavy bags of feed from a pallet when he experienced pain in his left shoulder which was much worse than the persistent left shoulder pain he had since the December 19, 2014 accident. Petitioner testified that on the same day, he notified his assistant department head, Dr. Park, that he experienced much worse left shoulder pain while lifting heavy bags of feed. Petitioner testified he again was directed to seek medical treatment at University Health Services. Petitioner was seen at University Health Services on March 17, 2016. Those records reflect a history of Petitioner re-injuring his left shoulder with much worse pain 2 days before while lifting at work. Petitioner was seen again on March 24, 2016. Those notes reflect Petitioner had residual left shoulder pain since the December 19, 2014 accident, which was now much worse following the March 15, 2016 accident. Petitioner was seen again on March 31, 2016 (PX 3).

Petitioner testified that he continued to work, performing his normal job duties, but that his left shoulder pain continued to be bad since the March 15, 2016 accident, and growing worse. As a result, Petitioner testified he sought treatment with an orthopedic surgeon, Dr. Preston Wolin, on June 7, 2016. Those records reflect the history of the December 19, 2014 accident, with Petitioner yanking his left shoulder with resulting pain. Petitioner was sent for an arthrogram/MRI on June 15, 2016 at Vanguard Weiss Memorial Hospital, which showed a partial thickness tear and posterior chondral labral junction tear. As a result, Dr. Wolin prescribed surgery. On July 11, 2016, Dr. Wolin performed an arthroscopic

labral repair and debridement. Petitioner was sent to Athletico for post-operative physical therapy from July 12, 2016 to November 18, 2016, followed by a work conditioning program from November 21, 2016 to December 16, 2016. Dr. Wolin placed a total work restriction on Petitioner from the surgery of July 11, 2016 through December 20, 2016. Based on Petitioner's good recovery from surgery, Dr. Wolin discharged Petitioner at full-duty on December 20, 2016 (PX 5,6,7).

Dr. Wolin testified at deposition regarding Petitioner's left shoulder condition and course of care. Dr. Wolin testified that while he was not provided a history of the March 15, 2016 re-injury during his treatment, he did subsequently review the history of this accident as contained in the University Health Services records. Dr. Wolin testified that the mechanisms of both the December 19, 2014 and March 15, 2016 accident as traction type injuries were competent causes of the labral tear seen in surgery. Dr. Wolin testified the January 29, 2015 MRI was not sensitive to glenohumeral pathology as was the June 15, 2016 arthrogram MRI. Dr. Wolin testified the findings in the June 15, 2016 MRI were not degenerative, as opined by Respondent's examining physician, Dr. Carroll, but were acute and caused by the December 19, 2014 accident and aggravated by the history of the March 15, 2016 re-injury. Dr. Wolin testified that the lack of immediate left shoulder symptoms after the December 19, 2014 accident, and that he was not aware of the March 15, 2016 accident during his treatment of Petitioner, did not change his opinion that Petitioner's left shoulder condition, need for surgery, and lost time from work, were all caused by the acute injury suffered on the December 19, 2014 accident and aggravated by the March 15, 2016 re-injury (PX 7).

Petitioner testified in redirect examination to the video surveillance offered by Respondent of his activities on June 24, 2015 and June 26, 2015. This surveillance showed Petitioner on June 24, 2015 carrying a bag with his right hand, and getting up using his left arm, and on June 26, 2015 carrying bags with both hands. Petitioner testified that during this time, no physician said he could not use his left arm at all, but that since the December 19, 2014 accident he always carried any heavier bags with his right hand. Petitioner testified that therefore on June 26, 2015, he was carrying the lighter bag of groceries with his left hand.

Petitioner testified that he was off of work and received no benefits, from July 11, 2016 through December 20, 2016. Petitioner testified that thereafter he has been performing his same full work duties for Respondent. Petitioner testified that he has had no other accidents to his left shoulder. Petitioner testified that he still has residual pain in his left shoulder which is worse on carrying, pushing, lifting overhead and after work.

CONCLUSIONS OF LAW

C – ACCIDENT

Based on Petitioner's undisputed and unrebutted testimony and the history contained in the University Health Services records the Arbitrator finds Petitioner suffered an accidental re-injury to his left shoulder on March 15, 2016 which arose out of and in the course of his employment for Respondent.

E – TIMELY NOTICE GIVEN TO RESPONDENT

Based on Petitioner's undisputed and unrebutted testimony that he notified his assistant department head, Dr. Park, of the March 15, 2016 accident, the Arbitrator finds that Petitioner provided timely notice of the accident to Respondent.

F – CAUSAL CONNECTION

The Arbitrator finds the opinions of Petitioner's treating orthopedic surgeon, Dr. Wolin to be consistent with the objective findings in the medical records and the mechanism of both accidents and resulting symptoms as Petitioner testified. Therefore, the Arbitrator finds the opinions of Dr. Wolin regarding causation to be credible and more persuasive than Respondent's examining physician, Dr. Carroll. Based thereon, the Arbitrator finds Petitioner's need for surgery and the current condition of his left shoulder to be causally related to the March 15, 2016 accident as a permanent aggravation.

J – MEDICAL EXPENSES

Based on the Decision of the Arbitrator regarding accident and causal connection, the Arbitrator awards per the fee schedule the bills of University Health Services of $284.92 (PX 3), Center for Athletic Medicine of $472.65 (PX 6), and Athletico of $46,005.00 (PX 7).

K – TTD

Based on the Decision of the Arbitrator regarding accident and causal connection, the Arbitrator awards 23 1/7 weeks of T.T.D. at $569.54, from July 11, 2016 through December 20, 2016.

L – NATURE AND EXTENT

Based on the Decision of the Arbitrator regarding accident and causal connection and the Petitioner's surgery and resulting symptoms, the Arbitrator awards a 10% disability under section 8d2, or 50 weeks at $512.59.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC016499
Case Name	KAPRAUN, VICKI v. JIM MCCOMB CHEVROLET INC
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0545
Number of Pages of Decision	32
Decision Issued By	Maria Portela, Commissioner, Thomas Tyrrell, Commissioner

Petitioner Attorney	Stephen Kelly
Respondent Attorney	William A. Lowry, Sr.

DATE FILED: 10/29/2021

/s/Maria Portela, Commissioner

Signature

DISSENT

/s/Thomas Tyrrell, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

[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

Vicki Kapraun,

Petitioner,

vs. NO: 16 WC 016499

Jim McComb Chevrolet, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 9, 2020, 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.

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.

October 29, 2021

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

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

DISSENT

I respectfully dissent from the opinion of the majority and would reverse the Decision of the Arbitrator. After carefully considering the totality of the evidence, I believe Petitioner met her burden of proving that she sustained an accident that arose out of and in the course of her employment on December 29, 2014.

Petitioner worked for Respondent for eight (8) years, but she had known General Manager Jeffrey Loucks for over 30 years. Respondent's GM testified that he had no reason to doubt that Petitioner was a truthful person. He not only confirmed she gave notice of her injury within the time allotted by the Act, but that she did not hide her hunting trip after the accident. In fact, she was bragging to him that she had shot a big doe. Respondent's GM was not claiming Petitioner injured herself in any other manner than was alleged. While Respondent tried to cast doubt on the reported mechanism of injury, these aspersions were not supported by any evidence.

Petitioner gave a credible and plausible explanation as to what occurred on December 29, 2014. Respondent's GM confirmed this was a regular activity Petitioner was required to perform to fulfill her job duties.

Petitioner's credibility was further strengthened by the histories she provided to the medical providers. Every provider was given the details of Petitioner's work opening hoods and how she felt a pop when her arm was up. Most convincing, Petitioner's report of difficulties with overhead activities was consistent not only immediately after the injury, but throughout her years of treatment. She was never found to be exaggerating her condition. Her testimony was also supported by her daughter-in-law and husband.

Contrary to the majority, I believe Petitioner more than met her burden of proving that her condition of ill-being was causally-related to opening the hood on December 29, 2014. Both Drs. Merkley and Bare testified that that the episode of lifting the hood could be a causative factor of her condition and need for treatment, regardless of whether she went hunting.

Dr. Merkley credibly testified that that the episode of lifting the truck hood could have exacerbated symptoms or caused an aggravation of preexisting glenohumeral arthrosis by producing cartilaginous loose bodies. Dr. Merkley confirmed that it was the position of the arm up on the hood that was the important factor, whereas shared lifting below shoulder level or shooting the shotgun resting on a stump would not typically cause the pathology he saw.

Whereas, the testimony of Dr. Bare was not convincing. First, Dr. Bare's opinion that it was "not normal" for someone to go on a hunting trip after such an injury was based on "if" she was adamant she could not lift her arm, but that is not borne out in the records. All of the medical records immediately following the injury consistently state that her issue was above chest-level, not that she had severe pain with no functional use of the arm.

Petitioner was a seasoned and accomplished hunter, as evidenced by the news articles about her exploits. She was more than capable of adapting her activities to accommodate her difficulties with above chest-level activities. It is also notable that she continued to work after the hunting trip as well. There was no evidence this changed her condition, as she never claimed to be totally incapacitated following the injury. She was able to keep working after the injury, as well as after the hunting trip, as the objective medical evidence shows she was able to get to 90 degrees at her first visit on January 7, 2015.

Second, a close reading of the inquiries made by Dr. Bare of the Petitioner is telling. Dr. Bare documented that he "asked her multiple times regarding any injuries outside of the scope of work or any recreational hobbies or any activities done either before the injury or between the time that she was reportedly injured and the time she sought medical care." It is clear that Dr. Bare was inquiring about whether she sustained any injuries with her hobbies or activities, which she adamantly denied. His interrogation did not start by an inquiry as to whether she went hunting. Confusion ensued, with her husband making denials as well. Petitioner had already bragged about this hunting trip to Respondent, so it is more likely she was denying any injury while hunting, as that is how Dr. Bare's "multiple" interrogatories proceeded. Ultimately, Dr. Bare admitted that it was possible the alleged episode of lifting the hood could be an aggravating or causative factor in her symptoms and need for initial treatment, even if she did go hunting. Dr. Bare's interrogation of the Petitioner, when all evidence points to the contrary, does not diminish his opinion that the injury could have aggravated a preexisting condition.

For the forgoing reasons, I would reverse the Decision of the Arbitrator in its entirety. Petitioner's testimony was supported by the medical evidence. Petitioner clearly met her burden of proving she sustained an accident on December 29, 2014, that her current condition of ill-being is related to that injury, and that she could return to her former employment following her release from Dr. Merkley on November 15, 2017.

o: 10/5/2021 /s/ *Thomas J. Tyrrell*

TJT/ahs Thomas J. Tyrrell

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ILLINOIS WORKERS' COMPENSATION COMMISSION **21IWCC0545**
NOTICE OF ARBITRATOR DECISION

KAPRAUN, VICKI Case# **16WC016499**
Employee/Petitioner

JIM McCOMB CHEVROLET INC
Employer/Respondent

On 4/9/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.16% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5354 STEPHEN P KELLY
ATTORNEY AT LAW LLC
2710 N KNOXVILLE AVE
PEORIA, IL 61604

2461 NYHAN BAMBRICK KINZIE & LOWRY
WILLIAM LOWRY
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602-4195

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Vicki Kapraun
Employee/Petitioner

v.

Jim McComb Chevrolet, Inc.
Employer/Respondent

Case # **16** WC **16499**

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Peoria**, on **February 20, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **December 29, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, per the stipulation of the parties, Petitioner earned **$21,840.00**; the average weekly wage was **$420.00**.

On the date of accident, Petitioner was **54** years of age, ***married,*** with **0** dependent children.

Respondent shall be given a credit of **$1,669.31** for TTD, **$0** for TPD, **$0** for maintenance, **$6,328.14** in non-occupational indemnity disability benefits and **$0** for other benefits, for a total credit of **$7,997.45.**

Respondent is entitled to a credit for medical bills paid in the amount of **$41,635.12** through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

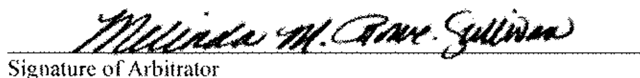
Petitioner failed to prove that she sustained an accident that arose out of and in the course of her employment with Respondent and, as such, all benefits are denied. The remaining issues are moot and the Arbitrator makes no conclusions as to those issues.

Respondent shall be given a credit of **$1,669.31** for TTD, **$0** for TPD, **$0** for maintenance, **$6,328.14** in non-occupational indemnity disability benefits and **$0** for other benefits, for a total credit of **$7,997.45.**

Respondent is entitled to a credit for medical bills paid in the amount of **$41,635.12** through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

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

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



Signature of Arbitrator

4/6/2020
Date

APR 9 - 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Vicki Kapraun Case # **16** WC **16499**
Employee/Petitioner

v. Consolidated cases: N/A

Jim McComb Chevrolet, Inc.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that she lives in Woodford County and that she started working for Respondent in 2006. She testified that Respondent is a car dealership and that she was hired in February 2006 as a porter. She testified that her job with Respondent was that of a porter, detailer, lot person, and photographer.

Petitioner testified that as a porter, her job responsibilities included that of getting in and out of vehicles, getting them off the service drive, and getting them in the back. She testified that in December 2014 she was five feet, two inches tall and weighed approximately 168 pounds. She testified that as to her detailing duties, she would have to get the vehicles prepared for delivery and make sure that they were suitable to be picked up. She testified that as a lot person, she moved the vehicles around, made sure that the lot looked nice and straight, and made sure that everything was clean. She testified that as a photographer, she would take pictures of all the vehicles that were on the lot and upload the pictures onto the computers. She testified that Respondent sold cars, trucks, and vans.

Petitioner testified that, prior to December 29, 2014, she had not missed any work for left shoulder problems, had not sustained any injuries to her left shoulder, had not missed work for her left shoulder, and had not received any treatment for her left shoulder. She further testified that she was able to do her job duties for Respondent prior to that date.

Petitioner testified that on the date of accident, she was out doing videos and taking pictures of trucks. She testified that she had get into each vehicle, make sure that it was clean, run it through the car wash, and then dry it off. She testified that it was hard at that time because the vehicles were freezing before she could get them dried off. She testified that she had four trucks lined up to take their pictures, that one was an extended truck, and that something popped in her left shoulder. She testified that it was a pretty "high" truck.

Petitioner testified that after the vehicles were all dry she went to open the hood, that she had a camera in one hand and was trying to unlatch the hood, and that when pushing up on the hood she felt a pop and burning sensation in her left shoulder. She testified that she was able to complete her tasks on the truck and that she also completed her work for that day. When asked what she noticed about her left shoulder as she completed her work, Petitioner responded that it still ached and hurt.

Petitioner testified that she returned to work the next day and worked about eight hours. When asked what she noticed about her left shoulder during the second day, Petitioner responded that when she

went to lift her arm up it started hurting more and more. She testified that she continued working, thinking that it would go away. Petitioner testified that she worked the third day for about eight hours, and that she was no longer doing trucks but instead was doing cars. When asked whether during those three days her pain ever completely went away, Petitioner responded that it did not and further testified that it hurt every time she lifted her arm above chest-level.

Petitioner testified that she did not work on January 1, 2015. When asked what she noticed about her shoulder that day Petitioner responded that she was not using it as much, as it seemed like it was getting better but that the pain did not go away. She testified that if she lifted her arm above chest-level, it would hurt. She testified that she worked on January 2, 2015 about seven hours, and that her shoulder was still hurting. She testified that she left work and went home. She further testified that on January 2, 2015, she also shot a deer.

Petitioner testified that after she got home from work, she went down to her property in Fulton County where she often hunted. She testified that her son and daughter-in-law have a home on the property. She testified that she got to the cabin and got ready by changing into her hunting clothes. She testified that there was a tree stump and that she sat there for approximately 10-15 minutes, and that she then saw a doe standing in front of her off to her left. She testified that she thought she could shoot the deer if she was sitting on the ground with her gun on the tree stump. She testified that she is right-handed.

Petitioner testified that her left arm holding was holding the butt of the gun, and that her right hand was the hand she used for pulling the trigger. She testified that she shot the gun and that she did not injure her left shoulder when she did so. Petitioner further denied having injured herself when preparing to go hunting. When asked what she did after she shot the doe, Petitioner responded that she watched the doe and then called her son and asked him to come down with a 4-wheeler to get the deer. She testified that her son indicated that he was sick, so Carina, her daughter-in-law, came down with a side-by-side 4-wheeler and brought a sled. Petitioner testified that Carina got to the deer and rolled it over onto the sled, and that Carina took the sled over to the 4-wheeler and hooked it up. She further testified that Carina drug the doe up to the cabin. Petitioner denied, at any time after having shot the doe, having pushed, pulled, or lifted it. She further denied using her left shoulder to put the doe on the sled.

Petitioner testified that after the doe was taken by the 4-wheeler on the sled up to the house, her husband showed up and field dressed it. Petitioner denied having participated in field dressing the doe. She further denied having used a deer stand. She also denied helping her husband field dress the deer.

Petitioner testified that she returned to work on January 5, 2015, and that the hunting incident occurred about three days before she went back to work. Petitioner denied that her pain ever went away in those three days. She further testified that she did not injure her shoulder at home during that time. Petitioner testified that when she went back to work she worked almost eight hours, and that she noticed whenever she lifted above chest-level she had severe pain. She testified that on January 6th she worked approximately nine hours, and that her shoulder was still hurting and that something did not feel right.

Petitioner testified that on January 7, 2015, she reported her work injury to Respondent. When asked why she did not report it in the 3-5 days before that while at work, Petitioner responded that she thought it would go away but that it did not. Petitioner testified that she reported the left shoulder injury to her boss, Jeff Loucks. She testified that she told Mr. Loucks that she thought something was wrong, that she went hunting and could not do anything, and that her daughter-in-law had to do everything for her. She further testified that she told Mr. Loucks that she had lifted a truck hood and that something had happened, and that she thought it would go away but that it never did. Petitioner denied telling anyone at work that she had injured her shoulder while hunting.

Petitioner testified that Respondent sent her to Prompt Care, and that she told the doctor how she had injured herself and how she felt. She testified that she was provided with an injection to the left shoulder and that she had never had that before. She testified that she followed-up with the doctor at Prompt Care in late January and stated that the injection had helped a little, but that it had worn off. She testified that she had pain when she lifted her arm above her chest. Petitioner denied having undergone an MRI for her left shoulder prior to this time period. She testified that before she underwent the MRI, she did physical therapy and had two injections. She testified that from the time that she first the saw the doctor at Prompt Care up until the time of the MRI, the pain in her left shoulder did not go away.

Petitioner testified that after she underwent the MRI, she was referred to Midwest Orthopaedic Center and saw Dr. Merkley in April 2015. She testified that Dr. Merkley recommended surgery. She testified that she was able to work up until her surgery date of June 17, 2015, and that Respondent was working with her restrictions. She testified that she underwent the first surgery on June 17, 2015, and that she followed-up with Dr. Merkley thereafter. She testified that her shoulder was not getting better after the first surgery and that she still had the same pain, and that she was unable to get in the trucks as she always had to use her left hand to grab the steering wheel in order to get in. She testified that she returned to work at some point after the first surgery, and that she was able to work up until approximately December 4, 2015. She testified that at some point Respondent was unable to provide her work within her restrictions, and that she was then off work as of December 4, 2015.

Petitioner testified that she underwent the second surgery to her left shoulder by Dr. Merkley on December 20, 2016. She testified that prior to that procedure, she was sent by Respondent for an IME with Dr. Bare. She testified that her husband accompanied her to the IME. She testified that Dr. Bare asked her various questions about her case. She testified that she did not deny that she went hunting in January 2015. She testified that she did not say anything and that her husband said he did not think that Petitioner had gone hunting, but that he did not realize that until she said that that was when Carina did all the work for her. She agreed that Dr. Bare asked her about her recreational activities. She denied having gone hunting after the first surgery was performed in June 2015. She agreed that she went turkey hunting in April 2015. She testified that she was sitting on a tree and had her gun on a tree that was laying over, and that she shot a turkey. Petitioner denied injuring her left shoulder while turkey hunting, and she also denied having been hurt lifting, carrying, or pulling on a turkey.

Petitioner testified that she underwent the second surgery and that it was not paid for through worker's compensation. She testified that she has not returned to work since December 2015. She testified that she eventually ended up with a third surgery by Dr. Merkley in June 2017, when he performed a total reverse shoulder. She testified that she followed-up with Dr. Merkley through November 15, 2017, at which time he indicated that from a medical standpoint he was done. Petitioner testified that as of November 15, 2017, she was given permanent restrictions of no lifting more than 10 pounds. She testified that she went back to Respondent and asked if they had job a job for her, and that they said they had nothing she could do so she was let go. She testified that she has not worked since November 2017, and that she has not looked for a job because she was unable to do things like she used to be able to do.

Petitioner testified that since November 2017, she has noticed that she is unable to do anything above chest-level and is unable to pick up and hold her granddaughters. Petitioner denied being able to hunt since November 2017. Petitioner denied having re-injured her left shoulder since November 2017. She testified that the pain never completely went away, and that she is not able to be active like she used to be. She testified that she is unable to do any kind of lifting. She further denied having injured herself while hunting.

Petitioner testified that she reviewed Respondent's Exhibit 6 before the arbitration hearing. Petitioner testified that the truck on the video was not the same truck, and that the truck she was working

on was much taller. Petitioner further testified that the person doing the job in the video was taller, and that it was not outside in the cold. She testified that the hood of the truck that she was working on when she was injured was at neck-level. She further testified that her left arm at the time of the accident was above chest-level.

Petitioner testified that she had outstanding medical bills for her claim and agreed that she was asking for those bills to be paid. Petitioner also testified that she was paid some short-term disability benefits while she was off work, and agreed that Respondent was entitled to a credit because it was their program.

On cross examination, Petitioner agreed that it was her testimony that she injured her left shoulder on December 29, 2014 while trying to open a hood on a truck. Petitioner testified that her injury occurred when the hood was approximately half-way up and that she was trying to get it up. She further testified that it was not her testimony that the accident occurred while she was putting the hood back down.

On cross examination, Petitioner agreed that, following the alleged accident, she first received medical treatment on January 7, 2015 from Dr. Harris. She testified that the history in Dr. Harris's note that two weeks ago she reached up to close a truck hood and that her left shoulder popped was not correct.

On cross examination, Petitioner testified that she had worked for Respondent for 10 years. Petitioner denied, as a 10-year employee, having ever been told what the dealership's policy was about when employees had a work accident. She testified that the only time she knew about it was when they had safety meetings and that Respondent indicated that if they got hurt, you were to let them know. She testified that at the time, she did not know she had been hurt that bad. She further testified that she had attended a number of safety meetings.

On cross examination, Petitioner testified that on January 2, 2015 she used a shotgun. Petitioner denied that there was any kickback from the shotgun. Petitioner testified that there was resistance, but that she knew what to expect. She testified that the doe that she shot was a yearling. Petitioner denied having pulled, pushed, or touched the doe.

On cross examination, Petitioner agreed that it was her testimony that when she reported the injury, she reported it to Jeff Loucks. She agreed that she told Mr. Loucks that she went hunting. She agreed that it was her testimony that she told Mr. Loucks that her daughter-in-law did all the work after the doe had been shot. She agreed that she testified that in April 2015 she went turkey hunting. She agreed that she shot turkeys and further testified that she used a shotgun. Petitioner further agreed that when she used a shotgun in April 2015, her arm was resting on a tree stump.

On cross examination, Petitioner agreed that, on December 29, 2014, she did not report an injury to her left arm. Petitioner agreed that she worked approximately eight hours on December 29, 2014. Petitioner agreed that, on December 30, 2014, she did not report an injury to her left arm and worked her regular shift. Petitioner agreed that, on December 31, 2014, she did not report an injury to her left arm and worked her regular shift. Petitioner agreed that, on January 1, 2015, she did not work and did not seek any treatment. Petitioner agreed that, on January 2, 2015, she did not report an injury to her left arm and worked her regular shift. Petitioner further agreed that she went hunting on that date.

On cross examination, Petitioner testified that she had been a hunter for as long as she knew her husband. She testified that she did not know the weight range of an adult doe, but agreed that it was likely more than 75 pounds. She agreed that Prairie State Outdoors was a hunting magazine, and that she was featured in their February 2009 edition for hitting a buck. She agreed that Heartland Outdoors was also a hunting magazine, and that she was featured in the September 2013 edition with a deer that she had shot.

On cross examination, Petitioner agreed that, on January 3, 2015, she did not work and was not scheduled to work that day. She further testified that she did not seek treatment for her left shoulder on that date. Petitioner agreed that, on January 4, 2015, she was off work that day and did not seek treatment for her left shoulder. Petitioner testified that, on January 5, 2015, she returned to work and worked her regular shift, but did not report an injury work that day. Petitioner further agreed that, on January 6, 2015, she did not report an injury to her left shoulder and worked approximately nine hours.

On cross examination, Petitioner testified that she believed that she first reported the alleged work accident to Mr. Loucks on January 7th. She testified that she had known Mr. Loucks for several years. She agreed that at the time of the accident, he was the general manager of the dealership. She testified that she had discussed with Mr. Loucks that she was a hunter. She agreed that she recalled advising Mr. Loucks that she went hunting in January 2015. She agreed that she recalled speaking to Mr. Loucks and advising him that her mother had asked her to take her father's welder and compressor. Petitioner testified that the compressor was at her mother's house and that her husband removed it. She testified that she told Mr. Loucks that they had to pick up a welder and an air compressor. She testified that she did not know the weight of the welder because she never tried to lift it. She denied lifting the air compressor, as she knew that she could not lift anything.

On cross examination when asked whether she recalled advising Mr. Loucks that she went hunting in January 2015 and had difficulty loading the deer onto the sled, Petitioner responded that she told him that something was wrong, that her shoulder was still hurting, and that she did not know what was wrong with it. She testified that she told Mr. Loucks that she could not do anything, and that her daughter-in-law had to do it.

On cross examination, Petitioner agreed that on January 7, 2015, she worked approximately five hours and then clocked out early to go see Dr. Harris. Petitioner agreed that this was the first time she sought treatment for her left shoulder after the alleged accident. She testified that she did not tell Dr. Harris that she reached up to close a truck hood and experienced a popping in her left shoulder, and that she told him that she was lifting a truck hood and said something happened. She agreed that she recalled Dr. Harris saying that she had osteoarthritis in the shoulder. Petitioner further agreed that on January 8, 2015, she worked her regular shift.

On cross examination, Petitioner agreed that she next saw Dr. Harris again on January 27, 2015. She agreed that following January 29, 2015, she did not seek additional treatment until March 19, 2015. Petitioner agreed that during that period of time, she continued working.

On cross examination, Petitioner agreed that she recalled receiving treatment from Midwest Orthopaedics on September 9, 2015. When asked whether she agreed that it seemed correct if the medical records showed that she reported that she was doing well, Petitioner responded that it did not. Petitioner agreed that it sounded correct that on September 9, 2015, she advised that she would be leaving for vacation. Petitioner agreed that it sounded correct that she was re-examined at Midwest Orthopaedics on October 7th. Petitioner further agreed that it sounded correct that she stated that she had no idea why her shoulder was sore.

On cross examination, Petitioner agreed that she was evaluated by Dr. Bare on June 1, 2016. When asked whether it sounded correct if Dr. Bare's records indicated that she told him that she could not lift her arm after her accident, Petitioner responded that it did for above her head. She agreed that it sounded correct that Dr. Bare testified that he asked her about a hunting trip on June 1, 2016. Petitioner testified that it was not correct if Dr. Bare testified that she denied it, as did the male that was with her. She testified that it was incorrect if Dr. Bare testified that they both denied it adamantly multiple times.

On cross examination, Petitioner agreed that it was correct if Dr. Bare's records indicated that she said that she did not think her surgery had helped. She agreed that it was correct if Dr. Bare's records indicated that she denied having any injuries outside of the scope of work. Petitioner disagreed that it was correct if Dr. Bare's records indicated that she denied any recreational hobbies or activities. Petitioner agreed that, during the evaluation on June 1st, Dr. Bare showed her records from DNR.

On cross examination, Petitioner agreed that she had her second surgery on her left shoulder on December 20, 2016, which was an arthroscopic procedure performed by Dr. Merkley. Petitioner agreed that, following the procedure in January 2017, Dr. Merkley advised her that she could return to work without using her left arm. Petitioner agreed that she had her third surgery by Dr. Merkley on June 16, 2017, and that following surgery Dr. Merkley returned her to work with a restriction of no lifting greater than 20 pounds and no lifting above 51 pounds above waist-level. Petitioner testified that it would be incorrect if the records of Dr. Merkley showed that, on November 15, 2017, she denied any shoulder pain. Petitioner agreed that on that date, Dr. Merkley indicated that she was at maximum medical improvement.

On cross examination, Petitioner agreed that she was re-examined by Dr. Bare on March 21, 2018. Petitioner agreed that, on that date, Dr. Bare indicated that she could return to work full duty. Petitioner testified that it was incorrect if Dr. Bare's records indicated that that she did not require any further treatment for her left shoulder on that date.

On cross examination when asked whether she was aware that she was free to apply for re-employment with Respondent, Petitioner responded that she did re-apply but that she did not remember when she did so.

On redirect, Petitioner testified that when she re-applied for a job at Respondent's new dealership, she was not offered a job. She testified that Respondent did not tell her why.

On redirect, Petitioner denied ever injuring her left shoulder while lifting a compressor or a welder. Petitioner denied that, after this accident, she lifted either a compressor or welder. Petitioner further denied injuring her left shoulder after this accident while on vacation.

On redirect, Petitioner testified that, during the January through March 2015 timeframe, she noted that she was unable to lift her arm above chest-level while working on pick-up trucks. Petitioner testified that she did not report the work accident to Respondent until January 7, 2015 because she thought it would go away but it never did, that she tried to work it out, and that she wanted to get the job done. Petitioner testified that her pain never went away.

Carina Kapraun was called as a witness by Petitioner at the time of arbitration. Ms. Kapraun testified that she resides in Fulton County and that Petitioner is her mother-in-law. She further testified that she has been married to Petitioner's son for approximately 10 years.

Ms. Kapraun testified that she recalled Petitioner's shooting a doe in January 2015. Ms. Kapraun testified that Petitioner had gotten off work late that night, that she said she was going to come down to hunt, and that she ended up hunting about 100 yards from their house. She testified that she first became aware that Petitioner shot a doe when she heard the gunshot from the house, and that she got a phone call immediately after that. She testified that the phone call was from Petitioner, and that she said she shot a doe and needed help. She testified that Petitioner had injured her shoulder at work prior to hunting, that she was physically unable to lift anything, and that she was to go pick up the deer for Petitioner.

Ms. Kapraun testified that prior to this she had seen Petitioner having problems lifting her left arm, and that she had said she had injured it at work. When asked what she did when she heard the gunshot and the call came in, Ms. Kapraun testified that she went out to the garage, got the side-by-side 4-wheeler, got

a deer sled, drove out to Petitioner's location, and drove right up to the deer. She testified that she shut the side-by-side off, got the deer sled and put it underneath the deer, rolled it over, tied it off, and pulled it back home. She further testified that she did not see Petitioner touch the deer at any time while she was there. She testified that she did all the work, and that when they took the deer up to the cabin Petitioner did not do anything with the deer. She denied that Petitioner stated that she had hurt her left shoulder while shooting a gun.

Ms. Kapraun testified that when they got to the cabin, they stayed there until her father-in-law came and he then field dressed the deer. She testified that they then hung the deer in the tree. She testified that Petitioner did nothing with the deer at that time. She denied that Petitioner had ever said that she hurt herself while hunting. She denied being aware of Petitioner hurting her left shoulder anywhere else besides at work.

On cross examination, Ms. Kapraun testified that approximately 10-15 minutes passed between getting the phone call from Petitioner and getting to the location of the deer. While she testified that Petitioner could not physically do anything with the deer, Ms. Kapraun admitted that she was not with Petitioner so as to observe her during that time.

On redirect, Ms. Kapraun testified that it was her opinion that Petitioner could not do anything with the deer during that 10-15 minute period. Ms. Kapraun testified that the average doe weighed more than 100 pounds.

Greg Kapraun was called as a witness by Petitioner at the time of arbitration. Mr. Kapraun testified that he lives in Woodford County and that he has been married to Petitioner for 37 years. Mr. Kapraun denied that Petitioner had any problems with her left shoulder prior to December 2014, and he further denied that Petitioner had ever injured her left shoulder prior to December 2014.

Mr. Kapraun testified that on December 29, 2014, Petitioner told him that she hurt her left shoulder when raising the hood on a truck. As to the hunting activity on January 2, 2015, Mr. Kapraun testified that he worked with a doe that Petitioner had killed. He testified that he was hunting at another farm, and that when he came back the doe was at the cabin. He testified that the doe was at the cabin on a sled on the back of the 4-wheeler, and that his daughter-in-law, Carina, had put it on there. He testified that when it was at the cabin, he field dressed the doe and hung it in the cooler. He testified that at no time while he was dressing the doe did Petitioner move, touch, or push the doe. He testified that he and Carina did all the work to complete the dressing, and that Petitioner did nothing with the doe.

Mr. Kapraun testified that he was not aware of any other accidents after this where Petitioner sustained any injury to her left shoulder outside of work. He testified that he went to the IME with Petitioner and that he went into the room for the exam. He testified that Dr. Bare asked various questions of his wife as to how she had injured herself, and that at some point he asked if Petitioner had been hunting after the work accident in January 2015. When asked whether Petitioner told Dr. Bare that she did not hunt, Mr. Kapraun responded that she did not and that he did. He testified that he had forgotten that Petitioner had done that. Mr. Kapraun testified that Dr. Bare brought out hunting records. He testified that at no time during the examination did Petitioner tell the doctor that she was not hunting. Mr. Kapraun testified that he then realized that he had made a mistake, and that he told the doctor that he remembered it now.

On cross examination, Mr. Kapraun testified that Petitioner first told him that she had hurt her left shoulder while working that night when she when came home on December 29th. When asked what he noticed about Petitioner's left arm at that time, Mr. Kapraun responded that he did not notice anything but that she could hardly raise it up. He testified that he noticed Petitioner having trouble raising the arm throughout the rest of December, as well as in January.

On cross examination, Mr. Kapraun testified that, during the period of time after Petitioner shot the doe and Carina went to the location of where the doe was, he did not observe Petitioner and that he was not there.

Jeffrey Loucks was called as a witness by Respondent at the time of arbitration. Mr. Loucks testified that he was employed by Uftring Weston Chevrolet Cadillac and that, on or about December 29, 2014, the dealership was known as Jim McComb Chevrolet. Mr. Loucks testified that he was the general manager, and that he held the same position on the alleged date of accident. He testified that he has known Petitioner for more than 30 years.

Mr. Loucks testified that Petitioner brought her alleged work-related accident to him in early January 2015. He testified that he was not aware of Petitioner reporting the injury to anyone in December 2014.

Mr. Loucks testified that during the course of knowing Petitioner, he had come to know that she was an avid hunter and that he knows that she enjoys working on automobiles and small engines. Mr. Loucks testified that he had a conversation with Petitioner in early January 2015 regarding her hunting activities, but that he could not remember the date or time. He testified that Petitioner had stopped by his office and said that she had gone hunting and had shot a big doe. He testified that he knew that Petitioner was going hunting because she had left work early that particular Friday, and that it was not a surprise to hear that she had shot a doe. He testified that he questioned Petitioner about where she went hunting, and that she gave the information that she went in an area where she knew she could shoot a big deer. He testified that he asked Petitioner how she removed a deer from that location, and that she said she used a deer sled. When asked whether during that conversation Petitioner ever advised him that after shooting the doe she was with any other person, Loucks responded in the negative and testified that from his memory it was just Petitioner out hunting and that the guys went to a different area to hunt.

Mr. Loucks testified that the dealership had a policy regarding when an employee sustained a work-related injury, and that all employees were advised that if they were involved in accident or hurt, they were to immediately notify their supervisor and that it was common practice at their organization to do so. When asked whether he recalled having any other conversations with Petitioner in January 2015 concerning recreational or outside activities, Mr. Loucks responded that she stopped by his office on another date in early 2015, and that he knew she (*i.e.*, Petitioner) was going to visit her mother, who was ill. He testified that Petitioner shared with him that her mother wanted her to get a welder, a compressor, and various tools that belonged to her father away from the home. He testified that he made the comment to Petitioner asking if that happened, and that she said she put it in the back of the truck. He testified that he asked if she did this by herself, and that Petitioner basically said that she did it on her own.

On cross examination, Mr. Loucks agreed that he has known Petitioner for 30+ years. He agreed that Petitioner is a truthful person and that he had no reason to doubt that. He agreed that Petitioner performed well at her job. He testified that he was not aware of Petitioner having ever missed work for any left shoulder problems from the time that she started until December 2014. He denied that Petitioner ever told him that she had to see a doctor for her left shoulder. He testified that Petitioner was doing her work up through early 2015. He agreed that Petitioner was required to work with hoods of all types of vehicles. He further agreed that Petitioner, when photographing, would have to lift truck hoods up.

On cross examination, Mr. Loucks agreed that Petitioner was shorter than five feet, five inches in height. He agreed that if Petitioner were lifting a hood, it would extend her arms up. When asked if it would have surprised him that Petitioner tried to work through some pain, Mr. Loucks responded that he would have thought that she would have brought it to their attention. He agreed that he was not with Petitioner on December 29, 2014 while she performed her work. He agreed that in his position, he did not follow Petitioner day in and day out. Mr. Loucks agreed that when Petitioner was at work in late 2014 and

early 2015, he was not observing her all the time. Mr. Loucks agreed that he was not telling the Arbitrator that Petitioner hurt her left shoulder while hunting. Mr. Loucks agreed that Petitioner told him that she shot a doe. Mr. Loucks further agreed that he was not present for the clean-up of the doe. He also agreed that the people that were there would be in a better position to say what happened at that scene, but further testified that that was not what Petitioner said to him.

On cross examination, Mr. Loucks agreed that he was not saying that Petitioner injured her left shoulder while lifting a welder, but that he was telling everyone about the conversation that Petitioner brought to his attention. He agreed that he was not saying that Petitioner injured her left shoulder while lifting a compressor.

On cross examination, Mr. Loucks denied being aware of the existence of the CD portraying someone lifting a hood. He testified that he did not know the person that was on the video. He agreed that there were different types of trucks at his organization, and that some were taller than others. He also agreed that people were of different heights. Mr. Loucks agreed that it was possible that trucks sitting out in the winter might be harder to unlatch as compared to trucks sitting out in July.

On cross examination, Mr. Loucks testified that he did not know why Petitioner was not hired back and that it was not his decision.

On redirect, Mr. Loucks testified that Petitioner continued to work her regular shift for the dealership in early January 2015, but that he could not give a specific date. He testified that following the alleged accident, Petitioner did not tell him that she needed medical attention for her left shoulder.

On redirect, Mr. Loucks denied that Petitioner advised him that there were others at the scene at the time that she shot the doe. When asked whether he recalled Petitioner advising him that someone other than she had lifted the compressor, Mr. Loucks responded that Petitioner told him that she removed the items herself.

On further cross examination, Mr. Loucks testified that he had the conversation with Petitioner about the welder and compressor in early 2015, but did not recall the exact date.

On rebuttal, Mr. Kapraun testified that Petitioner did not lift the compressor or welder, but that he did. He testified that they got it from Petitioner's mother after Petitioner's father had passed, and that he loaded it onto the truck. Mr. Kapraun denied that Petitioner loaded the items.

The Application for Adjustment of Claim was entered into evidence at the time of arbitration as Petitioner's Exhibit 1.

The medical records of UnityPoint Proctor First Care were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records reflect that Petitioner was seen on January 7, 2015, at which time it was noted that she stated that at work she takes pictures of trucks, that she was constantly opening/shutting parts of vehicles, that about two weeks ago she heard a pop when her arm was up and extended, and that her range of motion was limited in her left arm/shoulder. It was also noted that two weeks ago Petitioner reached up to close a truck hood and her left shoulder popped, that it had been hurting since that time, and that she had no problems lifting it or moving it behind her body. It was noted that Petitioner's left shoulder subacromial bursa was injected, as was the left anterior capsule/coracoid process. The diagnosis was noted to be that of left shoulder pain. Petitioner was recommended to undergo x-rays of the left shoulder, was recommended to alternate ice/heat to the left shoulder, was given range of motion exercises, and was recommended to return to work with no overhead work. (PX2).

The records of UnityPoint Proctor First Care reflect that Petitioner was seen on January 27, 2015, at which time it was noted that she was seen for a two-week follow-up with left shoulder pain. It was noted that Petitioner stated that it was not any better, that she stated that she felt better for a day and a half after the steroid injection and then went back to baseline pain, that she had difficulty with abduction and was noting crepitation now, and that she was requiring pain medication for sleep. Petitioner was given a left shoulder injection with an intraarticular approach. The assessment was noted to be that of left shoulder pain. Petitioner was given a referral for physical therapy and was recommended to undergo an MRI. Petitioner was also given prescriptions for Tramadol, Norco, and Naproxen, was recommended to return in two weeks, and was also given range of motion exercises. At the time of the March 19, 2015 visit, it was noted that Petitioner had had three injections with little relief and that she had been approved for physical therapy and an MRI. It was noted that Petitioner had pain above shoulder and that she had pain with pushing upward and outward, that she was unable to put her bra on or brush her hair, and that her shoulder was affecting her daily living. The assessment was noted to be that of left shoulder pain. Petitioner was recommended to continue follow-up with physical therapy and the MRI, and was educated on over-the-counter products for comfort/pain. (PX2).

The records of UnityPoint Proctor First Care reflect that Petitioner underwent x-rays of the left shoulder on January 7, 2015, which were interpreted as revealing no acute bony injuries of the left shoulder with evidence of osteoarthrosis. Petitioner underwent an MRI of the shoulder at Peoria Imaging Center on March 27, 2015, which was interpreted as revealing (1) partial-thickness intrasubstance tear supraspinatus tendon footprint, 5 mm medial-lateral, involving 50% of the medial-lateral width of the footprint and 10 mm anteroposterior dimension; (2) moderate to advanced glenohumeral osteoarthrosis; there are intraarticular loose bodies within the subscapularis bursa and long biceps tendon sheath; (3) moderate subscapularis tendinosis without a tear; (4) mild acromioclavicular osteoarthrosis. (PX2).

The medical records of Midwest Orthopaedic Center were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that Petitioner was issued a Return to Work slip by Dr. Merkley on November 15, 2017, allowing her to return to work with restrictions of lift as tolerate with both hands to waist level, 10-pound waist to shoulder level lift with the left arm, and no work above shoulder level. It was noted that Petitioner's restrictions were permanent, that she was disabled from her previous job due to total shoulder arthroplasty, and that she was at maximum medical improvement. At the time of the November 15, 2017 visit, it was noted that Petitioner had plateaued and had been discharged from therapy, that she did not have pain at the shoulder, and that she complained of a sense of pressure or tightness. The impression was noted to be that of reverse arthroplasty, left shoulder. It was noted that Petitioner had reached maximum medical improvement, that she would be released with permanent restrictions of two-hand lift to tolerance at waist level, 10-pounds waist to shoulder level lift with the left upper extremity, and no repetitive above-shoulder level work. It was noted that in Dr. Merkley's opinion Petitioner was disabled from her previous level of occupation due to the presence of the reverse shoulder, and that she was recommended to follow-up as needed. (PX3).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on September 6, 2017, at which time it was noted that she continued to make improvement with therapy. The impression was noted to be that of reverse arthroplasty, left shoulder. It was noted that Petitioner had a 20-pound waist level restriction with both hands, 5-pounds above waist level with the left. It was noted that Petitioner was to be re-checked in two months and that she would continue outpatient therapy. Petitioner was issued a Return to Work slip on September 6, 2017, which noted that she could return to work with restrictions of 20-pound lift restriction with both hands at waist level, 5-pound lift restriction with left arm above waist-level. At the time of the July 19, 2017 visit, it was noted that Petitioner was six weeks out from her reverse arthroplasty. It was noted that Petitioner had gotten good pain relief, that she was now able to raise her arm overhead and that she was pleased with this, and that she had not been able to do that for the past year and a half. The impression was noted to be that of reverse arthroplasty, left shoulder. Petitioner was

recommended to continue outpatient therapy and was recommended not to lift anything more than 5 pounds at that time. Petitioner was recommended to return in six weeks, at which time additional x-rays would be performed. Petitioner was also issued a Return to Work slip dated July 19, 2017, which noted that she was totally unable to return to work due to surgery for six weeks. (PX3).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on June 21, 2017, at which time it was noted that she returned after revision reverse arthroplasty. It was noted that Petitioner was doing well and that she noted a complete change in her pain symptoms. The impression was noted to be that of revision reverse total shoulder arthroplasty, left shoulder. Petitioner was recommended to continue outpatient therapy, was recommended not to lift more than 1-2 pounds, and was recommended to return for a re-check in four weeks with x-rays. Included with the records of Midwest Orthopaedic Center was the Operative Note dated June 6, 2017, which noted that Petitioner underwent explantation of left total shoulder arthroplasty with revision to reverse total shoulder arthroplasty by Dr. Merkley for a pre- and post-operative diagnosis of painful left shoulder arthroplasty. (PX3).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on May 15, 2017, at which time it was noted that the EMG/NCV showed that she had no evidence of axillary or suprascapular nerve neuropathy, but that it did show that she had some left medial nerve compression. It was noted that Petitioner was interested in proceeding with conversion of her OBO arthroplasty to an anatomic arthroplasty within an onlay glenoid component. Petitioner was issued a Return to Work slip dated March 27, 2017, which noted that she was totally unable to return to work due to her injury until further notice. At the time of the March 27, 2017 visit, it was noted that Petitioner was not making progress with therapy and that she seemed to be worsening. The impression was noted to be that of painful arthroplasty, left shoulder. It was noted that they were going to obtain an EMG/NCV to make sure that there was not a neurologic reason that Petitioner was having difficulty raising the arm and was still painful. It was noted that in lieu of any positive findings on the EMG/NCV, Dr. Merkley had nothing left to offer Petitioner other than explantation of her Arthrosurface OVO implants and conversion to a total shoulder with only an onlay-type glenoid. Petitioner was recommended to return after she had undergone the EMG/NCV, and it was noted that her work restrictions remained as per previous. (PX3).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on February 1, 2017, at which time it was noted that she was six weeks out from her decompression and biopsy. It was noted that Petitioner continued to complain of pain that was bursal in nature, and that she had been doing therapy once a week and was making slow progress. It was noted that Petitioner had no pain with passive range of motion at her side, but did have pain when she tried to forward elevate. The assessment was noted to be that of status post left shoulder arthroscopy with biopsy and subacromial decompression bursectomy. Petitioner was recommended to continue therapy. It was noted that as far as work was concerned, Dr. Merkley recommended keeping Petitioner off work as she had to get in and out of a truck and use her arm to pull herself up, and that she would not be able to do this. It was noted that Dr. Merkley wanted to limit Petitioner to a 5-pound lift restriction at waist level, and that she was to return for a re-check in six weeks. Petitioner was issued a Return to Work slip dated February 1, 2017, which noted that she was totally unable to return to work due to her injury for six weeks. (PX3).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on January 4, 2017, at which time it was noted that she returned following arthroscopy with biopsy, culture, and decompression. The impression was noted to be that of recalcitrant let shoulder pain after resurfacing arthroplasty. It was noted that the findings on Petitioner's biopsy may represent particulate wear, and that if her pain persisted they may need to consider revising her. It was noted that they were going to re-check an x-ray in March, which would be at one year to make sure that there was no osteolysis or loosening of the implants. It was also noted that no loosening was identified at the time of arthroscopy. Petitioner was recommended to return in four weeks. Petitioner was issued a Return to Work slip dated January 4, 2017, which noted that

she could return to work with restrictions of no use of the left arm. At the time of the April 21, 2016 visit, it was noted that Petitioner underwent an arthrogram which showed that there was no contrast extravasation into the subdeltoid bursa, and that she continued to have pain with overhead range of motion activities. The impression was noted to be that of (1) status post glenohumeral resurfacing, left shoulder; (2) subacromial bursitis and impingement, left shoulder. Petitioner was recommended a diagnostic arthroscopy with decompression, debridement, and possible synovial cultures. It was noted that Petitioner did not have any evidence of infection, but that with persistent pain it needed to be a consideration. It was also noted that the estimated maximum medical improvement after the debridement would be 2-3 months post-operatively. (PX3).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on March 24, 2016 for a left shoulder arthrogram, which was interpreted as revealing no evidence of full-thickness rotator cuff tear; no extent of intraarticular contrast into the subacromial/subdeltoid bursa. Petitioner was issued a Return to Work slip dated March 8, 2016, which noted that she was to continue her current work restrictions until further notice. At the time of the March 8, 2016 visit, it was noted that Petitioner continued to have pain with overhead activity, that she had no pain at waist level, that the pain did not awaken her at night, and that she described it as a sharp catch with certain movements. The impression was noted to be that of (1) status post resurfacing arthroplasty of the left glenohumeral joint; (2) subacromial bursitis with possible rotator cuff tear. Petitioner was recommended an arthrogram to evaluate her rotator cuff. It was noted that it was possible that with the improvement in Petitioner's motion, she had developed some cuff pathology. Petitioner was recommended to return after she had undergone the arthrogram, and it was noted that restrictions were given and documented in her status report. (PX3).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on December 4, 2015, at which time it was noted that she was making progress but still noted weakness and some loss of overhead reaching. The impression was noted to be that of left shoulder resurfacing arthroplasty. It was noted that Petitioner still had some fairly significant supraspinatus weakness, that her work restrictions at that point would be lift as tolerated to waist level, 10-pounds waist to shoulder lift restriction for repetitive use, and no repetitive overhead reaching or work with the shoulder. It was also noted that Petitioner was to be re-checked in three months. Petitioner was issued a Return to Work slip dated December 4, 2015, which noted that she could return to work with restrictions of may lift as tolerated at waist level, 10-pound lift restriction for repetitive use waist to shoulder level, no repetitive use above shoulder level, and no shoveling. It was noted that the restrictions were in effect for three months. At the time of the October 23, 2015 visit, it was noted that Petitioner was four months out from resurfacing arthroplasty at the left shoulder and that she did well at waist level. It was noted that Petitioner noted some anterior and lateral pain with raising the arm overhead and abduction. The impression was noted to be that of (1) status post resurfacing arthroplasty, left shoulder; (2) subacromial bursitis, left shoulder. It was noted that Petitioner's symptoms seemed to be mainly bursal at this point, and that it seemed to almost be impingement-related. It was noted that Petitioner was injected in the subdeltoid bursa, and that she was continue therapy for range of motion and strengthening. It was also noted that Dr. Merkley was to lift Petitioner's restrictions and that she was to return for a re-check in six weeks. Petitioner was issued a Return to Work slip dated October 23, 2015, which noted that she could return to work with restrictions of waist-level lifting as tolerated and 10-pound lift restriction waist to shoulder level. (PX3).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on September 11, 2015, at which time it was noted that she was about 2½ months out from resurfacing arthroplasty of the left shoulder and was doing well. It was noted that Petitioner still noted some mild anterior pain, that it was low-grade, and that she noted it when she raised the arm. The impression was noted to be that of resurfacing arthroplasty, left shoulder. It was noted that Petitioner could have a 20-pound lift restriction at waist level, and that they would re-check her in 6-8 weeks and anticipated release at that point. Petitioner was issued a Return to Work slip dated September 11, 2015, which noted that she could return to work with restrictions

of 20-pound waist level lift. At the time of the July 28, 2015 visit, it was noted that Petitioner was six weeks out from glenohumeral resurfacing arthroplasty at the left shoulder, and that she had made some mild progress with therapy but still noted moderate pain. The impression was noted to be that of glenohumeral arthritis, left shoulder. Petitioner was recommended to continue outpatient therapy, and it was noted that she wished to transfer to Midwest Orthopaedic Center. Petitioner was recommended to return in six weeks. Petitioner was also issued a Return to Work slip dated July 28, 2015, which noted that she could return to work with restrictions of 2-pound lift restriction and no above shoulder-level work. (PX3).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on June 30, 2015, at which time it was noted that she returned following resurfacing arthroplasty at the left shoulder. It was noted that two views of the left shoulder showed that the implants were stable. Petitioner was recommended to start outpatient therapy. It was noted that Petitioner was off work at that point and was to return for a re-check in four weeks. Petitioner was issued a Return to Work slip dated June 30, 2015, which noted that she was totally unable to work until further notice. At the time of the April 13, 2015 visit, it was noted that Petitioner injured her shoulder on December 29th while lifting a hood. It was noted that Petitioner felt a pop at the shoulder and had developed burning pain, that the pain was constantly rated as 3 on a scale of 10 but with exacerbation would reach a 7/10, and that it was aggravated by reaching, pulling, and lifting. It was noted that Petitioner had had two corticosteroid injections without longstanding relief, that she had been on restricted duty at work, that the pain did awaken her at night, and that it did not radiate past the elbow. It was noted that there was no associated numbness or tingling, that Petitioner denied any previous issues at the shoulder, and that she was seen at Proctor First Care and had undergone an MRI of the shoulder. The impression was noted to be that of aggravation of glenohumeral arthrosis, left shoulder. It was noted that Dr. Merkley opined that the described work injury could represent an aggravation of Petitioner's glenohumeral arthrosis by production of the cartilaginous loose bodies. It was further noted that Petitioner's symptoms seemed to be related to motion and loading of the glenohumeral joint, and that the supraspinatus partial tear most likely was degenerative in nature. It was also noted that various treatment options were discussed, including the possibility of a glenohumeral resurfacing such as the Arthrosurface system/OVO system. It was noted that Petitioner was going to consider her options and would seek workman's compensation approval based on her decision. It was further noted that Petitioner could continue to work under her previous work restrictions. (PX3).

The June 17, 2015 Operative Report was entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The report reflects that Petitioner underwent arthrosurface OVO, resurfacing arthroplasty of the left shoulder by Dr. Merkley on that date for a pre- and post-operative diagnosis of aggravation of glenohumeral arthrosis, left shoulder. (PX4).

The December 20, 2016 Operative Report was entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The report reflects that Petitioner underwent (1) arthroscopy with glenohumeral debridement and synovial biopsy, left shoulder; (2) arthroscopic decompression and bursectomy, left shoulder by Dr. Merkley on that date for a pre- and post-operative diagnosis of recalcitrant left shoulder pain, status post glenohumeral arthroplasty, left shoulder. (PX5).

The transcript of the deposition of Dr. Michael Merkley dated October 7, 2016 was entered into evidence at the time of arbitration as Petitioner's Exhibit 6. Dr. Merkley testified that he is board-certified in orthopedic surgery. He testified that 80% of his practice surrounds the shoulder and that 20% of his practice surrounds the knee. (PX6).

Dr. Merkley testified that he first saw Petitioner on April 13, 2015, at which time she gave a history that she was right-hand dominant, that she was employed as a photographer for Uftring Motors, that she related an injury from December that she felt while lifting a hood, and that she stated that she felt a pop at

the shoulder and since then developed burning pain in the shoulder. He testified that Petitioner stated that she had constant pain which she rated as 3/10, but that exacerbations would reach 7/10. He testified that Petitioner stated that her shoulder pain was aggravated by reaching, pulling, and lifting, that she had had two previous injections without longstanding relief, and that she had been working on restricted duty. He testified that Petitioner's pain awoke her at night, that there was no radiation of the pain or numbness or tingling, that she had undergone an MRI, and that her initial treatment was through Proctor First Care. (PX6).

Dr. Merkley testified that Petitioner's objective findings on physical examination were consistent with her subjective complaints of left shoulder pain. He testified that they took four views of the left shoulder, and that his interpretation was that there was narrowing of the glenohumeral joint space so the ball and socket joint showed narrowing, that there was no migration of the humeral head, that there was no narrowing of the acromial humeral space, and that there was osteophyte formation which was consistent with the glenohumeral arthritis. He testified that comparison to the outside MRI showed glenohumeral arthrosis with cartilaginous loose bodies, and what was noted as mild partial-thickness cuff tearing. He testified that his diagnosis was that Petitioner had an aggravation of her glenohumeral arthrosis at the left shoulder as it related to the described work injury occurring on December 29, 2014. (PX6).

Dr. Merkley testified that they discussed operative versus non-operative treatment. He testified that due to Petitioner's job demands he did not feel the total shoulder arthroplasty was the best option for her, and that she elected to proceed with a glenohumeral resurfacing arthroplasty. He testified that he had no evidence of Petitioner receiving any injections prior to December 29, 2014 to the shoulder prior to the work accident date, and that she denied previous problems at the shoulder to him. He testified that his opinion was that Petitioner had preexisting glenohumeral arthrosis, and that the work injury certainly could have exacerbated symptoms or caused aggravation by producing cartilaginous loose bodies. (PX6).

Dr. Merkley testified that Petitioner underwent surgery on June 7, 2015, at which time she underwent an arthrosurface OVO, resurfacing arthroplasty of the left shoulder. He testified that loose bodies were present in the shoulder when surgery was performed, and that there was also a large loose body present in the bicipital sheath. He testified that the accident of December 29, 2014 could have been responsible for the cartilaginous loose bodies seen in surgery. He further testified that if his medical records supported a six-week period where he took Petitioner off work completely, this would be consistent with his practice for shoulder replacements as well as rotator cuff repairs. (PX6).

Dr. Merkley testified that if the medical records indicated that Petitioner came back to the office on or about July 28, 2015 and there was discussion of a lifting restriction of two pounds, this was consistent with the progression of someone returning to work and therapy. He agreed that on July 28, 2015, he issued a lifting restriction of no lifting over two pounds and no above-shoulder work. He further agreed that as of the September 11, 2015 visit, the weight restriction was lifted to 20-pounds up to waist level, and that during this timeframe Petitioner was going through physical therapy. (PX6).

Dr. Merkley testified that when he saw Petitioner on October 23, 2015, she stated that she did well at waist-level but still noted pain raising her arm overhead as well as into abduction. He testified that this was not an abnormal complaint, but that Petitioner's symptoms were more than he would have liked to see at that point. He testified that the impression as of October 23rd was that of status post resurfacing arthroplasty with some persistent bursitis at the left shoulder. He testified that the bursitis could be related to the surgery, that it could be simply persistent weakness of the rotator cuff, that it could be that Petitioner had recalcitrant bursitis, or that it could be related to the implant geometry and the fact that the surgery improved Petitioner's range of motion allowing impingement. He testified that they attempted an anti-inflammatory corticosteroid injection at the subacromial bursa, and decreased Petitioner's lifting restriction to 10 pounds. (PX6).

Dr. Merkley testified that he saw Petitioner again on December 4, 2015, at which time she stated that she was making progress but still noted weakness and some loss of ability to reach overhead due to pain. He testified that as of that date he still had restrictions on Petitioner of lifting as tolerated to waist level, 10-pound lift restriction for repetitive use waist to shoulder level, no repetitive use above shoulder level, and no shoveling. He testified that Petitioner next returned on March 8, 2016, at which time she noted that she had no pain with use at waist level but continued to have pain with overhead activities, which she described as a sharp catching. He testified that he gave an impression of subacromial bursitis with possible rotator cuff tear, as Petitioner certainly had bursitis and one had to question whether she had some cuff tendinosis or partial cuff tearing that was responsible for the bursitis. He testified that he recommended that they do an arthrogram to make sure that there was not a full-thickness tear at the cuff. He further testified that Petitioner's work restrictions were the same as the previous visit. (PX6).

Dr. Merkley testified that on March 24, 2016 the arthrogram was performed, and that there was no extravasation of the contrast into the bursa which was consistent with no evidence of full-thickness rotator cuff tear. He testified that he saw Petitioner on April 21, 2016, at which time they discussed the arthrogram. He testified that his recommendation, due to Petitioner's persistent pain, was to do an arthroscopy to obtain cultures to rule out an infection, as well as do a debridement and a decompression to relieve pressure on her rotator cuff. He agreed that as of April 21st, his restrictions were the same that he had placed in the past. (PX6).

Dr. Merkley testified that he was of the opinion that, from the time that Petitioner was put on restrictions and was off work from the surgical date up to April 21, 2016, he believed that it was related to the surgery that was related to the work injury. He testified that from April 21, 2016, assuming nothing had really changed from a physical standpoint until the deposition, the restrictions would remain and would be related. He testified that, as to the diagnostic arthroscopy, he believed that it was related to Petitioner's surgery, which he believed was related to her work injury. He further testified that he believed that the care and treatment provided to date was reasonable and necessary to treat Petitioner for the condition that she suffered. (PX6).

When given a hypothetical question asking him to assume various facts about Petitioner's alleged accident, her hunting trip, and her post-accident work status, Dr. Merkley testified that assuming those facts to be true, it was still his opinion that the condition he treated and Petitioner's diagnosis were related to the described work injury, and that shared lifting up to 20-pounds waist to shoulder level should be tolerable in that situation. (PX6).

On cross examination, Dr. Merkley agreed that he began treating Petitioner 4½ months after her work injury. He testified that he did not believe that he had the records from Proctor when Petitioner first came in. He agreed that when he first saw Petitioner, he diagnosed her with preexisting glenohumeral arthrosis and a partial supraspinatus tear. He testified that he believed that the partial tear was degenerative. He testified that Petitioner told him that she injured her arm on December 29, 2014 while lifting a hood of a truck, but that he did not know which kind of truck. When asked whether it would make a difference if Petitioner was lifting or closing the hood, Dr. Merkley responded that he did not and that he thought simply the weight of the hood on the arm and the position of the arm relative to her body were the important factors. When asked whether Petitioner gave him an estimate of how heavy the hood was, Dr. Merkley responded that he did not recall. (PX6).

On cross examination when asked when he first evaluated Petitioner whether there were other activities non-work-related that she discussed with him that could have led to an aggravation of her condition, Dr. Merkley responded that Petitioner stated that she had not had any previous issues and that he was inferring based on that statement that she did not relate any previous histories or injuries or activities

that caused pain at her shoulder. He testified that he did not, to his recollection, have a discussion with Petitioner about any of her hobbies or recreational activities. (PX6).

On cross examination when asked whether, when harvesting a deer, lifting it onto a sled could have caused Petitioner's injuries, Dr. Merkley responded that he assumed that a deer weighed more than 20 pounds and that if she was pulling or lifting a deer above waist-level, it could aggravate shoulder pain. He testified that when he first saw Petitioner, he continued her under her previous work restrictions from Proctor First Care but that he did not review those records. When asked whether in his opinion Petitioner would have been able to go turkey hunting in her condition as of April 13, 2015, Dr. Merkley responded that safe lifting – *i.e.,* lifting with both arms or holding a gun with both arms – up to 20 pounds would be safe from a medical standpoint. (PX6).

On cross examination, Dr. Merkley testified that he had not been provided any of the Section 12 reports of Dr. Bare. When asked whether Petitioner told him when he first evaluated her that she was unable to lift her left arm after the injury, Dr. Merkley responded that he did not recall and did not have specific documentation of that. When asked to assume that was true that Petitioner was unable to lift her left arm after the injury and whether she would have been able to go deer hunting, Dr. Merkley responded that it would be hard to hold a gun if one could not raise their left arm at all. (PX6).

On redirect when asked whether laying and putting the gun on a log and taking a shot would cause the problem that he saw, Dr. Merkley responded that it typically would not. He agreed that counsel had not given him anything to change his opinions from direct examination. (PX6).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 7.

The transcript of the deposition of Dr. Aaron Bare dated November 30, 2016 was entered into evidence at the time of arbitration as Respondent's Exhibit 1. Dr. Bare testified that he is an orthopedic surgeon, and that he specialized in treatment of shoulder and knee injuries. He testified that he is board-certified in orthopedic surgery. (RX1).

Dr. Bare testified that he saw Petitioner for an IME on June 1, 2016, at which time she gave a history that she was employed at Chevrolet and that she told him that she was lifting the hood of a car or a vehicle and felt a pop in her shoulder. He testified that Petitioner's diagnosis was shoulder pain following shoulder replacement. When asked of his opinion at the time of the examination as to whether Petitioner's condition was related to her work injury, Dr. Bare responded that based upon conflicting records and the history given to him that was not accurate, he thought that there was a high likelihood that her pain stemmed from an injury that occurred outside of work, or at least contributed to that, and therefore he did not believe that the episode that Petitioner reported that reportedly occurred at work caused the need for surgery. (RX1).

When asked if the act of lifting a car hood would be able to cause a degeneration of Petitioner's preexisting condition, Dr. Bare responded that what it could do for someone who had mild degenerative wear and tear in any joint was to cause a temporary aggravation of a preexisting problem, but that it would not cause the problem nor would it cause an acceleration or deterioration of the preexisting problem. Dr. Bare confirmed that during his examination he asked Petitioner about any recreational activities that she engaged in between the time of the alleged accident and when she reported the accident, and that they spent a fair amount of time talking about this and that it got a little "heated." He testified that after reviewing the cover letter, the history, and the records, there was some concern about Petitioner having been on a hunting trip after the reported accident and that they talked about it for 5-10 minutes. He testified that Petitioner initially absolutely denied it, and that she denied it with the male that was also with her who he presumed was her husband. He testified that both individuals adamantly denied it several times, but when he showed

some records that supported the fact that she was on a hunting trip, Petitioner eventually admitted that that was the case and then was also adamant that it was not at all related to her shoulder. When asked when he initially asked the question whether he believed that Petitioner was intentionally untruthful, Dr. Bare responded in the affirmative. (RX1).

Dr. Bare agreed that he reviewed records from the Illinois Department of Natural Resources which were provided to him prior to the examination. He agreed that after confronting Petitioner about the hunting records, she admitted to hunting but stated that it did not affect her shoulder. After having been directed to his report where he noted that Petitioner stated that she could not lift her arm after the accident and whether, in his opinion, with the injury occurring to her non-dominant arm would she have been able to go hunting, Dr. Bare responded in the negative. He testified that it had been a few years since he had hunted pheasants and ducks, but that if one was going to hunt and kill a deer with a rifle one would need to use two arms and, if Petitioner was adamant she could not lift her arm, it was essentially impossible for her to be able to hunt. He testified that Petitioner did not have much of an answer for him as to how or why, that she got very silent in the room, and that he had a hard time getting more information out of her, but that he thought at that point in time it was pretty obvious that her history to him did not correlate with the medical records. (RX1).

When posed a hypothetical as to whether an individual with Petitioner's shoulder condition would be able to climb a ladder, Dr. Bare responded that he thought that climbing a ladder with one hand would be extremely challenging and very unlikely considering one would probably have equipment or gear with them. When posed a hypothetical as to the use of a tree stand where using both arms to push one's self up and then a pulley system lifted the knees and having been asked whether an individual in Petitioner's condition would be able to physically from their knees push themselves up using their arms, Dr. Bare responded that he could not say with a high degree of medical certainty one way or the other, but that he could say that Petitioner essentially told him that she had limited to no functionality of her arm, that she could not lift it, and that she could not move it. He testified that he had a hard time believing that Petitioner could push herself up with good portion of her weight on her arm considering what she told him in that she was, for the most part, not functional. (RX1).

When asked whether a person in Petitioner's condition would be able to use their non-dominant arm to stabilize a shotgun or hold their arm parallel to the ground at shoulder-level to stabilize the shotgun, Dr. Bare responded that it required one to hold the arm up at least 80-90 degrees of flexion and that, for an individual that said she could not move her arm, that was not possible. He testified that if one was in severe pain and was unable to lift their arm, one could not go on a hunting trip. When asked whether he believed that hunting and harvesting a deer would fall outside of a 20-pound shared lifting restriction, Dr. Bare responded that unless someone did it for her, she would have had to grab, haul, pull, and move the animal and that it was very unlikely that this person could do that. When asked whether the body mechanics involved in hunting and harvesting a deer had caused Petitioner's aggravation and then need for surgery assuming the work injury did not happen, Dr. Bare responded that he thought shooting a gun could have aggravated a preexisting condition in the shoulder. (RX1).

When asked of his opinion regarding causal connection of the alleged work injury to the diagnoses after reviewing the DNR document, Dr. Bare responded that in his opinion based upon the profound disparity in Petitioner's reports as to what happened and her history and what he documented in the records, he felt that considering there was a hunting trip that she was passionately denying that actually happened and the fact that she reported her pain after the hunting trip led him to believe that her condition probably was not facilitated by a work injury. He testified that the other thing that also made him concerned about Petitioner's history was the fact that this occurred in December 2014 and that she reported it about a month later when she said that she could not lift her arm. He testified that if it was an average individual who had

an injury and could not lift their arm, it was very unlikely that someone would take a month before they sought medical care. (RX1).

On cross examination, Dr. Bare agreed that he believed that Petitioner definitely had abnormal findings on exam, but that he did not detect that there were abnormal pain responses or anything of that nature. He testified that he thought that Petitioner's physical examination was consistent. He agreed that in reviewing the medical records he did not note in his report any evidence of inconsistencies, magnification, or malingering in any of the records that he reviewed. He agreed that had he noted those, he would have included that in his report. He agreed that he recommended that Petitioner may need additional treatment for her shoulder to see if there was a failure of the components. He agreed that he did not have any problem with continued medical management of Petitioner's condition, including the culture or arthroscopy to evaluate the situation. (RX1).

On cross examination, Dr. Bare agreed that he was in agreement with Dr. Merkley's restriction of a 10-pound weight limit and no lifting above chest-level. He agreed that chest-level was about the 80-90 degrees that he referred to. He agreed that when he looked at forward flexion he was talking about raising the arm in front of the body, and that 90 degrees was about chest-level. He agreed that he did not see any evidence of any preexisting treatment as to the left shoulder prior to December 29, 2014, including no therapy, injections, x-rays, MRIs, or orthopedic consults. He further testified that the arthritis that was found was extremely mild. (RX1).

On cross examination, Dr. Bare agreed that the medical records that he reviewed indicated that Petitioner's treatment for her left shoulder pain started about eight days after her reported injury. He testified that someone could wait 10 days for treatment, but that if someone had severe pain and could not lift their arm, most individuals would probably seek medical care within 24 hours. He testified that other than the time from her surgery, Petitioner was recommended to work on some type of modified work with her employer. He agreed that he saw no contraindication to that. (RX1).

On cross examination, Dr. Bare agreed that there were multiple components to doing surgery, including looking at the person's subjective complaints. He agreed that if a person was not having any symptoms or functional loss from the arthritic condition, generally he would not do any type of surgery absent a malignancy or something of that nature. He testified that, regardless of causation, he did not see where Petitioner's symptoms that she reported on January 7th when she went to Prompt Care ever resolved or returned to baseline of no pain or symptoms prior to her initial surgery. (RX1).

On cross examination, Dr. Bare agreed that he wrote in his report that the degenerative condition was present before the injury and that the injury, if it did occur, could have aggravated a preexisting condition. He agreed that the mechanism that Petitioner described of lifting hoods could be a mechanism to aggravate a preexisting degenerative condition. (RX1).

On cross examination, Dr. Bare testified that he had concerns including the fact that Petitioner said that she was in severe pain and could not lift her arm so he did not see how someone could go deer hunting, and that she was passionate about the fact that she did not hunt until he put in front of her the DNR records and then she changed her story and was pretty reserved in talking to him anymore. Dr. Bare denied that he was aware of any medical records that contained a history of Petitioner being injured deer hunting. He agreed that all of the medical records contained the history of the shoulder popping and involving the lifting of the hood. Dr. Bare agreed that he did not know whether Petitioner was in a tree stand or not. He testified that he did not have a recollection of what Petitioner did with the deer after it was killed. He further testified that he did not have any information as to the position in which Petitioner was hunting, such as either standing, in a prone position, or using a stump. (RX1).

On cross examination when posed with a hypothetical as to Petitioner's post-accident hunting activities and having been asked whether the episode of lifting the hood could be an aggravating factor or a causative factor in her symptoms and need for initial treatment, Dr. Bare responded in the affirmative and agreed that it was possible. He testified that he did not know if Petitioner's hunting trip was on her property. He agreed that at least one other person was with Petitioner when the deer was killed, and that this person came into the exam room with her. (RX1).

On redirect, Dr. Bare agreed that if the hypothetical facts were true, the aggravation from lifting the car hood would have been a temporary aggravation. He agreed that the individual with Petitioner during the examination was with her on the hunting trip in question. He testified that he never specifically talked with the man, and that Petitioner and the man would converse. (RX1).

On further cross examination, Dr. Bare testified that he was not aware that Petitioner ever returned to her pre-functional level. (RX1).

The Narrative Report of Dr. Aaron Bare dated March 21, 2018 was entered into evidence at the time of arbitration as Respondent's Exhibit 2. The report reflects that Petitioner was re-evaluated on March 21, 2018, at which time she reported that she had minimal pain but that she felt weak, that she said that she had not regained full functional range of motion, that she said that she had completed physical therapy and had been released from care from her doctor, and that overall she felt that the reverse shoulder arthroplasty had offered her some relief from her symptoms and had overall functional clinical improvement. It was noted that Petitioner felt that the shoulder replacement had helped her pain but not necessarily her range of motion, and that she was now over nine months following the revision reconstructive surgery to the reverse replacement. It was noted that Petitioner stated that she had limitation with reaching and lifting, that she could reach above shoulder-level but not much above eye-level, that she had no radicular complaints, that she had no neck pain or radiating pain down the arm, and that she had no evidence of instability. (RX2).

The report reflects that Dr. Bare's diagnosis was that of left shoulder status post conversion total shoulder arthroplasty to reverse shoulder arthroplasty. It was noted that Dr. Bare opined that Petitioner had gotten better following the reverse shoulder arthroplasty procedure and was doing reasonably well, that she had functional range of motion with limited to no pain, and that she was now nine months after the procedure and had essentially reached maximum medical improvement. It was noted that Petitioner had some restrictions of range of motion and may have some functional limitations. It was also noted that Dr. Bare reviewed Petitioner's job description analysis as a detailer at the Chevrolet dealership and that it required her to take multiple pictures of vehicles and sometimes clean vehicles, such as removing snow. It was noted that it also documented a job description analysis that Petitioner lifted less than 5 pounds and no more than that. It was noted that Dr. Bare opined that Petitioner was capable of doing most of her normal job and that he agreed with Dr. Merkley that no repetitive reaching above the shoulder was appropriate, but that Petitioner could do that activity occasionally. It was noted that if Petitioner needed to occasionally lift and close the hood of a vehicle, she should be able to do that without much difficulty. It was noted that Dr. Bare opined that Petitioner could return to work full duty without restrictions. The report further reflects that Dr. Bare opined that Petitioner had reached maximum medical improvement, that no further treatment was indicated or required, and that the records confirmed that she did go on a hunting trip less than a month after the injury and did land or process a deer on that trip. (RX2).

The report reflects that Dr. Bare opined that the treatment Petitioner had been given since his last evaluation had been reasonable and necessary, irrespective of causation. It was noted that Dr. Bare opined that the information given to him confirmed that Petitioner was on a hunting trip as had been suggested previously and that it had not changed his opinion regarding causation (*i.e.*, that there was no causal connection between the reported injury and need for shoulder treatment). It was noted that Petitioner agreed with the job description analysis that was provided to Dr. Bare, that she did mostly work with cars, that she

said that she had to reach above her head occasionally to the hood on cars and trucks and close these, and that she did not have to do this frequently. It was noted that it appeared that Petitioner's job description did fall under the guidance of the work restrictions given by her treating physician, and that if any discrepancy existed between Petitioner's treating physician and her work demands and her ability to return to work full duty, a functional capacity evaluation could be performed to check for validity and the definitive capabilities based upon the outcome of her shoulder procedure. (RX2).

The report reflects that Dr. Bare opined that Petitioner was capable of working unlimited work to about eye-level and that regarding her ability to work overhead, she could reach the arm up overhead occasionally and lift a hood and close a hood, but that she should not be doing that more than about 10 times per hour. It was noted that these were permanent restrictions and that Petitioner was capable of lifting 10-20 pounds to chest-level and probably 5-10 pounds occasionally above chest-level. It was noted that Dr. Bare further opined that Petitioner had reached maximum medical improvement, and that no further treatment was required, indicated, or necessary as it pertained to her shoulder. (RX2).

The Narrative Report of Dr. Aaron Bare dated May 21, 2018 was entered into evidence at the time of arbitration as Respondent's Exhibit 3. The report reflects that Dr. Bare indicated that what he attempted to relay in his narrative was the fact that while Petitioner has permanent restrictions, they should not affect her ability to work her full job demands. It was noted that Dr. Bare believed that Petitioner could work her normal job duties and job demands under the umbrella of permanent restrictions that he recommended. (RX3).

The Narrative Report of Dr. Aaron Bare dated August 10, 2019 was entered into evidence at the time of arbitration as Respondent's Exhibit 4. The report reflects that Dr. Bare reviewed the video dated July 16, 2019 which showed a nearly 5-minute video with a male undergoing the operation of lifting the hood of a truck. It was noted that Dr. Bare reviewed the video in its entirety. It was noted that it was demonstrated a couple of times that the operation required minimal lifting forces and could be done with one or two fingers. It was noted that Dr. Bare opined that the video "shine[d] light" on the mechanism that Petitioner reported to her shoulder, and that the lifting event would not have caused any shoulder pathology to her shoulder. It was noted that it required minimal to no force to lift up a hood, that the hood did not have to be held open, that it did not require any substantial force to lift the hood open, and that Petitioner could continue to do this type of lifting and lifting hoods indefinitely. It was also noted that Dr. Bare further opined that the permanent restrictions that he recommended would include unlimited lifting of hoods, such as this type of vehicle and similar vehicles. (RX4).

The report reflects that Dr. Bare further indicated that the mechanism of lifting a hood would not have caused shoulder pathology or tears or structural pathology of the shoulder. It was noted that Dr. Bare previously opined that Petitioner's need for surgery and treatment was not causally related to the work injury as she went on a hunting trip after that, that his opinions had not changed, and that the video supported his claims that her need for shoulder treatment was likely not a result of what she claimed happened on December 29, 2014. (RX4).

The transcript of the deposition of David Patsavas dated March 20, 2019 was entered into evidence at the time of arbitration as Respondent's Exhibit 5. Mr. Patsavas testified that he is a certified rehabilitation consultant and that he provides vocational evaluations and vocational rehabilitation services in the workers' compensation system, as well as career counseling and career assistance outside the workers' compensation system. He testified that he has been working as a professional rehabilitation counselor since 1982. (RX5).

Mr. Patsavas testified that he conducted a labor market survey and was asked to render findings and opinions regarding Petitioner's employability and earning capacity. He testified that he prepared a labor market research report dated June 21, 2018. He testified that it was his understanding that Petitioner was employed as an auto detailer with Jim McComb Chevrolet in 2014 and that she reported a work-related

injury of December 29, 2014. He testified that his understanding was that the injury was to Petitioner's left upper extremity/left shoulder, and that she underwent three surgical procedures by Dr. Merkley. He testified that the permanent restrictions issued by Dr. Merkley on November 15, 2017 were that of two-hand lift to tolerance at waist level, 10-pounds waist to shoulder-level lift with left upper extremity, and no repetitive above shoulder-level work. He testified that as he understood the restrictions, there was nothing in the restriction note that prohibited infrequent or occasional use of the left arm above shoulder-level. He testified that he was unaware if there were any restrictions to the right upper extremity, and that it was his understanding that there were no medical restrictions to the uninjured right arm. (RX5).

Mr. Patsavas testified that he also reviewed reports authored by Dr. Bare, and that his opinions regarding permanent restrictions were that of lift up to 20 pounds chest-level on occasional basis, 5-10 pounds above chest level and prior to that unlimited work to above eye-level. He testified that Dr. Bare's opinion about opening and closing doors of cars, vehicles, and hoods of cars and vehicles was that Petitioner was capable of taking pictures with a camera, that she could open doors, and that she may not be able to lift hoods overhead and lift up hoods but otherwise could open car doors, truck doors, climb in and out of trucks, and take pictures. (RX5).

Mr. Patsavas testified that the only work history that was on Petitioner's application that he saw was that with the dealership where she was injured and that her application form indicated that she started in 2006. He testified that Petitioner was off work for a little bit of time after her original injury, that she did have to go back to work for several months in 2017, and then beyond that she was a high school graduate and nothing else as far as detail of prior work history. When asked what Petitioner was doing on a daily basis at Jim McComb Chevrolet, Mr. Patsavas responded that according to the job analysis she was responsible for taking pictures of new and used vehicles, loading the photos onto a desktop computer system, locating the vehicle by walking through the car lot, running the autos through an automatic car wash, at times having to dry off the vehicles utilizing a towel, looking under the hood at the engines, and taking pictures. He testified that according to the job analysis, the heaviest lift was five pounds. He further testified that Petitioner's occupation with the dealership did not require any climbing or crawling. (RX5).

Mr. Patsavas testified that the Dictionary of Occupational Titles would classify Petitioner's job duties in the Medium demand level and that, as to skill level, it would be unskilled Level 2. He testified that according to the information that he reviewed, Petitioner also loaded those photographs into a computer and that while there were no specific guidelines for this particular job, usually with computers it may move someone up to a semi-skilled type position. He testified that in his opinion, Petitioner's occupation at Jim McComb Chevrolet was unskilled to beginning level of semi-skilled. He testified that the physical demand level of Petitioner's employment, if he went by the job analysis, would be either Sedentary to Light. (RX5).

Mr. Patsavas testified that he performed a transferable skills analysis and that he selected those they could identify as realistic job opportunities within a certain geographic area where Petitioner lived. He testified that the results of his labor market survey included positions that he identified that were open and available at the time that he prepared the report. He testified that he was not asked to do direct job placement, and that the positions that were identified were advertised that would normally be within the categories of Sedentary to Light. He testified that there was nothing about Petitioner's injury and permanent restrictions that prevented her from holding a position or working in an occupation that required a lot of walking and standing. He agreed that it was his understanding that Petitioner also sat at a desk for about an hour a day working on a computer, and that he was not aware of anything about her injury or her permanent restrictions that prevented her from doing desk work. He testified that it was indicated in the job analysis that Petitioner would have to drive cars on occasion, and that he was not aware of anything about her injury or permanent restrictions that precluded her from driving. He further testified that Petitioner could do occasional infrequent drying of a car with a rag, so long as it was not repetitive, according to her permanent restrictions. (RX5).

Mr. Patsavas testified that based upon the labor market survey, it would appear that there would be employment opportunities available to Petitioner. He testified that, based on the results of the labor market survey, there was a stable market for Petitioner given her permanent restrictions. He testified that when he did the labor market research and the transferable skills analysis he also gathered wage data, and that it was his opinion that there was no diminishment of Petitioner's earning capacity based on the labor market survey. (RX5).

On cross examination, Mr. Patsavas testified that he had never met Jeff Loucks nor did he discuss the job analysis that he did with him. He testified that he did not meet with Petitioner, that it was a record review only, and that it was a blind labor market survey. He agreed that if he received a job description from an employer and met with the person, he would then go over that job description with the injured worker to see if there were any discrepancies in terms of the functions of the job. He testified that if there were discrepancies between the functions of the jobs as described by the employer versus the employee, he would investigate that further. (RX5).

On cross examination, Mr. Patsavas testified that if he found out that Petitioner's job required her to lift more than 10 pounds above her waist that could affect his opinions on the physical demand level that she could perform in the job, and that it could change his opinions or analysis in this case if her job description was different than what Mr. Loucks portrayed. He testified that he had no knowledge if Mr. Loucks had ever performed the job. He agreed that the job description was filled out February 8, 2015 and was coming from the insurance company, so they knew it was after Petitioner's reported injury. (RX5).

On cross examination, Mr. Patsavas agreed that he was unable to describe Petitioner. He testified that he did not know how tall Petitioner was and agreed that her height could actually make a difference in terms of work above waist- or chest-level if she was 5'11" versus 5'2". He agreed that he did not call Unity Point to inquire as to the height of their trays, how many trays they delivered, or the weight of the trays. He agreed that he indicated that Petitioner had a high school diploma and testified that that was what she put down on her application form. He agreed that since he did not talk to Petitioner, he did not get any further into additional educational courses or degrees that she might have. (RX5).

On cross examination, Mr. Patsavas agreed that when he met a person he evaluated how they presented, because it could affect his suggestions and ideas for identifying jobs or what they might do in the interview to increase their likelihood of obtaining employment. He agreed that he had had people that had worked in a career a long time and might be resistant to job evaluation and job searching. He agreed that this was something he was assessing when meeting with someone, to see if that was an area of weakness. He agreed that since he did not meet with Petitioner, he was not assessing how she presented or what her attitudes were towards finding gainful employment. (RX5).

On cross examination, Mr. Patsavas denied having contacted Petitioner's former employer to see if they would take her back as a detailer if she could do that job. He agreed that if he believed that Petitioner could do that job, that would be the first place to start. He testified that he did not know why Respondent had not taken Petitioner back. (RX5).

On cross examination, Mr. Patsavas agreed that Dr. Merkley gave the opinion that, due to her shoulder condition, Petitioner was disabled from her previous level of occupation. He testified that he did not know whether Dr. Merkley had had a chance to see the job description or whether he had an understanding of what the job duties were. He testified that if the individual described it correctly, the person that was going to know the most intimate details about their job was the person who did it. He agreed that Dr. Merkley had talked with Petitioner, as she had been in for numerous visits. (RX5).

On cross examination, Mr. Patsavas agreed that if Petitioner were actually limited to no work above her shoulder on the left side, that could change his analysis of available jobs. He agreed that a person's age

could be a factor in their ability to find work. He testified that age could be a factor in person's ability to learn to adapt to new lines of work. He testified that he did not know Petitioner's computer literacy beyond what was in the job description. He denied having knowledge of Petitioner's skills with Excel, Macs or Microsoft, Outlook or e-mailing, or Word. He further testified that he did not know if Petitioner could type. (RX5).

On cross examination, Mr. Patsavas testified that he did not have any knowledge of what experience Petitioner had in her work life experience of being a customer service representative where she was interacting with the public. He testified that he did know if Petitioner had experience working in stores behind a register. He agreed that if he met with her and did an assessment and he was considering customer service-type work, he would be evaluating Petitioner for a transferability of skills or skill ability to perform those duties. He agreed that since he had not met with Petitioner, he had not done so in this case. (RX5).

On cross examination, Mr. Patsavas testified that he did not know what skills Petitioner had managing people. He testified that he did not have any opinion as to Petitioner's communication skills. He agreed that as a CRC he relied upon the physician's restrictions and that he relied upon the physician's direction for a person's work capabilities. He agreed that he was aware that Petitioner was terminated by her employer and further agreed that it was in July 2017. He testified that a medical leave in an interview could be an obstacle or barrier to obtaining gainful employment depending on the job and how many people applied for it, the number of openings, etc. (RX5).

On cross examination, Mr. Patsavas agreed that he currently did active job placement in central Illinois. He testified that they had approximately eight people involved in active job placement in central Illinois. He testified that that he believed that they had actively placed about six people in the last 12 months in the central Illinois region. He further testified that he could not think of anyone that was age 59 or older in that subset of cases. (RX5).

On cross examination, Mr. Patsavas testified that he did not know what Mr. Loucks' definition of an essential job function was. He testified that he was not sure they were using it the way he was using that word. He agreed that with every job he had identified in the labor market research, he did not call any of the employers to get further details on the job requirements. He agreed that assembly work could be beyond Petitioner's restrictions, depending on the details. (RX5).

On cross examination when asked whether he believed that Petitioner's medical restrictions and age were a barrier or obstacle to gaining employment, Mr. Patsavas responded that for anyone that lost a job for whatever reason there were certain barriers that they had to overcome, but that there were positions that he believed would either be able to accommodate and/or within the Sedentary category that Petitioner may be employed with. (RX5).

On redirect, Mr. Patsavas agreed that Dr. Merkley would determine whether medical restrictions were needed depending on a particular patient's condition of ill-being. When asked whether, based on his experience, physicians who issued permanent restrictions for patients had experience with what was required for employment in various sectors of the economy, Mr. Patsavas responded that he did not think they had the same expertise levels that certified rehabilitation counseling would. He testified that he did not have any knowledge one way or the other as to whether Petitioner ever discussed her job functions or duties with Dr. Merkley. He testified that he did not know the basis of Dr. Merkley's opinion when he indicated that he did not think that Petitioner could go back to her occupation. (RX5).

On redirect, Mr. Patsavas agreed that he had encountered formal written job descriptions from many employers. He testified that not all employers had job descriptions in their companies. When asked whether there was a problem with the description provided, Mr. Patsavas responded that most of the checklists on the forms were standard, that he thought that one of the areas was that of essential versus non-

essential, and that as a vocational expert he probably would want more detail as to how that was defined. He agreed that his opinion as to Petitioner's employability was based on the vocational evidence that he reviewed in conjunction with the medical restrictions issued by Dr. Merkley. (RX5).

On redirect when asked if one were to assume that Petitioner's uninjured right arm was also her dominant arm and whether that would improve her ability to perform the essential tasks or duties of jobs in the Sedentary and Light categories, Mr. Patsavas responded that if it was a non-dominant hand and upper extremity that was injured, it was always beneficial for the injured individual to have more function. (RX5).

On further cross examination, Mr. Patsavas agreed that if he were actually doing job placement he would want to hear both sides as to job duties and also talk to the injured person to see how they described their job duties. He agreed that when he interviewed people he could find out if there were discrepancies. He agreed that in this case when he did his report, he was relying on Mr. Loucks' side of the story in terms of what Petitioner's job description was. (RX5).

The CD was entered into evidence at the time of arbitration as Respondent's Exhibit 6. The video clip was prepared on July 16, 2019 and features a white truck located in an indoor setting. The video clip was 4 minutes, 56 seconds in length. (RX6).

The TTD Pay Sheet was entered into evidence at the time of arbitration as Respondent's Exhibit 7. The Medical Pay Sheet was entered into evidence at the time of arbitration as Respondent's Exhibit 8. The E-Mail Dated August 14, 2017 regarding Short-Term Disability Benefits Paid was entered into evidence at the time of arbitration as Respondent's Exhibit 9.

The Prairie State Outdoors Article dated February 24, 2009 was entered into evidence at the time of arbitration as Respondent's Exhibit 10. The Journal Star Article dated December 11, 2008 was entered into evidence at the time of arbitration as Respondent's Exhibit 11. Both articles indicated that Petitioner had been hunting deer for 26 years. (RX10; RX11).

The Employee Timecard Report for December 27, 2014 to January 8, 2015 was entered into evidence at the time of arbitration as Respondent's Exhibit 12.

CONCLUSIONS OF LAW

With respect to disputed issue (C), the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that she sustained an accident on December 29, 2014 that arose out of and in the course of her employment with Respondent.

In the case at hand, the Arbitrator notes that there were numerous inconsistencies between Petitioner's testimony and the contemporaneous evidence and medical records which cause the Arbitrator to question the veracity of Petitioner's testimony regarding her unwitnessed alleged accident. As a result thereof, the Arbitrator places little evidentiary weight on Petitioner's testimony in this matter.

The Arbitrator notes that Petitioner alleges an injury to her left shoulder while performing the act of raising the hood on a truck. Petitioner testified that she had difficulty raising her left arm above chest-level subsequent to the alleged accident, yet the documentary evidence - and even Petitioner's own testimony - revealed that she continued working regular duty for some nine days (*i.e.,* ten days excluding the New Year's Day holiday) post-accident. (*See* RX12). In addition, on cross examination Petitioner

denied, as a 10-year employee of Respondent, having ever been told what the dealership's policy was about when employees had a work accident. Petitioner then testified that the only time she knew about it was when they had safety meetings, that Respondent indicated that if employees got hurt they were to let them know, and that she had attended a number of safety meetings. In addition, the evidence reveals that during the ten days between the alleged accident and the date on which she reported the alleged accident to Respondent, Petitioner apparently worked full duty with no complaints to anyone at work. The evidence further reveals that, during those same ten days, Petitioner required no medical treatment, as the first post-accident documented medical treatment was that of January 7, 2015. (PX2).

Related thereto, Petitioner testified that Respondent sent her to Prompt Care, and that she told the doctor how she had injured herself and how she felt. The medical records from Prompt Care dated January 7, 2015, however, noted that Petitioner stated that at work she takes pictures of trucks, that she was constantly opening/shutting parts of vehicles, that about two weeks ago she heard a pop when her arm was up and extended, and that her range of motion was limited in her left arm/shoulder. It was also noted that two weeks ago Petitioner reached up to close a truck hood and her left shoulder popped, that it had been hurting since that time, and that she had no problems lifting it or moving it behind her body. (PX2). The history of accident as contained in the medical records is inconsistent, however, with the history of accident as given by Petitioner at the time of arbitration. The Arbitrator further notes that Petitioner even disagreed with her own medical records at the time of arbitration, as she testified that it would be incorrect if the records of Dr. Merkley showed that, on November 15, 2017, she denied any shoulder pain. The medical records of Midwest Orthopaedic Center for the office visit of November 15, 2017, however, noted that Petitioner had plateaued and had been discharged from therapy, that she did not have pain at the shoulder, and that she complained of a sense of pressure or tightness. (*See* PX3).

In addition, the Arbitrator further notes that just four days after the alleged accident Petitioner apparently felt well enough to participate in deer hunting and was able to shoot a doe with a shotgun. Petitioner testified at the time of arbitration that she did not deny to Dr. Bare that she went hunting in January 2015. Dr. Bare, on the other hand, testified that Petitioner initially absolutely denied it, and that she denied it with the male that was also with her who he presumed was her husband. In fact, Dr. Bare further testified that both individuals adamantly denied it several times, but when he showed some records that supported the fact that she was on a hunting trip, Petitioner eventually admitted that that was the case and then was also adamant that it was not at all related to her shoulder. (RX1). As a result thereof, the Arbitrator places little evidentiary weight on Petitioner's testimony.

Having considered and reviewed the entirety of the evidence in this matter, the Arbitrator finds that Petitioner failed to prove by a preponderance of evidence that she sustained an accident on December 29, 2014 that arose out of and in the course of her employment. All benefits are denied. The remaining issues of causation, medical services, temporary total disability and the nature and extent of the injury are moot, and the Arbitrator makes no conclusions as to those issues.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	97WC039437
Case Name	JONES-RICHARD, ALITA v. CHICAGO BOARD OF EDUCATION
Consolidated Cases	No Consolidated Cases
Proceeding Type	REMAND Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0546
Number of Pages of Decision	5
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Mark Schaffner
Respondent Attorney	George Klauke

DATE FILED: 10/29/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alita Jones-Richard,

Petitioner,

vs. No.

Chicago Board of Education,

Respondent.

CORRECTED DECISION AND OPINION ON REMAND

This matter again comes before the Commission on remand from the June 24, 2021 order of the Circuit Court of Cook County.

On June 4, 1997, Petitioner, then a 40-year old physical education teacher, was pushed down a flight of six stairs by a student, and sustained multiple injuries. Following a July 3, 2014 arbitration hearing, the Arbitrator, in a February 13, 2015 decision,[1] found that: Petitioner's current condition of ill-being of both knees and feet were causally related to her work accident; Petitioner had not reached Maximum Medical Improvement (MMI); and that it was not yet appropriate to determine Petitioner's permanent disability. The Arbitrator awarded Petitioner her medical expenses, 836-3/7 weeks of TTD benefits,[2] and prospective medical care for her left foot including a surgical consultation with Dr. Kelikian and a re-evaluation of Petitioner by Dr. Hill.

In its March 28, 2016 decision, the Commission modified the Arbitrator's decision. The Commission reduced the TTD award, found Petitioner had reached MMI for her injuries, and was

[1] The Commission's November 5, 2020 Decision mistakenly referred to the Arbitrator's Decision as having been dated February 20, 2015. The correct date of the Arbitration Decision is February 13, 2015.
[2] For the periods 7/1/97 to 9/4/97; 7/1/98 to 9/4/98, and 10/31/98 to 7/3/14.

entitled to a permanency award of 20% body as a whole under §8(d)2. Following an appeal from the Commission, the Circuit Court entered an order dated May 3, 2019, in which it found the Commission had erred as a matter of law. That order set aside most of the Commission's findings, including that Petitioner had reached permanency for her condition, was not entitled to prospective medical care and was ineligible for maintenance benefits. The court set aside the Commission's reduction of the Arbitrator's award of TTD and medical expenses, and remanded the case to the Commission, "for determination as to the benefits due to Alita and for any further proceedings consistent with [its] order." Respondent filed an appeal of the Circuit Court's May 3, 2019 order to the Appellate Court, but that appeal was dismissed by the Appellate Court on March 27, 2020 for lack of jurisdiction.

In accordance with the Circuit Court's May 3, 2019 order, the Commission issued a new Decision and Opinion on Remand, on November 5, 2020. In that decision, the Commission vacated its March 28, 2016 decision and affirmed and adopted the Arbitrator's February 13, 2015 decision. In doing so, the Commission found, inter alia, that Petitioner had not reached MMI; that a determination as to permanent disability was not yet appropriate, and that Petitioner was in need of prospective medical care. The Commission reinstated the benefits awarded by the Arbitrator, and remanded the case to the Arbitrator for further proceedings consistent with its decision.[3]

Respondent appealed the Commission's November 5, 2020 decision to the Circuit Court. On June 24, 2021, the Circuit Court entered an order finding the Commission erred in failing to follow in full the directions of its May 3, 2019 remand order, before permitting an appeal. Specifically, the Circuit Court found the Commission had erred by including language, in its November 5, 2020 decision, which delayed further proceedings by the Arbitrator. The language in question stated that further proceedings by the Arbitrator would be delayed until, "after the latter of expiration of the time for filing a notice of intent to file for review in the Circuit Court has expired without the filing of such notice of intent, or after the time of completion of any judicial proceedings, if such a notice has been filed." The Circuit Court found the Commission's language, "necessarily compelled Plaintiff to file the instant appeal, or run the risk of being found barred from doing so."

The Circuit Court's June 24, 2021 order remanded this case back to the Commission, with a mandate to make a, "determination as to the benefits due" to Petitioner. The mandate was for the Commission to specifically include:

A. Findings as to when the claimant reached Maximum Medical Improvement (if she has done so yet);
B. The amount of Temporary Total Disability Benefits for which the claimant is eligible, and, potentially, the amount of Permanent Partial Disability benefits to award the claimant;
C. The amount of vocational rehabilitation to which the claimant is entitled.

[3] The Commission made no express finding regarding Petitioner's entitlement to vocational rehabilitation because that had not been an issue at Arbitration or on the initial Review.

The Circuit Court authorized the Commission to employ whatever methods it deemed necessary to comply with the Circuit Court's order, including remanding the case to the Arbitrator.

The Commission now finds again that Petitioner has not yet reached MMI, and that she is entitled to the TTD benefits which were awarded by the Arbitrator. At this time, based upon the evidence before it, the Commission is unable to make any determination as to what vocational rehabilitation, if any, the Petitioner may be entitled.

Because the Commission has no authority to admit further evidence on the issues not decided herein, it again remands this case to the Arbitrator for further proceedings for a determination of all remaining issues, including but not limited to: a further amount of temporary total compensation, maintenance benefits, medical expenses, prospective medical care, Petitioner's MMI date, vocational rehabilitation, or compensation for permanent disability, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980). In accordance with the Circuit Court's mandate, the Commission now omits from this decision the language delaying further proceedings before the arbitrator which the Circuit Court found was improper.

With regard to Respondent's Motion for Special Findings now pending before the Commission seeking information concerning how it reached its November 5, 2020 decision, that motion is denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that its Decision and Opinion on Remand dated November 5, 2020 is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the decision of the Arbitrator dated February 13, 2015 is affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $695.20/week for 836-3/7 weeks, commencing 7/1/1997 through 9/4/1997, 7/1/1998 through 9/4/1998, and 10/31/1998 through 7/3/2014, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services of $10,531.25, as provided in Section 8(a) and subject to Section 8.2 of the Act, as applicable.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for surgical consultation for Petitioner's left foot with Dr. Kelikian, followed by a re-evaluation of Petitioner by Dr. Hill.

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.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent's Motion for Special Findings is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that this case is remanded to the Arbitrator for further proceedings for a determination of all remaining issues, including but not limited to a further amount of temporary total compensation, maintenance benefits, medical expenses, prospective medical care, Petitioner's MMI date, vocational rehabilitation, or compensation for permanent disability, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

October 29, 2021

/s/ *Marc Parker*
Marc Parker

MP/mcp
068

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	11WC045732
Case Name	DUNN, JOHNNY M v. UNIVERSITY OF ILLINOIS
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0547
Number of Pages of Decision	12
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	David Feuer
Respondent Attorney	Brad Antonacci

DATE FILED: 10/30/2021

/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 COOK	)	☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☒ Modify all other issues moot- no need to address notice	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHNNY M. DUNN,

Petitioner,

vs. NO: 11 WC 45732

UNIVERSITY OF ILLINOIS,

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, and permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms the Arbitrator's decision finding Petitioner failed to prove accident. Based on this finding regarding accident, all other issues are rendered moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 5, 2020 is hereby, otherwise, affirmed and adopted.

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

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

Pursuant to Section 19(f)(1) of the Act, this decision is not subject to judicial review. *820 ILCS 305/19(f)(1) (West 2013)*.

October 30, 2021

o- 10/5/21
KAD/jsf

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION **21IWCC0547**

NOTICE OF ARBITRATOR DECISION

DUNN, JOHNNY
Employee/Petitioner

Case# **11WC045732**

UNIVERSITY OF ILLINOIS
Employer/Respondent

On 5/5/2020, 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 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:

0226 GOLDSTEIN BENDER & ROMANOFF
JUNIRA A CASTILLO
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

6205 HEYL ROYSTER VOELKER & ALLEN
BRAD ANTONACCI
33 N DEARBORN ST 7TH FL
CHICAGO, IL 60603

J. Dunn v. University of Illinois, 11 WC 045732

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

JOHNNY DUNN
Employee/Petitioner
v.
UNIVERSITY OF ILLINOIS
Employer/Respondent

Case # **11** WC **045732**

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 **11/16/2018 & 10/15/2019**. 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [x] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] 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. [x] Other **Statute of Limitations**

J. Dunn v. University of Illinois, 11 WC 045732

FINDINGS

On **October 18, 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.

In the year preceding the injury, Petitioner earned $**28,383.16**; the average weekly wage was $**545.83**.

On the date of accident, Petitioner was **66** years of age, ***single*** with **0** dependent children.

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

Respondent 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 on October 18, 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

May 4, 2020
Date

ICArbDec p. 2

MAY 5 - 2020

INTRODUCTORY

This case was tried on two days, November 16, 2018 and October 15, 2019. The Arbitrator redacted Petitioner's SSN from Respondent's Exhibit 1 and Petitioner's Exhibits 6, 10 and 12 in order to comply with Supreme Court Rule 138.

FINDINGS OF FACT

Petitioner was employed by Respondent as a food service laborer. He was hired in 2001. He would pull carts with food trays and serve patients with breakfast and lunch. He worked eight hour shifts and served trays to five floors. The carts had wheels and petitioner used an elevator to get to different floors. He testified that the carts had balance and maintenance issues.

Petitioner testified on October 15, 2019 that on October 18, 2011 he was pulling a cart and felt pain in his side, knee and back. He said that he went to his supervisor, who gave him a slip and he went to the doctor. He did not work after that day.

Petitioner initially claimed an accident date of October 24, 2011, according to the Application for Adjustment of Claim signed by him on December 11, 2011 (Resp. Ex. No. 10, Pet. Ex. No. 1) and the Request for Hearing that was admitted on the first day of trial, November 16, 2018. (Arb. Ex. No. 1) Respondent introduced wage records into evidence which document Petitioner was not working on October 24, 2011. (Resp. Ex. No. 3) Petitioner had been on Family Leave since October 19, 2011. Petitioner then amended his Application for Adjustment of Claim on January 7, 2019, to claim an accident date of October 18, 2011. (Pet. Ex. No. 1)

Petitioner completed an injury report on October 24, 2011. (Resp. Ex. No. 1, Pet. Ex. No. 6) According to that report, he claimed a date of injury of December 12, 2003. He stated that while pulling a food cart, he felt pain in his right hip and right knee area. He again noted on the form a second time that the injury occurred on December 12, 2003. Petitioner testified he knew in 2003 he had suffered an injury to his right hip and right knee, and knew it was related to work. He testified he never filed a workers' compensation claim for his 2003 work injury. Nowhere on the injury report form did he identify a work injury occurring in October 2011.

Petitioner testified he reported his alleged October accident to his supervisor, Ruth Kross. Ruth Kross testified at the request of Respondent on November 16, 2018, prior to the testimony of Petitioner being submitted. Kross was employed by Respondent as a food service manager on October 24, 2011 and had been so employed since June 12, 2006. Kross was self-employed as a consultant at the time of her testimony and was scheduled to return to her former job in the future. She was Petitioner's direct supervisor from the time that she started. She testified Petitioner's duties as a food sanitation laborer primarily involved passing out trays to patients. He would take carts by elevator to patient floors, pass trays out to patients, pick up the trays, and then return to the dish room. He then either loaded dirty dishes into dish machine or would place clean dishes in the appropriate rack. Petitioner would push the carts to the patient floors approximately four to four-and-a-half hours per workday. Petitioner was seen to lean on the carts and push them, using the cart as a brace. Kross had seen Petitioner walking with a shuffling limp gait since she started in her job. The carts were either three-door or two-door units greater than fifty pounds, with room for around 24-36 trays. The carts were wheeled. They

were in good working condition. If there was an issue with the carts, they submitted a work order, and the carts were fixed promptly.

Ruth Kross completed the supervisor section of an injury report regarding petitioner on October 25, 2011. (Resp. Ex. No. 2) She noted on the form and testified that Petitioner reported an injury to her that had occurred years prior in which he injured his leg. Petitioner never reported an injury that occurred in 2011. He never said that his pain had recently become worse.

Ruth Kross testified to a conversation she had with Petitioner about his State University Retirement System (SURS) benefits, shortly before completing the injury report noted above. Petitioner agreed that this conversation took place. Petitioner asked Kross to assist him in applying for SURS benefits, and she did so. After completing the forms, Petitioner was surprised by the small amount of SURS benefits he would be receiving. It was at that point that Petitioner mentioned to Ruth Kross the work injury from years prior. He did not tell her that he had suffered an injury that occurred in October of 2011.

Petitioner has a significant past medical history regarding the body parts that he claimed he injured on October 18, 2011. Petitioner first received medical treatment on December 12, 2003 for complaints of right low back pain radiating along the right buttock/thigh. (Resp. Ex. No. 4) The history was of recurrent low back pain without any trauma or strain. His symptoms started two to three days prior when pulling a food cart. Petitioner confirmed this history of a 2003 work accident during his testimony. Dr. Shipley diagnosed atraumatic low back pain with symptoms of sciatica. Petitioner followed up for more treatment on December 23, 2003. His symptoms were now radiating to his bilateral lower extremities. He continued with medical treatment on April 20, 2004 with the same complaints stating that he hurt himself pulling food carts. He received the same diagnosis. (Resp. Ex. No. 4) On May 7, 2004, Petitioner complained again of low back pain and right hip pain. He continued to have pain with ambulation. The doctor prescribed Motrin. A right hip x-ray from May 17, 2004 revealed mild osteoarthritic changes of the hip joint and greater trochanter of the femur. Treatment continued on June 10, 2004 and June 15, 2004. Dr. Albright assessed right hip osteoarthritis. (Resp. Ex. No. 6)

Petitioner testified he walked with a limp after the 2003 work accident. He had no treatment for these injuries between 2004 and 2011.

On October 10, 2006, Petitioner stated he had more persistent swelling in his left leg for the past ten years after a gunshot repair surgery in 1974. Then on April 16, 2007, Petitioner reported sudden back pain with no trauma. Dr. Sohn assessed lumbago and prescribed medications. He restricted Petitioner from work for one week. Treatment continued on April 23, 2007. On February 13, 2008, Petitioner presented for medical care after being mugged. He twisted his low back, abraded his right knee and was complaining of muscle spasm in the low back. Dr. Trammer assessed acute low back muscle strain. (Resp. Ex. No. 4)

On March 29, 2011, seven months before the claimed work accident, Petitioner presented again for medical treatment, complaining of significant bilateral knee pain for six months. (Resp. Ex. No. 4) Dr. Hyderi assessed likely knee arthritis. X-rays from March 31, 2011 revealed extensive post-traumatic changes in the left knee with evidence of a prior gunshot wound and post-traumatic osteoarthritis. The right knee x-ray revealed a large suprapatellar effusion. (Resp. Ex. No. 6) Then on August 2, 2011, Petitioner presented for treatment for back pain, knee pain and hip pain. (Resp. Ex. No. 4) Petitioner had also presented for pain in the middle low back on August 1, 2011 at University Health Services. (Resp. Ex. No. 5)

On September 14, 2011, approximately one month before his alleged work accident, Petitioner received medical treatment for right hip and right knee pain. He provided a history of right hip and knee pain for the past five to seven years. He provided a history of a work injury from 2004 while pulling carts. Dr. Grief assessed

right knee/hip arthralgia, likely osteoarthritis. Dr. Grief aspirated fluid from Petitioner's right knee. (Resp. Ex. No. 4)

Petitioner admitted during his testimony to experiencing right hip and right knee pain before October 18, 2011.

On October 18, 2011, Petitioner presented to University Health Services, due to right knee pain that day. (Resp. Ex. No. 5) He did not provide a history of a work injury and it was noted that he had not taken his usual pain medication that morning. The examiner noted Petitioner was "knock kneed" and ambulated with a significant limp to the right lower extremity. The provider assessed right knee pain and provided work restrictions. On October 19, 2011, Petitioner reported ongoing bilateral knee pain, right greater than left, to Dr. Grief. (Resp. Ex. No. 4) He noted his knee pain was disturbing him at work. Petitioner did not give a history of a work injury. Dr. Grief noted positive crepitus on exam. He assessed osteoarthritis of both knees, chronic pain, diabetes and hyperlipidemia. (Resp. Ex. No. 4) Dr. Grief noted Petitioner could not return to work due to chronic medical conditions including advanced osteoarthritis of both knees, diabetes and hypertension/hyperlipidemia. He noted Petitioner was scheduled to retire at the end of the month. On that same date, University Health Services acknowledged Petitioner's work restrictions and noted Petitioner was scheduled to retire after October 31, 2011. (Resp. Ex. No. 5)

Petitioner began treating with Dr. Gerber at Fullerton Drake Medical Center on December 6, 2011 and received physical therapy three times per week through February 23, 2012 for complaints of pain and limited motion in his right knee and right hip. (Pet. Ex. No. 10) The December 6, 2010 (sic?) chart says that he reported periodic episodes and aggravations of arthritis and acute aggravation on October 25, 2011, when pushing and pulling food carts. Dr. Gerber recommended MRIs of the right knee and hip, and evaluation by an orthopedic surgeon and pain management. A December 8, 2011 x-ray of the right knee revealed chondrocalcinosis of the body of the medial meniscus and an osteochondral depression involving the lateral femoral condyle with arthritic changes of the medial joint compartment. (Pet. Ex. No. 11) An MRI of the right knee from the same date revealed the same osteochondral depression of indeterminate age, evidence of osteoarthritis of the lateral femoral condyle and lateral tibial plateau, chondromalacia and osteophytosis. An MRI from the same date of the right hip was normal. (Pet. Ex. No. 11)

As of February 23, 2012, Dr. Gerber noted Petitioner reached maximum medical benefit from physical therapy and should follow with his family doctor. (Pet. Ex. No. 10) He noted Petitioner improved with treatment. He released Petitioner from care and released him to return to work without restrictions. (Pet. Ex. No. 10)

Petitioner has had ongoing issues and medical treatment directed to his feet since then. (Resp. Ex. No. 7) He has been diagnosed with bilateral hallux valgus (bunions). Id. He also received medical treatment on March 7, 2014 for chronic, daily knee pain and was diagnosed with arthritis. (Resp. Ex. No. 7) Dr. Dehkordi noted Petitioner's knees had a varus deformity. On January 4, 2016, Petitioner complained of right knee pain/swelling that started on December 27, 2015. He reported this new pain and swelling was so significant it was debilitating. He woke up with the symptoms. Dr. Wells assessed right knee pain. Petitioner wanted no further work-up of his condition.

On April 11, 2019 Respondent presented Dr. Fetter for his evidence deposition. (Resp. Ex. No. 9(a)) Dr. Fetter reviewed Petitioner's records and had authored a report dated December 10, 2018. (Resp. Ex. No. 9(b)) Dr. Fetter testified consistently with his detailed records review. He testified to the complete medical records he reviewed, dating back to 2003, in which Petitioner was claiming a work injury on December 12, 2003. He noted Petitioner's degenerative conditions in his right knee and right hip that was noted throughout

the medical records dating back to 2003. Based on his review of the records, Dr. Fetter diagnosed Petitioner with degenerative right hip and knee conditions by radiograph and low back and right lower extremity pain. He did not find Petitioner's current condition of ill-being with respect to any of the allegedly injured body parts to be causally related to either a specific time and place of injury in October of 2011 or related to Petitioner's work duties as a food sanitation laborer. His opinion was based on Petitioner's significant pre-existing and symptomatic degenerative conditions. He noted, at most, Petitioner sustained a right hip strain pulling carts in October of 2011, which was a temporary condition that resolved long ago. He further noted Petitioner's diagnosis of right hip osteoarthritis dating back to 2004. He noted Petitioner's diagnosis of a pre-existing degenerative right knee condition. Assuming Petitioner suffered a strain in October of 2011, he reached MMI by about December 10, 2011. Dr. Fetter testified that if Petitioner requires work restrictions, they would be in no way related to any work injury. He felt that Petitioner suffered no permanent partial impairment as a result of any low back, right hip, right knee or right leg injury. (Resp. Ex. No. 9(a))

Petitioner testified that it is difficult for him to "get around" after October 18, 2011. He testified he has used a cane since October 18, 2011. He did not return to work after October 24, 2011 and retired. He testified to experiencing pain in his knee and hip, problems with walking and getting on a bus. He testified he has not had any medical treatment for his right hip, right knee or back since 2012. He has not looked for work since he last worked for the Respondent.

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)

In support of the Arbitrator's Decision relating to (C), whether an accident occurred that arose out of or in the course of Petitioner's employment by Respondent, and (D), the date of the accident, the Arbitrator finds:

Petitioner failed to prove that he sustained accidental injuries that arose out of and in the course of his employment by Respondent on October 18, 2011.

Petitioner's testimony is found to be not credible and is not supported by the medical records and the incident report that he completed on October 25, 2011.

Ruth Kross' testimony is found to be credible. In October of 2011, Petitioner reported to her that he had been injured at work (in December of 2003) after finding out what his retirement benefits were going to be. He completed an incident report (Resp. Ex. No. 2, Pet. Ex. No. 6), not mentioning any injury occurring in October of 2011 and certainly not mentioning any injury occurring on October 24, 2011 (as alleged in the Application

for Adjustment of Claim) or October 18, 2011 (as alleged in the Amended Application). Petitioner never told Kross of any injury that happened in October of 2011.

When the trial began, the Parties also completed a Request for Hearing form in which Petitioner stipulated to an accident date of October 24, 2011. (Arbitrator's Ex. No. 1) However, Petitioner was not working on October 24, 2011. The wage records document that the Petitioner was on Family Medical Leave after October 19, 2011. (Resp. Ex. No. 3) Petitioner claimed an accident on a date on which he was not working. Petitioner amended his Application for Adjustment of Claim in January of 2019, almost 2 months after the trial began and seven years after the alleged accident. He then amended the Application for Adjustment of Claim to claim an accident date of October 18, 2011. (Pet. Ex. No. 1) Regardless, Petitioner presented no evidence corroborating that an accident took place on October 18, 2011.

The contemporaneous medical records support a finding that no accident took place in October of 2011. When Petitioner first presented to University Health Services on October 18, 2011, he did not provide a history of a work injury in October of 2011. He presented due to right knee pain from that date, not relating it to a recent work injury. It stands to reason that if Petitioner had suffered a work injury on that date, he would have specifically noted this to the medical providers at University Health Services. Petitioner then presented to Dr. Grief on October 19, 2011 and did not provide a history of the alleged work injury. He stated he was experiencing knee pain which was disturbing him at work, but again, there was no specific report of a work injury as Petitioner attempted to testify to eight years later. It was not until December 6, 2011 (2010, Sic?), when Petitioner began receiving medical treatment with Dr. Gerber, that he reported period episodes of aggravations of arthritis and acute aggravation on October 25, 2011 when pushing and pulling food carts. This is the first time there is mention of an alleged acute injury occurring in October of 2011, albeit on a completely incorrect date of accident. The earlier treating medical records support the fact that no accident took place in October of 2011. "It is presumed that a declaration to a treating physician as to one's physical condition and the cause thereof is true because the patient will not falsify such statements to the one from which he expects to get medical aid." Shell Oil Co. v. Industrial Commission, 2 Ill.2d 590, 602 (1954)

No history of accident in the initial medical records convinces the Arbitrator that no accident or aggravation occurred in October of 2011. Petitioner's claim for compensation is, therefore, denied.

In support of the Arbitrator's Decision relating to (E), was timely notice of the accident given to Respondent?, the Arbitrator finds:

Petitioner gave timely notice of the accident. This finding is based upon the testimony of Ruth Kross and Pet. Ex. No. 6 and Resp. Ex. Nos. 1 and 2.

In support of the Arbitrator's Decision relating to (F), is Petitioner's current condition of ill-being causally related to the injury?, (J), Medical expenses, and (L), Nature and extent, the Arbitrator finds:

As the Arbitrator has found that Petitioner failed to prove that he sustained accidental injuries which arose out of and in the course of his employment by Respondent on October 18, 2011, the Arbitrator needs not decide these issues.

J. Dunn v. University of Illinois, 11 WC 045732

In support of the Arbitrator's Decision relating to (O), Statute of Limitations, the Arbitrator finds:

Given the evidence adduced, Petitioner's claim regarding any accidental injury which arose out of and in the course of his employment by Respondent in December of 2003 is barred by the Statute of Limitations in §6 of the Act, because more than 3 years after the date of accident lapsed before the Application for Adjustment of Claim was filed and there was no proof regarding when the last payment of compensation was made.