ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC024062
Case Name	PERDUN, RALPH v. LTI TRUCKING
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0216
Number of Pages of Decision	20
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Christopher Crawford
Respondent Attorney	Jennifer Wagner

DATE FILED: 5/3/2021

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RALPH PERDUN,

Petitioner,

vs. NO: 19 WC 24062

LTI TRUCKING,

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, causal connection, temporary total disability, medical expenses, prospective medical care, and permanent partial disability (causal connection only), and being advised of the facts and law, reverses the Decision of the Arbitrator, and finds that Petitioner failed to meet the burden of proving accident, as stated below. As Petitioner failed to prove accident, all other issues are rendered moot.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Petitioner was working as a spotter for Respondent on July 15, 2019, his second day of working for Respondent. This job entailed moving trailers around at the docking facility. Petitioner was attempting to close a trailer door that was stuck. Petitioner pushed on the door with an open hand using his body weight. The door finally closed and his body continued to move forward. The force was "like getting electrocuted," he testified. (T. 16-18) Petitioner testified that there was no way he could stop himself from hitting the handle. He recalled having immediate pain that went from his middle finger up to his shoulder. (T. 18-19)

Petitioner completed his shift that day and did not notify anyone at the company he had been hurt. Petitioner testified that when he got home that night, he tried to cut a piece of meat and was unable to do so because he could not hold the fork. Petitioner is right-hand dominant. (T. 19-20)

Petitioner testified he called his supervisor the next day. He could not recall the name of the person he spoke to because it was only his second day working for Respondent. The supervisor advised Petitioner to call the safety department and Petitioner called numerous times over about 10 days, but he did not hear back from the safety department. (T. 20-21)

Petitioner testified that over the first couple of days after the accident, he continued having pain. He testified his pain level was 7-8/10 but it had gotten up to 10/10. Petitioner identified the pain in his left palm and left thumb area, including the base of the thumb. It was noted Petitioner was wearing a brace on his thumb at arbitration and he indicated he had been wearing it since a couple of days after the accident. (T. 21-23) Petitioner testified he had problems with his left hand before July 15, 2019. He testified he experienced occasional numbness at night but did not seek medical treatment or miss time from work because of those problems. (T. 12-13)

Petitioner first sought medical care on 7/18/19 with J. Nanney, PA-C. Petitioner reported pain in his left hand and thumb after closing a door of a big trailer on Monday when the door gave way. He reported he had numbness and tingling in his left hand radiating to the wrist and arm. Petitioner had not taken any medications. Petitioner was diagnosed with paresthesia of the skin and Gabapentin was prescribed. (PX2). Petitioner was not restricted from returning to work.

The medical records show Petitioner contacted PA Nanney's office on 7/16/19 asking if they had documentation of any problems with his hands. (RX 2) PA Nanney's office notified Petitioner it did not have any such documentation noting, "I look (sic) through the encounters and patients (sic) cases and do not see any mention of problems with his hands." (PX2) No mention was made of a work-related accident.

Petitioner returned to PA Nanney's office on 7/31/18 reporting pain, numbness and tingling in his left hand. An examination revealed positive Tinel and Phalen tests. An EMG/NCS was ordered. Petitioner was not restricted from returning to work on that date.

Petitioner contacted PA Nanney's office on 8/5/19, indicating he needed an off work note until they can figure out something with his hand. Petitioner was waiting for copies of the last 2 office notes pertaining to his hand. (PX2) PA Nanney complied and a work note was issued 8/6/19 restricting Petitioner from work until he is re-evaluated on 8/12/19. (PX5) (RX2)

Petitioner returned to PA Nanney's office on 8/12/19. His examination revealed left wrist and arm neuropathic pain. The records state, "[h]as MRI scheduled for the 20th of august (sic). lawyered up..still trying to push this thru workmans comp. says the gabapentin is not helping.."

(PX2) He was continued off work through 8/23/19. The Assessment/Plan was noted as "Screening for malignant neoplasm of colon" and "Paresthesia of upper limb."

An EMG/NCS performed on 8/20/19 was positive for carpal tunnel syndrome on the left. Petitioner was seen by PA Nanney on 8/23/2019 and referred to Dr. Randall Rogalsky for an orthopedic evaluation. Petitioner was released to return to work on 9/6/19. (RX2) PA Nanney restricted Petitioner to right-handed work only in a note dated 1/13/20. (PX7)

Petitioner testified he continues to experience symptoms in his left hand. They have neither gone away nor increased in severity since July 15, 2019. (T. 28) He agreed he has symptoms on a daily basis. He testified that when he picks up a plate with his left hand, it puts pressure on the thumb, and it will shoot pain up his arm and it will go numb. He stated, "Feels like it's getting electrocuted." (T. 29) He also testified he cannot hold a towel with his thumb. He testified if he taps his thumb the pain is a 9 or a 10. When his girlfriend has grabbed his thumb, he would be in tears. (T. 30) He testified he is unable to return to work in any kind of truck driving or spotting position at this time because there's too much pulling on trailer handles. (T. 30-31) He can do it, he testified, but it's going to be painful. (T. 31)

On cross examination, Petitioner was asked if he recalled taking medication Diclofenac which was prescribed on 5/6/19. (T. 36) He responded he did not know what that was for and referenced a stomach issue. When asked if he sustained any prior injuries in the month or two before this claim, Petitioner responded, "No." (T. 37) When asked if he had an injury with his prior employer, Alterior Express, Petitioner responded, "Oh, I hurt my back there, yeah." He agreed the accident occurred in May of 2019. (T. 37) Petitioner testified he worked for Alterior Express for about three or four months and stopped working there when they fired him for dropping a trailer. (T. 38)

Petitioner testified on cross-examination he did not see a doctor after he injured his back. (T. 39) When asked who prescribed the Diclofenac, he responded he did not know what kind of pill that is. (T. 39) When asked further about whether he recalled taking Diclofenac, the anti-inflammatory medication, he responded he did recall and PA Nanney prescribed it. (T. 40) He denied it was prescribed for the May 2019 back injury and that he just has a bad back. (T. 40) Petitioner denied that Nanney continues to see him for that problem. When asked how long he has been seeing Nanney for that problem, he responded he sees him once a year. (T. 40-41)

Mr. Chartrand, operating manager/on-site supervisor for the Dial location, testified for Respondent. He had been working for Respondent for 4 years and was Petitioner's supervisor on July 15, 2019. Mr. Chartrand testified that on the day of the accident, Petitioner had been in training for two days. He testified Petitioner came to the office for what Mr. Chartrand described as "chit chat." He testified Petitioner stated his son recently had a workers' compensation claim and received a large lump sum settlement enabling him to pay off many bills and purchase a muscle car. (T. 51-54)

Mr. Chartrand testified the conversation worried him. (T. 54) He stated Petitioner's accident was about 4 hours after that conversation. Mr. Chartrand testified that Petitioner did not tell him about the injury until the next day. He took down what Petitioner reported to him, wrote a report, and sent Petitioner to the safety department. Mr. Chartrand did not see Petitioner after the accident and had no further conversations other than providing the telephone number for the safety department. (T. 54-55)

Dr. Mall, orthopedic surgeon at The Orthopedic Center of St. Louis, examined Petitioner on 10/23/19, at request of Respondent. Dr. Mall stated with CTS typically the median nerve supplies the thumb, index, and middle fingers, but only on the volar side, palmer side. He stated when people have numbness on the dorsal side/top, it is not consistent with CTS. He conducted a physical exam of Petitioner noting Petitioner had a BMI of 32.77. He noted Petitioner had pain over the cubital tunnel at the elbow and reported some tingling and numbness into the thumb and index finger when he pushed on it. He stated that was not consistent with CTS. Dr. Mall stated he pushed on the ulnar nerve at the elbow and that should produce numbness and tingling to ring and little fingers, not thumb and index. Petitioner had pain over the elbow at the ulnar nerve. Petitioner had some production of neuro symptoms. Petitioner had Tinel's at the elbow producing some complaints down the forearm, not the fingers. There were no Tinel signs at the wrist. He noted flexion compression did not produce median distribution symptoms. (T. 12-14) (RX1)

Dr. Mall noted Petitioner reported pain to palpation at the base of the thumb, CMC joint. He noted Petitioner had intact discrimination. Cervical x-rays showed some arthritis in the neck and the elbow x-ray examination was normal. He noted the hand x-ray showed very severe osteoarthritis at the CMC joint and some joint subluxation; there was no evidence of fracture or prior fracture, but there were spurs around the joint. (T. 14-16) (RX1)

Dr. Stahle, board certified in family practice, examined Petitioner on 1/9/20, at the request of Petitioner's counsel. Dr. Stahle reviewed the J. Nanney, PA-C records, the EMG and Dr. Mall's IME report. Dr. Stahle obtained a history from Petitioner as part of the exam. Petitioner reported that he was moving trailers around in the back of an 18-wheeler and as he was shutting the trailer door, the door was stuck. He pushed with all his force, the door gave way and Petitioner jammed his hand. (T. 9-11) (PX 1)

Dr. Stahle testified that the mechanism of injury was sufficient to cause an aggravation of pre-existing CTS or pre-existing arthritic condition. He stated any type of blow will cause inflammation. Whether it was a bad contusion or a stress fracture, there would be a lot of inflammation. He stated inflammation can set off an abnormal kind of process where it swells and now the nerve is impinged due to the swelling. He stated the force described would have been sufficient force to cause the aggravation described. He stated that had immediate imaging been done, that could rule out a fracture. If he knew exactly what happened, he would be in a little better position to see why he was having so much pain afterwards and not so before. (T. 14-16) (PX 1)

Dr. Stahle stated that he thought the described injury certainly could have changed the CMC and CTS that Petitioner was experiencing. As to Dr. Mall's comment regarding ROM and swelling reports, Dr. Stahle said it was possible for a patient to have CMC joint arthritis and/or CTS and be relatively asymptomatic until a traumatic event occurred. (T. 17-18) (PX 1)

The Commission notes the issue of accident was not raised on Review. However, Section 19(b) of the Act states, in part, "The jurisdiction of the Commission to review the decision of the arbitrator shall not be limited to the exceptions stated in the Petition for Review". (*820 ILCS 305/19(b)*) As such, the Commission has jurisdiction to address any and all issues and we address the issue of accident.

After careful review of the evidence, the Commission finds Petitioner failed to prove by a preponderance of the evidence he sustained a work-related accident on July 15, 2019. Petitioner alleges he sustained an unwitnessed accident on his second day of working for Respondent. These facts coupled with Petitioner's actions on the date of the alleged accident and one day after, call into question Petitioner's credibility upon which his case is based. Petitioner claimed he felt immediate pain in his hand and arm and felt like he was electrocuted; however, he continued to work his shift and did not report the accident until the following morning. Also, on the date of the alleged accident, Petitioner spoke with his supervisor about his son's workers' compensation claim just hours before the incident. Petitioner's supervisor testified that Petitioner told him how his son had a workers' compensation case, was able to secure a lump sum settlement and able to pay off several bills and purchase a muscle car. Petitioner denied having this conversation with his supervisor. The Commission finds the supervisor's testimony reliable and persuasive.

Furthermore, the day after the alleged incident, Petitioner contacted his medical provider's office inquiring if they had documentation in their records of any problems pertaining to his hands. Notably, the medical records on this date are devoid of any reference to a work-related injury to his left hand which purportedly occurred one day earlier.

The Petitioner's credibility is further eroded by his own testimony. He was evasive when asked about prior injuries at previous places of employment. He initially could not recall an injury occurring two months before in May 2019 for which he filed a workers' compensation claim alleging injury to his back. Petitioner was evasive in answering why he was taking an anti-inflammatory Diclofenac prior to the 7/15/19 accident that was prescribed on 5/9/19. He then admitted the medication was for his low back and was prescribed by PA Nanney. Petitioner initially testified he had not seen a doctor for his back injury, but then admitted he sees PA Nanney once a year for low back problems.

Based on the foregoing, the Commission finds Petitioner failed to prove he sustained a work-related accident on 7/15/19. All other issues are, therefore, rendered moot. The Commission, herein, vacates the Arbitrator's award.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator is reversed to find that Petitioner failed to meet the burden of proving he sustained an accident that arose out of and in the course of employment. All remaining issues, including prospective medical care, are rendered moot and the award of TTD and medical benefits are vacated.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 3, 2021

o- 3/9/21
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 21IWCC0216
NOTICE OF 19(b) ARBITRATOR DECISION

PERDUN, RALPH
Employee/Petitioner

Case# **19WC024062**

LTI TRUCKING
Employer/Respondent

On 8/26/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.12% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4493 GOLDENBERG HELLER & ANTOGNOLI
JENNIFER M WAGNER
2227 S STATE ROUTE 157
EDWARDSVILLE, IL 62025

0358 QUINN JOHNSTON HENDERSON ET AL
CHRISTOPHER S CRAWFORD
227 N E JEFFERSON ST
PEORIA, IL 61602

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)

Ralph Perdun
Employee/Petitioner

v.

LTI Trucking
Employer/Respondent

Case # **19** WC **24062**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Collinsville**, on **June 26, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 15, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**N/A; new job**; the average weekly wage was $**720.00**.

On the date of accident, Petitioner was **64** 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 $**5,919.96** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**5,919.96**.

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

ORDER

Respondent shall pay TTD benefits for a period of 4-3/7 weeks at the rate of $480.00, commencing 8/6/19 through 9/5/19, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services of $1,892.40, specifically $600.00 due and owing Southern Illinois Healthcare Foundation, Inc., and $1,292.40 due and owing BJC HealthCare, 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.

Petitioner is not entitled to prospective medical care as Petitioner reached maximum medical improvement for a left wrist strain on 9/5/19.

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

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

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

Signature of Arbitrator

8/22/20
Date

AUG 26 2020

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

RALPH PERDUN,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 19-WC-24062
	)	
LTI TRUCKING,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on June 26, 2020 pursuant to Section 19(b) of the Act. The issues in dispute are accident, causal connection, medical bills, temporary total disability benefits, and prospective medical care. All other issues have been stipulated.

TESTIMONY

Petitioner was 64 years old when he allegedly sustained injuries to his left hand on July 15, 2019 while working as a truck driver for Respondent. Petitioner testified he has been engaged in driving 18-wheelers for the last ten years. He testified he requires the use of both hands for this work, including for steering, shifting, and closing trailer doors. Petitioner's educational background consists of a high school diploma and truck driving school.

Petitioner testified that prior to 7/15/19 he had some occasional night numbness in his left hand, but he never had excruciating pain. Petitioner testified that these symptoms never prevented him from performing his job duties and he never sought medical treatment for these symptoms prior to July 15, 2019.

Petitioner testified he began working for Respondent around July 12 or 13, 2019. He testified he was hired as a spotter which moves trailers around at the docking facility. Petitioner testified he used a short truck, hooked it up to the trailer, closed or opened the trailer doors if necessary, and moved the trailer to another location. Petitioner testified he was trained as a spotter for one day and his shifts were eight hours per day.

Petitioner testified that on the day of the accident he was attempting to close a trailer door that was stuck. Petitioner testified that the door resisted closing about one foot from completion

and he used his body weight to push as hard as he could against the door with his hand open and flat against the door. Petitioner testified that the door finally gave way and his body continued to move forward with the force. Petitioner weighed 185 pounds on that date.

Petitioner testified he immediately felt as though he had been electrocuted from the middle finger of his left hand up to his shoulder. Petitioner testified he has been shocked before and this was a similar sensation. Petitioner testified he finished his shift and thought the injury was minor, but later that evening he was not able to hold a fork with his left hand. Petitioner called his supervisor the following day to report the injury and was told to call the safety department. Petitioner could not recall the name of his supervisor as the injury occurred on his second day of employment with Respondent. Petitioner testified he called the safety department numerous times and did not get a response for approximately ten days.

Petitioner testified he continued to have pain in his left hand that was 7 to 8 out of 10 on a pain scale at rest and a 10 if he used his hand. Petitioner testified the pain was at the base of his thumb and in his palm. He bought a brace to keep from bumping his hand and to provide pressure to alleviate numbness at night. On 7/18/19, Petitioner was examined by his primary medical provider, Mr. Nanney, P.A., who ordered a nerve conduction study, took him off work, and prescribed medication to calm the nerves in his hand. Petitioner testified the medical did not help and he was diagnosed with carpal tunnel syndrome. Petitioner testified he did not have health insurance at the time of the accident and does not currently have insurance.

Petitioner testified he continues to have symptoms in his left hand that have never disappeared or decreased in severity since the accident. He testified that his symptoms occur daily and they interfere with his ability to do everyday tasks. Petitioner testified that picking up a dinner plate causes shooting pain and numbness in his arm due to pressure on his thumb, which feels like an electric shock. He testified he has to use his four fingers on his left hand to hold a towel to dry himself because any use of his left thumb causes pain. Petitioner testified that changing the way he does things helps him cope with his symptoms. Petitioner testified that if he bumps his hand even lightly his pain can reach 9 to 10 out of 10.

Petitioner testified he does not believe he can return to truck driving or spotting at this time because there is too much pulling on trailer handles, and although he could do it, it would be painful. Petitioner testified that he has not returned to work for Respondent or worked anywhere since the accident.

On cross-examination, Petitioner testified he filed a workers' compensation claim related to a back injury with another employer in May 2019. Petitioner testified he worked for that employer for three to four months prior to injuring his back. He testified he did not receive treatment for that injury and did not receive indemnity benefits. Petitioner testified he was fired by that employer after he dropped a trailer. Petitioner also testified he was taking an anti-inflammatory, Diclofenac, prior to his work accident with Respondent that was prescribed by P.A. Nanney for a bad back that was not related to his May 2019 work accident.

Petitioner testified he did not speak to his supervisor the day of the accident. He did not recall a conversation with his supervisor wherein he allegedly told his supervisor that his son

recently received a workers' compensation settlement and bought a classic car they were restoring together. Petitioner testified he purchased the classic car with his son and the vehicle did not require restoration and he did not work on the vehicle.

Petitioner testified he was referred to Dr. Rogalsky for orthopedic consultation and the visit was denied pending workers' compensation approval. He also saw Dr. Stahle at the recommendation of his attorney and Petitioner has not decided if he will treat with Dr. Stahle. He testified he was told by Mr. Nanny to return in two weeks to address his work status.

Respondent called Petitioner's former supervisor, Nathan Chartrand, as a witness. Mr. Chartrand is the Operations Manager/On-Site Supervisor at the St. Louis location where Petitioner worked. Mr. Chartrand has been employed by Respondent for four years. He testified that on 7/15/19, Petitioner came to his office where they engaged in "chitchat" in order to get to know each other. Mr. Chartrand testified that Petitioner told him his son just received a workers' compensation settlement and was able to pay off many bills and buy a muscle car they both could work on and play with. Mr. Chartrand testified he felt worried with Petitioner's statement and within four hours of the conversation Petitioner alleged an injury to his left hand.

Mr. Chartrand testified Petitioner called him the date after the accident to report his injury and he made a report and sent it to the safety department. He directed Petitioner to contact safety. He testified that Petitioner called him daily to report safety had not returned his calls.

MEDICAL HISTORY

On 7/16/19, Petitioner called James Nanney, PA-C's office inquiring if their office had documentation of problems with his hands. After reviewing Petitioner's medical file, Mr. Nanney's office notified Petitioner it did not have any documentation of problems with his hands.

On 7/18/19, Petitioner was examined by James Nanney, a physician's assistant, claiming injury to his left hand. Petitioner provided a history of closing a door on a big trailer container and felt shooting pain up through his arm when the door gave way. He has numbness and tingling in his hand that radiates to his wrist and arm, shooting pain in his first three fingers radiating up his arm with use of his hand, with weak grip strength. Petitioner was diagnosed with paresthesia of the upper limb and prescribed Gabapentin. The medical record states Petitioner was prescribed Diclofenac on 5/9/19. Petitioner was not restricted from working and no follow up visits were scheduled.

Petitioner returned to Mr. Nanney's office on 7/31/19 stating the Gabapentin helped some but made his sleepy so he stopped taking it. He reported he had pain, numbness, and tingling in his left hand. Physical examination revealed positive Phalen's and Tinel's tests. No work restrictions were given.

Petitioner called Mr. Nanney's office on 8/5/19 requesting an off work slip until they can figure something out with his hand. A work slip dated 8/6/19 was provided restricting Petitioner from work from 7/18/19 to 8/12/19.

Petitioner returned to Mr. Nanney's office on 8/12/19 and stated he had an MRI scheduled on 8/20/19. The record indicates Petitioner "lawyered up…still trying to push this thru workmans' comp. says the Gabapentin is not helping…". Physical examination revealed left wrist and neuropathic arm pain. Petitioner was continued off work through 8/23/19.

Petitioner underwent an EMG/NCS on 8/20/19 that was positive for left carpal tunnel syndrome. Petitioner returned to Mr. Nanney on 8/23/19 at which time he was referred to Dr. Randall Rogalsky for orthopedic evaluation. He was restricted from working from 8/23/19 through 9/6/19, at which time he could return to work.

On 10/23/19, Petitioner was examined by Dr. Nathan Mall pursuant to Section 12 of the Act. Petitioner reported he bumped his hand while shutting a trailer door that was in a bind. Dr. Mall reported Petitioner injured himself on his fifth day of employment with Respondent and denied any prior symptoms in his left hand. Petitioner described symptoms of numbness and pain that travels up his arm and numbness in all of his fingers that runs up his elbow when he is sleeping. He described his whole hand both on the top and the surface that goes numb.

On physical examination, Dr. Mall noted pain over Petitioner's cubital tunnel and Petitioner felt numbness and tingling into his thumb and index finger when Dr. Mall applied pressure. Dr. Mall noted Petitioner's response was inaccurate as it was not the true distribution of the ulnar nerve. Tinel's test caused some sensation into his forearm, but not the fingers. Tinel's at the wrist caused pain but not numbness. He had significant pain over his CMC joint with a positive grind test and Petitioner indicated it was by far the place that was most tender.

Dr. Mall ordered x-rays of Petitioner's left hand due to complaints of thumb pain. X-rays revealed severe osteoarthritis at the CMC joint with significant subluxation and bone spur formation. Dr. Mall diagnosed severe left CMC joint osteoarthritis and carpal tunnel syndrome, both of which he opined were not work-related. Dr. Mall opined Petitioner suffered a wrist contusion resulting from the incident that occurred on 7/15/19. Dr. Mall observed that Petitioner's symptoms were not consistent with carpal tunnel syndrome as he felt numbness into his ulnar digits which was not consistent with this diagnosis. Although the EMG confirmed carpal tunnel syndrome, Dr. Mall did not feel Petitioner had any active symptoms of the condition. Petitioner had no pain over the wrist structure and his was localized at the CMC joint. He has large spur formation which could also contribute to the diagnosis of carpal tunnel syndrome. Dr. Mall opined Petitioner was at maximum medical improvement for the wrist contusion and no further treatment was necessary as it related to the work accident. Petitioner did not require work restrictions.

Petitioner was examined by Dr. Steven Stahle on 1/9/20. Petitioner described increased pain, numbness, and tingling with pressure or bumping his hand. He has difficulty holding a newspaper, phone, golfing and carrying groceries. Dr. Stahle reported Petitioner underwent right carpal tunnel surgery approximately 30 years ago. Dr. Stahle noted exquisite tenderness over the CMC joint of the left hand. He had a positive Phalanx test and a questionable Tinel's test. Range of motion of the left wrist and elbow were intact. Petitioner described tingling into the first three half fingers on his left hand. He did have decreased grip strength on the left hand. Dr. Stahle

diagnosed Petitioner with left hand carpal tunnel syndrome and left hand pain with a history of CMC degenerative joint disease. Dr. Stahle concluded Petitioner's CMC degenerative joint disease was not caused by the 7/15/19 incident, but it did aggravate his condition. Dr. Stahle noted Petitioner was having minimal pain or problems prior to the work-related accident and is now in a substantial amount of pain. Dr. Stahle opined within a reasonable degree of medical certainty that Petitioner's left carpal tunnel condition was not caused by the 7/15/19 incident, but it aggravated his condition to the point it became symptomatic and quite different than prior to the accident. Dr. Stahle opined Petitioner was not at MMI and required CMC joint and carpal tunnel injections, anti-inflammatories, and physical therapy. He opined Petitioner will require surgery if he failed conservative care.

Dr. Nathan Mall testified by way of evidence deposition on 2/28/20. Dr. Mall testified consistent with his written report dated 10/23/19, and addendum report dated 11/18/19. Dr. Mall testified that the lack of evidence of trauma, i.e. no bruising or swelling, to Petitioner's left hand supports his opinion the accident did not aggravate his pre-existing CMC joint arthritis. Dr. Mall testified that Petitioner's underlying carpal tunnel syndrome is caused by his BMI greater than 30, his age at 64, his severe osteoarthritis in the CMC joint, no evidence of trauma. Dr. Mall questioned Petitioner's claim that he was having no problems in the CMC joint prior to this incident. He said there was absolutely no way Petitioner would not have stiffness and lack of range of motion due to the bone spurs found on X-rays inside the CMC joint. It is undisputed that these spurs existed prior to the accident.

Dr. Steven D. Stahle testified by way of evidence deposition on 2/21/20. Dr. Stahle testified consistent with his report dated 1/9/20. Dr. Stahle's understanding of the mechanism of injury was that Petitioner fell forward with his body weight after the door slipped and then caught, which Dr. Stahle likened to "punching a wall". Dr. Stahle testified that Petitioner's carpal tunnel syndrome was "set off" to the point it became symptomatic. Dr. Stahle testified he was aware Petitioner had symptoms on and off prior to the accident, but that those symptoms did not prevent Petitioner from working or driving. Thus, Dr. Stahle opined that the work accident aggravated Petitioner's condition and made it quite symptomatic. He testified that the type of blow will cause inflammation, which will set off an abnormal process that will impinge on nerves. He opined it would have been better had Petitioner been provided with imaging closer in time to the accident, in order to assess whether he had suffered a stress fracture, which might have provided more clues as to why his pain was so excruciating. Dr. Stahle's opined it is possible for a person to have carpal tunnel syndrome and CMC joint arthritis, yet remain functional with full range of motion until a traumatic event occurs.

CONCLUSIONS OF LAW

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

Petitioner testified that on 7/15/19 he attempted to close a trailer door that was stuck open approximately one foot. He used his body weight to push as hard as he could against the door with his left hand open and flat against the door. Petitioner testified that the door gave way and his body continued to move forward with the force. Petitioner weighed 185 pounds on that date.

Petitioner testified he immediately felt as though he had been electrocuted from the middle finger of his left hand up to his shoulder. There were no witnesses to the accident and Petitioner finished his shift and went home. Petitioner testified he reported the accident the next day due to worsening symptoms the evening of the accident.

The Arbitrator finds that Petitioner met his burden of proof that he sustained an accident on 7/15/19 that arose out of and within the course of his employment with Respondent.

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

As to the issue of causation, the Arbitrator finds Petitioner's current condition of ill being is not causally related to the accident that occurred on 7/15/19. The medical evidence supports severe degenerative process of his pre-existing condition in the left hand/wrist that predates his 7/15/19 accident.

The Workers' Compensation Act is a humane law of a remedial nature that should be liberally construed to achieve its purpose. *Hagene v. Derek Polling Const.*, 902 N.E.2d 1269, 1273 (5d Dist. 2009). When a pre-existing condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the pre-existing [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the pre-existing condition." *St. Elizabeth's Hospital v. Workers' Compensation Comm'n*, 864 N.E.2d 266, 272-273 (5th Dist. 2007).

The question of whether the Petitioner's claimed injury is related to a degenerative process of a pre-existing condition or an aggravation of that pre-existing condition, is a factual determination to be made by the Workers' Compensation Commission. *Roberts v. Industrial Commission*, 93 Ill.2d 532, 67 Ill. Dec. 836, 445 N.E.2d 316 (1983).

The Arbitrator questions Petitioner's credibility at arbitration. Petitioner was evasive when asked about prior injuries at other places of employment. He initially could not recall an injury occurring two months prior in May 2019 for which he filed a workers' compensation claim alleging injury to his back. Petitioner was evasive in answering why he was taking an anti-inflammatory Diclofenac prior to the 7/15/19 accident that was prescribed on 5/9/19. He then admitted the medication was for his low back and was prescribed by his primary PA-C Mr. Nanney. Petitioner initially testified he had not seen a doctor for his back injury, but then admitted he sees Mr. Nanney once a year for low back problems.

Further reflecting poorly on Petitioner's credibility is that Petitioner allegedly spoke with his supervisor about his son's workers' compensation claim just hours before the incident. Petitioner's supervisor testified that Petitioner told him how his son had a workers' compensation case, was able to secure a lump sum settlement and able to pay off several bills. Petitioner denied having this conversation with his supervisor. Petitioner worked for the prior employer for three to four months before he was terminated for cause and testified he was having financial difficulty. Petitioner's injury on 7/15/19 occurred the second day on the job and there were no witnesses. Although Petitioner felt immediate pain in his hand and arm and felt like he

was electrocuted, he did not report the accident until the following morning and continued to work his shift.

The Arbitrator notes that on 7/16/19, Petitioner called his primary doctor's office inquiring if they had any documentation of problems with his hands. After reviewing Petitioner's medical file, Mr. Nanney's office notified Petitioner it did not have any documentation of problems with his hands. This phone call took place the day Petitioner reported the accident to his supervisor. Petitioner was examined by Mr. Nanney on 7/18/19 and 7/31/19 and was diagnosed with paresthesia of the upper limb. He was not taken off work as a result of either of those visits.

Petitioner called Mr. Nanney's office on 8/5/19 requesting an off work slip until they can figure something out with his hand. A work slip dated 8/6/19 was provided restricting Petitioner from work from 7/18/19 to 8/12/19. He was written subsequent off work slips on 1/9/20 and 1/13/20 and there were no office visits associated with either of those notes.

Petitioner's histories and testimony generally do not support his claim that he suffered an aggravation of pre-existing carpal tunnel and CMC joint arthritis. Petitioner did not complain of thumb pain following the accident. No bruising or swelling in his hand or wrist was noted by Mr. Nanney following the accident. His symptomatic complaints were not consistent with a diagnosis of carpal tunnel either to Mr. Nanney or Dr. Mall. It was only when he saw Dr. Stahle, having had the benefit of reviewing Dr. Mall's report, that he described symptoms consistent with carpal tunnel syndrome. Petitioner made no mention of numbness and tingling into his index, middle and ring fingers which need to be present for a diagnosis of carpal tunnel. The fact that Petitioner did not complain of symptoms consistent with carpal tunnel supports Dr. Mall's opinion that he does not have active carpal tunnel problems.

The Arbitrator finds Dr. Nathan Mall's testimony to be more persuasive. He testified it is very common for CMC joint arthritis to cause pain. It can travel up the forearm slightly and typically the pain is localized at the bottom of the thumb. Dr. Mall explained that genetics is the number one factor in the development of CMC joint arthritis. Dr. Mall explained that CMC arthritis is a degenerative condition that gets worse over time. Petitioner told Dr. Mall he had numbness in all the fingers on the top and bottom sides of his hand. He was unable to describe any specific fingers that were numb. Dr. Mall explained that if carpal tunnel is involved, then the index, long finger and radial side of the ring finger will have symptoms. He explained generalized symptoms on the palmer surface of the hand, meaning numbness on the top or bottom side of the hand, is not consistent with a diagnosis of carpal tunnel.

Dr. Mall's physical examination of Petitioner revealed a body mass index of 32.77 which is clinically obese. He had pain over the cubital tunnel of his left elbow. He said he would get some numbness and tingling into his thumb and index finger. He said this was inconsistent because pushing the ulnar nerve ought to produce numbness and tingling in the small and ring finger and not the thumb or index finger. He had a lot of pain over the base of his thumb at the CMC joint. He had a positive grind test. He did not have very severe nerve compression because he had intact two-point discrimination. Dr. Mall opined Petitioner suffers from severe arthritis at the CMC joint with no evidence of prior fractures. Dr. Mall explained that the lack of a fracture showed

Petitioner did not have an aggravation of the underlying CMC joint condition. Petitioner did not exhibit any signs of trauma which made it less likely that Petitioner's CMC joint arthritis was aggravated by the incident. Dr. Mall noted there was no swelling or bruising in the three days after the accident. The Arbitrator notes the medical records do not mention any bruising or swelling in Petitioner's left hand/wrist.

The EMG showed Petitioner had carpal tunnel syndrome; however, on clinical examination Dr. Mall did not feel Petitioner had active carpal tunnel based upon reported symptoms. Dr. Mall explained that an EMG can show swelling across the carpal tunnel but the patient still must exhibit symptoms consistent with an active carpal tunnel syndrome for the clinical diagnosis. The physician performing the EMG concluded that clinical correlation was recommended. Dr. Mall testified that Petitioner has a BMI greater than 30, is 64 years old and has osteoarthritis at the CMC joint. All of these are risk factors in the development of carpal tunnel.

Dr. Mall questioned Petitioner's claim that he had no problems in the CMC joint prior to this incident. He said there was absolutely no way Petitioner would not have stiffness and lack of range of motion due to the bone spurs found on X-rays inside the CMC joint. It is undisputed that these spurs existed prior to the accident.

The Arbitrator finds that Dr. Mall's opinions and diagnosis are consistent with the evidence in this case. At arbitration, Petitioner testified that his symptoms are primarily located at the base of his thumb consistent with the CMC joint arthritis and inconsistent with a diagnosis of carpal tunnel syndrome. Dr. Mall's opinions that Petitioner's CMC joint arthritis was not aggravated by the event are consistent with initial treatment records. There was no evidence that Petitioner sustained a fracture. Petitioner's symptomatic complaints to Mr. Nanney were limited to the fingers with numbness up the arm. None of Petitioner's symptoms were localized to the thumb according to Mr. Nanney's records. Petitioner testified that his thumb hurt immediately following the accident, but the medical records do not support this testimony.

The Arbitrator finds that Dr. Mall's opinions are more credible than those of Dr. Stahle. Dr. Stahle is board certified in family medicine and testified he does not do carpal tunnel surgeries. Dr. Mall performs surgeries and is an orthopedic physician. Dr. Mall diagnosed Petitioner with CMC joint arthritis as Petitioner's source of symptoms. Dr. Mall testified that CMC joint arthritis can be set off by just about any activity. Dr. Stahle and Dr. Mall agreed that Petitioner's CMC joint arthritis was severe and Dr. Stahle admitted it was strange that there was no diagnosis of CMC joint arthritis at initial examination with Mr. Nanney. Dr. Stahle also conceded that time is a factor in the development of CMC arthritis. Dr. Stahle could not tell whether the character of the carpal tunnel changed by virtue of the incident. He said he did not know whether the Petitioner's CMC joint otherwise anatomically changed. Dr. Stahle confirmed that his diagnosis was based on whether Petitioner reported pain prior to the accident or pain after the accident. Petitioner did not complain of thumb pain following the accident and his complaints at arbitration and to Dr. Mall were inconsistent with carpal tunnel. These facts support Dr. Mall's ultimate conclusion that Petitioner suffered a wrist contusion strain.

Petitioner explains that if his girlfriend bumps his thumb it causes pain. This is consistent with Dr. Mall's opinion that anything can aggravate Petitioner's thumb arthritis given the severity of his condition. He explained that CMC joint arthritis represents a ticking time bomb where anything, including ministerial activities of daily living, can cause pain. Dr. Mall's opinions regarding the nature of CMC joint arthritis are supported by Petitioner's testimony.

Based on the above, the Arbitrator finds Petitioner has failed to meet his burden of proof that his current condition of ill-being in his left hand/wrist is related to the accident of 7/15/19, and that the opinions of Dr. Mall that Petitioner sustained a left wrist contusion is credible.

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

Based upon the above findings as to causal connection, the Arbitrator finds that Petitioner is entitled to recovery for the medical expenses as it related to a left wrist sprain for which he reached maximum medical improvement on 9/6/19. Petitioner did suffer a wrist strain consistent with Dr. Mall's opinions and the period is consistent with Mr. Nanney's records. The first note restricting Petitioner from work is dated 8/6/19. Mr. Nanney released Petitioner to return to work without restrictions on 9/6/19. Mr. Nanney's work restriction dated 1/13/20 is unpersuasive. It was authored without an office visit and there is no explanation of what changed between 9/6/19 and 1/13/20 to move Petitioner from no restricted work duties to being fully restricted from work.

Respondent shall therefore pay the expenses contained in Petitioner's group exhibit 8, specifically $600.00 due and owing Southern Illinois Healthcare Foundation, Inc., and $1,292.40 due and owing BJC HealthCare, 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.

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

Based on the Arbitrator's finding that Petitioner's current condition of ill-being is not causally related to the injury, and the credible testimony of Dr. Mall, the Arbitrator finds that any need for treatment related to Petitioner's left hand/wrist is related to a pre-existing condition that was not aggravated or accelerated by the incident that occurred on 7/15/19, and Respondent is not liable for Petitioner's medical care.

Accordingly, Petitioner's request for authorization of medical treatment for his left hand/wrist is hereby denied.

ISSUE (L): What temporary benefits are in dispute?

Based on the Arbitrator's decision with regard to causation, the Arbitrator finds Petitioner is entitled to and Respondent is ordered to pay temporary total disability benefits of 4-3/7 weeks

at the rate of $480.00, commencing 8/6/19 through 9/5/19, as provided in Section 8(a) of the Act. Petitioner did suffer a wrist strain consistent with Dr. Mall's opinions and the period is consistent with Mr. Nanney's records. The first note restricting Petitioner from work is dated 8/6/19. Mr. Nanney released Petitioner to return to work without restrictions on 9/6/19. Mr. Nanney's work restriction dated 1/13/20 is unpersuasive. It was authored without an office visit and there is no explanation of what changed between 9/6/19 and 1/13/20 to move Petitioner from no restricted work duties to being fully restricted from work.

Arbitrator Linda J. Cantrell

8/22/20
DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC028618
Case Name	WILLIAMS, JAWAHARIAL v. CITY OF CHICAGO-DEPT WATER
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0217
Number of Pages of Decision	18
Decision Issued By	Kathryn Doerries, Commissioner, Maria Portela, Commissioner, Thomas Tyrrell, Commissioner

Petitioner Attorney	Al Koritsaris
Respondent Attorney	Matthew Locke

DATE FILED: 5/3/2021

/s/Kathryn Doerries, Commissioner
Signature

/s/Maria Portela, Commissioner
Signature

/s/Thomas Tyrrell, Commissioner
Signature

21IWCC0217

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAWAHARIAL WILLIAMS,

Petitioner,

vs. NO: 16 WC 28618

CITY OF CHICAGO,
DEPARTMENT OF WATER MANAGEMENT,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of permanent partial disability-nature & extent only, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission modifies the Arbitrator's award from 40% loss of Petitioner's person as a whole to 35% loss of use of Petitioner's person as a whole.

The Commission performs an analysis under Section 8.1(b) as follows:

1) There was no impairment rating performed so this factor is given no weight.
2) Petitioner was working as a journeyman laborer for the City of Chicago, Department of Water Management, prior to his back, head, neck, and dominant right arm and right shoulder injuries. As a result of the injury, Petitioner was given permanent lifting restrictions of 87.5 pounds. Petitioner was unable to return to his former position given the permanent restrictions. Petitioner currently works for Respondent in a caulker position and is working towards becoming a journeyman plumber for Respondent. This position is within his restrictions. This factor is given

some weight.

3) Petitioner was 41 years old at the time of his injuries. Petitioner has many working years ahead of him and will have to live with the residual effects from his work injury. This factor is given greater weight.

4) No evidence was submitted that Petitioner's earning capacity was affected. Petitioner testified he was earning less money in his current position, but his wages have increased over time in his apprenticeship position and will be that of a journeyman plumber in the future. This factor is given no weight.

5) Petitioner's disability was corroborated by the medical records. Petitioner underwent numerous treatment modalities including therapy, ESI and right shoulder rotator cuff repair, labral repair, subacromial decompression and mini-open biceps tenodesis due to biceps tear. Petitioner testified he has difficulty performing overhead work and he has diminished strength in his right arm and shoulder. While Petitioner's permanent restrictions prevent him from returning to his former position, he is working as an apprentice for Respondent towards becoming a journeyman plumber. This factor is given considerable weight.

In reviewing the totality of the evidence, the Commission finds that the Arbitrator issued an award for permanency in an amount higher than supported by the evidence. Petitioner was able to return to work for Respondent, albeit in a different position and department due to his permanent restrictions, and Petitioner currently works full time as an apprentice and is working towards becoming a journeyman plumber.

Based on the above, when considering the five factors the Commission modifies the Arbitrator's Decision, to decrease Petitioner's partial disability award from 40% loss of use of his person as a whole, to 35% loss of use of his person as a whole pursuant to Section 8(d)(2) of the Act. Petitioner has essentially recovered from his physical injuries and has been working in his new position under the permanent restrictions since April 2019. Petitioner testified that he cannot perform like he did before with his right arm and shoulder, and he cannot do a lot of overhead work and has difficulty tightening pipes. Petitioner testified he does have difficulty squatting so be bends over more but has difficulties bending because of his back. Petitioner testified his neck has gotten a little better and does not have complaints regarding his head. Petitioner was currently not taking any prescription medication from any doctor and he had not returned to any treating doctor since his April 2019 return to restricted work.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $755.22 per week for a period of 175 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the 35% loss of Petitioner's person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $3,670.19 for medical expenses under §8(a) of the Act.

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

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

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

MAY 3, 2021

d-4/6/21
KAD/jsf

_____
Kathryn A. Doerries

_____
Maria E. Portela

_____
Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0217

WILLIAMS, JAWAHARIAL
Employee/Petitioner

Case# **16WC028618**

CITY OF CHICAGO
Employer/Respondent

On 10/5/2020, 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:

4564 ARGIONIS & ASSOCIATES LLC
AL KORITSARIS
180 N LASALLE ST SUITE 1925
CHICAGO, IL 60601

0010 CITY OF CHICAGO CORP COUNSEL
MATTHEW LOCKE
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

Jawaharial Williams
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **16** WC **28618**

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 **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **September 17, 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 **May 26, 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 $**81,226.60**; the average weekly wage was $**1,562.05**.

On the date of accident, Petitioner was **41** 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.

The parties agree that Petitioner was temporarily totally disabled from June 4, 2016 through April 17, 2019, a period of 149 3/7 weeks. Respondent shall be given a credit of $**155,610.44** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**155,610.44. Arb Exh 1**.

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 $197.00 to Northwest Orthopaedic & Sports Medicine, $615.00 to Mark Sokolowski, M.D./Orthopedic Surgery of the Spine, and $2,858.19 to Prescription Partners, as provided in Sections 8(a) and 8.2 of the Act. PX 7-9. Respondent shall have credit for the payments reflected in RX 2. See the attached decision for additional details concerning the medical award.

Permanent Partial Disability

Respondent shall pay Petitioner the sum of $**755.22**/week for a further period of **200 weeks**, as provided in Section **8(d)(2)** of the Act, because the injuries sustained resulted in permanency equivalent to **40% loss of a person as a whole.**

Respondent shall pay Petitioner compensation that has accrued from **December 19, 2018** through **Date of Arbitrator's Decision,** 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.

Molly C Mason

Signature of Arbitrator

October 5, 2020
Date

Jawaharial Williams v. City of Chicago – Dept. of Water Management
16 WC 28618

Summary of Disputed Issues

The parties agree that Petitioner, a longtime laborer, was injured on May 26, 2016, due to a trench cave-in. Petitioner testified he was working in a hole that was 13 feet deep when the sides caved in, causing large rocks, dirt and other debris to fall onto his head, neck, shoulders and back. He initially went to Physicians Immediate Care, where he was placed on restrictions which Respondent did not accommodate. He later began seeing Dr. Sokolowski, who injected his right shoulder and back. Cervical and lumbar spine MRIs showed significant disc pathology and a right shoulder MRI showed labral, rotator cuff and biceps involvement. At Dr. Sokolowski's recommendation, Petitioner began seeing Dr. McCall, a shoulder specialist. Dr. McCall operated on Petitioner's right shoulder in March 2018. Petitioner underwent therapy, work conditioning and a functional capacity thereafter. His lifting capacity did not match the 100-pound requirement of his laborer job so he began looking for work. In approximately April 2019, he began working as a journeyman caulker for Respondent. As of the hearing, he was working as an apprentice caulker earning $44.20 per hour, slightly less than he would have been earning had he continued as a laborer. [See stipulation attached to Arb Exh 1.]

The disputed issues include medical expenses and nature and extent. Arb Exh 1.

Arbitrator's Findings of Fact

Petitioner testified he began working as a laborer for Respondent on December 1, 1998. His duties included digging holes, repairing water services and going underground to work on sewer lines. He testified he spent each day performing strenuous physical tasks. He operated a jackhammer and dug holes by hand. He was required to lift 100 pounds. He is right-handed.

Petitioner denied injuring his head, neck, right shoulder or back before his accident of May 26, 2016. As of the accident, he worked full-time and was not subject to any restrictions.

Petitioner testified that, on May 26, 2016, he and various co-workers dug a hole that was 13 feet deep so that they could expose PDs that needed to be tied into the main line to stop the street from flooding. As he was working inside the hole, the sides caved in. Boulders, rocks and dirt fell onto him, striking his head, neck, shoulders and back. He was buried under about 1 ½ feet of debris and had to dig his way out. After the accident, he remained at the scene but did not resume working.

Petitioner testified he went to Physicians Immediate Care the following day, at Respondent's direction. The records from this facility reflect that Petitioner saw Dr. Shanahan on May 27, 2016. The doctor recorded a history of the cave-in and noted complaints of 5-7/10 pain in Petitioner's neck and right shoulder. He ordered X-rays of the cervical spine and right shoulder. The cervical spine X-rays demonstrated no fractures and minimal degenerative

changes. PX 3. The shoulder X-rays showed no fractures or dislocations and no soft tissue swelling. The doctor diagnosed a cervical spine sprain. He prescribed Prednisone and released Petitioner to full duty, noting that Petitioner "wants to be back at work." He directed Petitioner to return on June 3rd. PX 1, pp. 1-4.

Petitioner testified he resumed his regular job duties. His symptoms did not improve. He returned to Physicians Immediate Care on June 3, 2016 and saw a different physician, Dr. Weddaburne-Bossie. The doctor noted that Petitioner's pain had worsened and that he was experiencing increased neck stiffness. On examination, she noted that Petitioner's neck range of motion was very limited in all directions. She started Petitioner on Valium and prescribed physical therapy. She imposed restrictions of no bending or climbing, no lifting over 15 pounds, no pulling or pushing over 30 pounds and no neck or back exercise. PX 1, pp. 8-12.

Petitioner testified that he remained off work after June 3, 2016 because Respondent was not able to accommodate Dr. Weddaburne-Bossie's restrictions. He continued seeing various providers at Physicians Immediate Care and underwent a cervical spine MRI on June 25, 2016. This study, performed without contrast, showed mild multi-level cervical spondylosis, minimal to mild disc bulges at C2-C3 to C5-C6 and no significant stenosis. PX 3.

On August 8, 2016, Dr. Soler of Physicians Immediate Care noted the MRI results and indicated that Petitioner was still experiencing pain when turning his head. He prescribed Prednisone and recommended that Petitioner see an orthopedic spine surgeon for his neck condition. PX 1, pp. 32-34.

On August 29, 2016, Dr. Podgorska of Physicians Immediate Care noted that Petitioner's symptoms had worsened and that he had not yet received authorization to see an orthopedic surgeon. The doctor discontinued the Prednisone and started Petitioner on Naproxen. PX 1, pp. 35-37.

On September 9, 2016, Ricky Shah, a physician's assistant affiliated with Physicians Immediate Care, noted that Petitioner was complaining of neck pain radiating down his arms. Shah continued the work restrictions and found Petitioner to be at maximum medical improvement "with residual disability." PX 1, pp. 39-46.

On September 19, 2016, Petitioner saw Dr. Sokolowski, a spine surgeon. The doctor noted a referral from Dr. Soler. He recorded a consistent history of the work accident, noting that, on May 26, 2016, Petitioner was inside a deep hole, digging out a water main, when concrete and dirt struck his right shoulder and the back of his neck on the right side. He noted complaints of 7/10 neck and back pain and 6/10 right shoulder pain. On initial examination, Dr. Sokolowski noted a bilaterally positive Spurling's sign, a full range of motion in both shoulders but markedly positive impingement signs in the right shoulder, pain with resisted right supraspinatus strength testing, considerable anterior glenohumeral tenderness to palpation, pain with neck extension, diffuse lumbar tenderness, back pain with straight leg raising and

intact lower extremity strength. He reviewed the cervical spine MRI images and described them as "significant for disc pathology maximal at C6-7, principally left-sided."

Dr. Sokolowski diagnosed cervical pain, features of cervical radiculopathy, right rotator cuff tendinitis, with a possible tear, and lumbar pain. He indicated that these diagnoses were causally related to the accident. He recommended right shoulder and lumbar spine MRIs and prescribed an alternating regimen of Ibuprofen and Dendracin. He fitted Petitioner for a rigid lumbosacral orthosis and kept Petitioner off work. PX 2, pp. 68-70.

On October 19, 2016, Dr. Sokolowski noted that Petitioner rated his back, neck and right shoulder pain at 8/10. He also noted that the previously recommended MRIs had not yet been approved. He continued to keep Petitioner off work and again recommended the MRIs. PX 2, pp. 62-65.

On December 13, 2016, Dr. Sokolowski noted ongoing significant symptoms. He also noted that Petitioner had not yet undergone the recommended MRIs because he was unaware that they had been approved. On re-examination, he again noted markedly positive impingement signs on the right. He directed Petitioner to remain off work and proceed with the MRIs. PX 2, pp. 54-55.

The lumbar spine MRI, performed without contrast on January 5, 2017, showed mild lumbar spondylosis, moderate L4-L5, mild L3-L4 and minimal L5-S1 spinal canal narrowing and mild left L5-S1 facet arthrosis. PX 2, pp. 51-52. The right shoulder MRI, performed without contrast the same day, showed a partial thickness articular surface tear of the supraspinatus tendon at the greater tuberosity, superimposed upon mild to moderate tendinosis, mild infraspinatus and biceps tendinosis and a probable posterior to posterior superior labral tear. PX 2, pp. 52-53.

On February 10, 2017, Dr. Sokolowski reviewed the MRIs with Petitioner. He administered a right shoulder injection and prescribed therapy specifically for the shoulder. He noted that Petitioner might need a consultation with a shoulder specialist. He recommended a bilateral transforaminal epidural steroid injection at L4-L5, noting that Petitioner complained of pain radiating into his buttocks and thighs. He directed Petitioner to continue his medications and remain off work. PX 2, pp. 44-49.

Petitioner underwent therapy at Dr. Sokolowski's office between February 20, 2017 and April 24, 2017. PX 2.

Coventry sent a letter to Dr. Sokolowski on February 22, 2017 certifying the recommended L4-L5 injection. PX 2, pp. 42-43. Dr. Sokolowski administered this injection on March 13, 2017. PX 5.

Petitioner returned to Dr. Sokolowski on April 26, 2017 and reported that he had obtained authorization to see a shoulder specialist. He also reported some benefit from the

epidural injection but indicated his pain had started to return, again radiating to his buttocks. The doctor recommended that he remain off work, continue therapy, undergo a second epidural steroid injection and see the shoulder specialist. PX 2, pp. 29-32.

Dr. Sokolowski administered a second bilateral L4-L5 transforaminal epidural steroid injection on May 15, 2017. PX 5, pp. 1-2.

On May 30, 2017, Petitioner returned to Dr. Sokolowski and reported that he was still experiencing 7/10 back pain but no longer experiencing pain radiating to his buttocks. He also indicated he was awaiting a consultation with a shoulder specialist. The doctor recommended ongoing therapy pending this consultation. He directed Petitioner to remain off work. PX 5.

On June 29, 2017, Dr. Sokolowski noted ongoing complaints of 8/10 right shoulder, neck and non-radiating back pain. He indicated Petitioner would be a candidate for a third injection if his radicular symptoms reappeared. He recommended that Petitioner remain off work and continue therapy. PX 5.

At Dr. Sokolowski's referral, Petitioner saw Dr. McCall, an orthopedic surgeon, on July 7, 2017. Dr. McCall described Petitioner as a right-handed worker who was injured in a cave-in. He noted complaints of 8/10 pain in the right shoulder and neck. He indicated that Petitioner denied any prior right shoulder problems. On examination, he noted a moderately restricted range of neck motion, positive Spurling's to the right, positive Neer and Hawkins impingement signs on the right, pain with O'Brien's and Speed's testing, tenderness to palpation over the proximal biceps and 5/5 strength. He interpreted the right shoulder MRI as showing acute edema to the anterior supraspinatus footprint, a partial-thickness undersurface tear, degenerative fraying in the posterior labrum and edema and a longitudinal signal in the biceps. He also reviewed the cervical spine MRI, noting stenosis but no compressive disc pathology. He found the mechanism of injury that Petitioner described to be a competent cause of his pathology. He recommended therapy and found Petitioner capable of sedentary duty with no lifting with the right arm and no overhead work. PX 4, pp. 28-29.

Records in PX 5 reflect that Petitioner underwent an independent medical examination on July 12, 2017. No report concerning this examination is in evidence.

On August 8, 2017, Dr. Sokolowski indicated that Petitioner had recently undergone an independent medical examination, with the examiner finding Petitioner capable of full duty. He expressed disagreement with this finding, noting that Petitioner remained symptomatic and was seeing Dr. McCall. He continued to keep Petitioner off work. PX 5.

On August 16, 2017, Dr. McCall noted some improvement with therapy but a persistent pain rating of 7-8/10. He administered a right shoulder injection and continued the work restrictions. PX 4, pp. 26-27.

On September 27, 2017, Dr. McCall noted that Petitioner had completed 24 therapy sessions and obtained only transient relief from the injection. He administered another injection and prescribed four weeks of work conditioning. PX 4, pp. 24-25.

On November 8, 2017, Dr. McCall noted that Petitioner had progressed in work conditioning to the point where he was "65% matched to his job description." He recommended that Petitioner continue work conditioning. PX 4, pp. 21-22.

Petitioner underwent a functional capacity evaluation at Athletico on December 29, 2017. The evaluator, Maureen Ziegler, OTR, found that Petitioner put forth acceptable effort. She also found that Petitioner was "functionally employable" but met only 70.37% of his job demands. She concluded that Petitioner could perform occasional two-handed lifting of 60 pounds from floor to waist but that his job required occasional two-handed lifting of 100 pounds from floor to waist. PX 6.

On January 24, 2018, Dr. McCall noted that Petitioner was still experiencing pain and clicking in his right shoulder. He also noted that, while Petitioner had progressed in work conditioning, his lifting capacity was still below his work threshold of 100 pounds. He indicated that "a previous IME" described Petitioner as having a "pre-existing condition" but that Petitioner denied any pre-accident shoulder symptoms. He discussed various options, noting that Petitioner opted for surgical intervention. PX 4, pp. 19-20.

On February 2, 2018, Dr. Sokolowski reviewed the functional capacity evaluation report, noting that the evaluation was valid and that Petitioner was not capable of unrestricted duty. He recommended that Petitioner continue seeing Dr. McCall. He indicated Petitioner would likely require pain management for his cervical and lumbar pain. PX 5.

Dr. McCall operated on March 1, 2018, performing a right shoulder arthroscopy, glenohumeral debridement of the superior labrum and partial-thickness rotator cuff tear, a subacromial decompression and a mini-open biceps tenodesis. He continued seeing Petitioner postoperatively. On April 18, 2018, he recommended that Petitioner discontinue the sling and continue therapy. On August 8, 2018, he recommended that Petitioner transition to work conditioning. PX 4, p. 7. On November 2, 2018, he noted that Petitioner had strained his right thigh during a work conditioning session. He recommended six sessions of right thigh therapy followed by a return to work conditioning for the shoulder. PX 4, pp. 3-4. Petitioner finished the work conditioning on December 6, 2018.

Petitioner underwent a second functional capacity evaluation on December 14, 2018. The evaluation took place at an Athletico facility. The evaluator, Rosa DelPino, PT, rated the results as valid and observed no significant pain behaviors. DelPino found that Petitioner did not demonstrate the physical capabilities and tolerances to perform all of the essential functions of his laborer job. She indicated that Petitioner was functioning within the medium physical demand level and that his job fell into the heavy physical demand category. She

indicated that Respondent provided two job descriptions and that a nurse case manager later confirmed Petitioner "is a construction laborer and is at 100 lbs. for lifting." PX __.

On December 19, 2018, Dr. McCall reviewed the functional capacity evaluation. On re-examination, he noted negative O'Brien's, negative Neer impingement testing, mild pain with resisted drop arm and 5/5 strength. He found Petitioner to be at maximum medical improvement. He released Petitioner to work with a permanent restriction of 87.5 pounds maximal lifting. PX 4, pp. 1-2.

Petitioner testified that Respondent was not able to accommodate the permanent lifting restriction. He began participating in Respondent's job search program, which involved submitting ten applications per week. In approximately March 2019, he received approval to apply for a caulker position with Respondent. This position involved maximum lifting of 75 pounds. He applied for the position and obtained it about a month later. He started out as a journeyman caulker and eventually progressed to an apprentice. He testified that the next step would involve him becoming a licensed plumber. When he started out as a journeyman, he earned less than he would have earned in his previous laborer job.

Petitioner testified his right shoulder and back continue to bother him. He cannot perform much overhead work and finds it difficult to tie items tightly. He avoids squatting and tries to bend rather than squat. His neck has improved and his headaches have gone away.

Petitioner denied reinjuring his right shoulder, head, neck or back since being released to return to work.

Under cross-examination, Petitioner testified he started working as a caulker in approximately April 2019. He is still working as a caulker. Since he resumed working, he has not really lost any time due to his injuries. He is now an apprentice. The next progression would be to become a licensed plumber. That is his goal. He does not take any prescription medication for his injuries. He has not returned to Dr. McCall. He last saw Dr. Sokolowski in 2020 for a medication refill.

No witnesses testified on behalf of Respondent. Respondent offered into evidence ledgers outlining its medical and temporary total disability payments. RX 1-2.

Arbitrator's Credibility Assessment

The fact that Petitioner has worked for Respondent for over twenty years weighs in his favor, credibility-wise. None of his treating physicians noted any symptom magnification. His functional capacity evaluations were valid. The Arbitrator found him very credible.

Arbitrator's Conclusions of Law

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims unpaid medical and prescription expenses from Northwest Orthopedics (Dr. McCall, office visit of November 8, 2017, $197.00, PX 7), Prescription Partners ($2,858.19, medication dispensed by Dr. Sokolowski in 2016 and 2017, PX 8) and Orthopedic Surgery of the Spine (Dr. Sokolowski, office visits of June 29, 2017 and October 7, 2019, $615.00, PX 9). Respondent disputes this claim, asserting that it already paid these expenses. Arb Exh 1.

The Arbitrator has compared the claimed expenses with the medical payments listed in Respondent's payment ledger. RX 2. The ledger reflects a payment toward a November 8, 2017 therapy session but there is no indication Respondent paid Dr. McCall's $197.00 charge for the office visit of the same date. Respondent stipulated to causation and did not dispute any aspect of Dr. McCall's care. The Arbitrator awards the claimed charge of $197.00, subject to the fee schedule. As for Prescription Partners, Respondent paid $0 toward the September 19, 2016 charge of $988.69, $57.16 toward the December 13, 2016 charge of $991.91 and $57.16 toward the February 10, 2017 charge of $991.91. Respondent stipulated to causation and did not dispute any aspect of the prescriptions. The Arbitrator awards the claimed Prescription Partners charges of $2,858.19, with Respondent receiving credit for its two payments, each in the amount of $57.16. The ledger reflects a payment of $80.86 to Dr. Sokolowski for the office visit of June 29, 2017 but a payment of $0 for the office visit of October 7, 2019. Respondent offered no explanation as to why it made no payment toward this visit. The Arbitrator awards the claimed $615.00, subject to the fee schedule and with Respondent receiving credit for its payment of $80.86. RX 2.

What is the nature and extent of the injury?

Because the accident occurred after September 1, 2011, the Arbitrator looks to Section 8.1b of the Act for guidance in determining the nature and extent of Petitioner's injury. This section sets forth five factors to be considered in assessing permanency, with no single factor predominating. The Arbitrator assigns no weight to the first factor, any AMA Guides impairment rating, since neither party offered such a rating into evidence. The Arbitrator gives significant weight to the second and third factors, Petitioner's occupation and age at the time of the accident. Petitioner was 41 years old as of the accident. [The stipulation sheet incorrectly reflects he was 39.] The Arbitrator views him as a younger individual who could reasonably be expected to remain in the workforce for another twenty or twenty-five years. The restrictions resulting from his shoulder injury precluded him from resuming his laborer occupation. He was able to secure a caulker position with Respondent and could eventually become a licensed plumber but there is no guarantee Respondent will retain him in his current job. His lifting restriction could preclude him from obtaining another laborer position. The fourth factor, future earning capacity, cuts both ways. As of the hearing, Petitioner was earning only slightly less per hour as a caulker than he would be earning as a laborer. [See stipulation attached to Arb Exh 1.] If he continues along his current path, and eventually becomes a licensed plumber, his earnings could be enhanced. If, on the other hand, he loses his current job before obtaining this license, he could have difficulty securing work as a laborer, due to his

permanent restrictions. The Arbitrator gives these circumstances some weight. As for the fifth and final factor, evidence of disability corroborated by the treatment records, the Arbitrator notes the various MRI results, Dr. McCall's operative findings, the functional capacity evaluation results and Dr. McCall's final examination findings. Petitioner injured his spine as well as his dominant right arm. Dr. McCall's operative report documents labral, rotator cuff and biceps involvement.

The Arbitrator has considered the foregoing along with Petitioner's credible testimony concerning his ongoing complaints and the manner in which his injury has affected how he performs his work duties. The Arbitrator finds that Petitioner is permanently partially disabled to the extent of 40% loss of use of the person as a whole, equivalent to 200 weeks of benefits.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC013873
Case Name	ACOSTA, DANIEL RANGEL v. RG CONSTRUCTION SVCS, INC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0218
Number of Pages of Decision	23
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Jonathan Schlack
Respondent Attorney	Robert Newman

DATE FILED: 5/3/2021

/s/ Stephen Mathis, 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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Daniel Rangel Acosta,

Petitioner,

vs. NO: 17 WC 13873

RG Construction 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 accident, notice, causal connection, medical expenses, benefit rates, temporary disability, permanent disability and evidentiary rulings, and being advised of the facts and law, affirms and adopts the amended Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the amended Decision of the Arbitrator filed January 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 3, 2021

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

SJM/sk
o-3/3/2021
44

/s/ *Thomas Tyrrell*
Thomas Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
AMENDED

ACOSTA, DANIEL RANGEL
Employee/Petitioner

Case# **17WC013873**
17WC013870

R G CONSTRUCTION SERVICES INC
Employer/Respondent

On 1/28/2020, 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 1.53% 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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CHICAGO, IL 60601

0481 MACIOROWSKI SACKMANN & ULRICH
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CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

- [ ] 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
AMENDED ARBITRATION DECISION

Daniel Rangel Acosta
Employee/Petitioner

v.

R.G. CONSTRUCTION SERVICES, INC
Employer/Respondent

Case # 17 WC 13873

Consolidated cases: 17 WC 13870

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 **September 9, 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. [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. [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. [ ] Other _____

FINDINGS

On **May 5, 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 $**94,328.00**; the average weekly wage was $**1,814.00**.

On the date of accident, Petitioner was **39** years of age, ***married*** with **3** dependent children.

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

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

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

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

ORDER

Respondent shall pay Petitioner TTD benefits from May 6, 2017 through April 24, 2018 representing 50 3/7 weeks.

Respondent to pay to Petitioner the outstanding medical amounts contained in Petitioner's exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 pursuant to sections 8(a) and 8.2 of the Act, subject to medical fee schedule.

Respondent shall pay Petitioner permanent partial disability benefits 30 weeks, because the injuries sustained caused 6% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

The Petition for penalties and fees is denied.

Respondent shall pay Petitioner compensation that has accrued from May 5, 2017 through September 9, 2019 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

1/23/2020
Date

JAN 2 8 2020

Procedural History

Daniel Rangel Acosta (hereafter referred to as "Petitioner') filed two Application of Adjustment of Claim both alleged an injury to Petitioner's low back. In Case number 17 WC 13870 Petitioner alleges a low back injury that occurred on April 3, 2017. In that case, Petitioner did not seek medical care or miss time from work. In case number 17 WC 13873 Petitioner alleges a second injury to his low back that occurred on May 5, 2017. In that case, Petitioner received medical treatment and missed time from work. Both cases were tried on September 9, 2019 and separate decisions have been issued on each case.

In the instant case (*i.e.* 17 WC 13873) the disputed issues are: (1) whether Petitioner sustained an accidental injury that arose out of and in the course of his employment, (2) whether Respondent received notice of the accident within the time limits stated in the Act, (3) whether Petitioner's current condition of ill-being is causally connected to the injury, (4) whether respondent is liable for unpaid medical bills, and (5) whether Petitioner is entitled to TTD benefits, (6) the nature and extent of Petitioner's injury. Petitioner is also seeking penalties and fees pursuant to sections 19(k), 19(l), and 16 of the Act. (Arb. Ex. #2).

Finding of Fact

Petitioner testified that he started working for Respondent in February of 2017 as a drywall installer. (T.14, 19). Petitioner testified that as a drywall installer, his duties included bending over, picking up sheets of drywall from the ground, placing the sheets of drywall on the wall for installation, and nailing the drywall to the wall. Petitioner testified that a sheet of drywall could weigh up to 80-90 pounds. (T. 15, 16).

Petitioner testified that on April 3, 2017, he was carrying and lifting a piece of drywall weighing between 80-90 pounds when he felt pain in his back and right leg. Petitioner testified that he believes he told his supervisor, Alex Lopez, that he was in pain. Petitioner testified that the pain wasn't so bad, and he was able to continue working. Petitioner testified that he took over-the-counter medicine and that he was doing better with the medicine. (T. 16, 17).

Petitioner testified that he did not experience any pain or discomfort in his lumbar spine prior to April 3, 2017 (T. 36). Petitioner also testified that, prior to April 3, 2017, he was not actively treating or seeking medical treatment for his lumbar spine (T.37).

Petitioner testified that he was able to continue working until May 5, 2017. Petitioner testified that on that day he was bent over lifting a piece of drywall when he felt "big pain" in his

lower back. Petitioner testified that the pain was different from the pain he experienced in the first accident because now he was unable to pick up drywall. Petitioner testified that he told his supervisor, Alex Lopez, what happened, and Mr. Lopez told him to go home and to go fix himself. (T. 17-21).

Later that day, on May 5, 2017, Petitioner sought medical treatment at MacNeal Hospital emergency room. Petitioner reported pain from his right leg moving up to his back after lifting drywall at work. Petitioner indicated that he was experiencing tingling down his leg. The examination showed mild to moderate tenderness over approximately the 5th lumbar vertebrae, mild to moderate lumbosacral paravertebral spasm on the right and left sides of the low back with a moderately abnormal straight leg raise test with the right leg. Petitioner was diagnosed with low back pain and proscribed Toradol, Flexeril and a Lidoderm patch. (RX 1),

After being released from MacNeal Hospital, Petitioner started treating with Dr. Snook, a chiropractor, with New Life Medical Center. The medical records dated, May 8, 2017, stated Petitioner sustained a work-related injury on May 5, 2017 when he was carrying drywall and felling intense pain in his low back and right leg. Dr. Snook opined the injury was a "direct result of injury sustained at work". Petitioner was diagnosed with lumbar spine sprain, lumbar spine pain, and lumbar radiculopathy. Petitioner was restricted from work. (PX 4).

Petitioner continued treatment with New Life Medical Center and on May 15, 2017, Petitioner underwent an x-ray of the lumbar spine at Specialized Radiology Consultants which noted biomechanical alterations. (PX 6). Petitioner continued treatment with New Life Medical Center and, on May 27, 2017, Petitioner was given an updated work status restricting him from work. (PX 4).

On May 30, 2017, Petitioner returned to Dr. Snook. At that time, Petitioner reported low back pain located predominately on the midline with hot sensation and weakness in his right lower extremity. Petitioner was diagnosed with lumbar spine sprain, lumbar spine pain, and lumbar radiculopathy from a work-related injury. Petitioner continued to treat at New Life Medical Center. An MRI was recommended, and Petitioner was referred to a pain management doctor. Dr. Snook also recommended durable medical equipment, which was provided by G&U Orthopedic. (PX 4, 7).

On June 1, 2017, Petitioner underwent a lumbar MRI at Berwyn Diagnostic Imaging. The MRI showed a right asymmetrical disc bulge at L3-L4 with a concentric disc bulge at L5-S1 and a 4.5 mm right central herniation at L4-L5. (PX 8).

On June 9, 2017, Petitioner was treated by Dr. Jain at Pinnacle Pain Management Specialists. The records state that Petitioner sustained an injury at work while lifting drywall when he felt pain in his lower back. The records further indicate that after reporting the accident to his supervisor, Petitioner went home but his pain continued to worsen causing him to go to the emergency room. Dr. Jain noted that Petitioner's low back pain that tingled down the right leg and the pain worsen with standing, bending backwards and sudden movements. Dr. Jain diagnosed lumbar facet syndrome, lumbar discogenic pain, and lumbar radiculopathy. Dr. Jain recommended bilateral L3-L4, L4-L5, and L5-S1facet joint injections. In his records, Dr. Jain opined that Petitioner's symptoms were directly related to the injury and that Petitioner's treatment was reasonable and necessary. On June 14, 2017 Petitioner underwent bilateral L3-L4 and L4-L5 facet joint injections. (PX. 10).

On June 19, 2017, Petitioner underwent a Neurological Consultation and Electrodiagnostic Examination with Dr. Thurston, a chiropractic Neurologist, with New Life Medical Center at the request of Dr. Snook. Dr. Thurston noted that Petitioner sustained a work-related injury, while carrying drywall when he felt sudden pain in his low back and right lower extremity on May 5, 2017. Dr. Thurston performed an NCV/EMG, which revealed mild-moderate right lumbar radiculitis involving the L5, S1 dermatomal distributions. (PX 5).

On June 26, 2017, Petitioner was re-evaluated by Dr. Snook. At that time, Petitioner reported that he was experiencing burning low back pain aggravated by walking and standing. Dr. Snook diagnosed disc displacement of the lumbar spine, lumbar spine pain, and lumbar radiculopathy. (PX 4).

On July 18, 2017, Petitioner was examined by Dr. Soriano, a neurosurgeon, pursuant to Section 12 of the Act.

On July 29, 2017, Petitioner returned to Dr. Snook. At that time, Petitioner reported low back pain, numbness and tingling down the right lower extremity. Petitioner was diagnosed with disc displacement of the lumbar spine, lumbar spine pain, and lumbar radiculopathy from the work-related injury. Petitioner continued to treat with Dr. Snook until August 18, 2017. At that time, Dr. Snook referred Petitioner for a neurological consultation. (PX. 4).

On August 30, 2017, Petitioner presented to Dr. Robert Erickson, of the American Center for Spine and Neurosurgery. Petitioner reported that he was injured on April 3, 2017 while carrying drywall, but he was able to continue working until May 5, 2017 when he sustained an injury that caused a distinct problem. Petitioner complained of low back pain, tingling involving his right leg extending into the foot. Petitioner reported that those symptoms had improved but the low back pain remained. Petitioner reported his pain level as 4 out of 10. (PX 13).

Dr. Erickson's examination showed a positive straight leg raise test on the right side at 35 degrees. The Lasegue maneuver was positive. Petitioner experienced pain with lumbar extension. Dr. Erickson reviewed the MRI impression of June 1, 2017 and noted the MRI showed a right central disc herniation at L4-5, measuring 4-5 mm. Dr. Erickson also noted that the EMG, dated July 7, 2017, suggested abnormalities of the L5 and S1 nerve roots on the right side. Dr. Erickson further noted Petitioner had no history of a prior injury and had been working for 15 years as a carpenter before the injury. Dr. Erickson opined that Petitioner sustained a lifting injury on April 3, 2017 with some progression over the next two months followed by partial spontaneous relief. Dr. Erickson recommended SSEP testing of the lower extremities. Dr. Erickson issued light duty work restrictions consisting of no carrying or lifting greater than 20 pounds. (PX 13).

Petitioner treated with Dr. Jain from July 6, 2017 through October 2, 2017. Dr. Jain also recommended lumbar injections. Dr. Jain recommended physical therapy and he took Petitioner off work. (PX 9).

On August 21, 2017, Petitioner treated with Dr. Snook until October 30, 2017. Dr. Snook issued light duty work restrictions consisting of avoiding construction work involving heavy lifting and repetitive bending. (PX 4).

On October 31, 2017, Petitioner followed up with Dr. Jain who noted that Petitioner's pain had improved. Dr. Jain discharged Petitioner from pain management. In his records, Dr. Jain opined that Petitioner's symptoms were directly related to the injury and that Petitioner's medical treatment was reasonable and necessary. PX 9).

On March 9, 2018, Petitioner underwent the SSEP examination previously recommended by Dr. Erickson. On May 5, 2018, Petitioner return to Dr. Erickson who noted that the SSEP examination suggested a moderate delay at the L5 nerve root on the right side at 0.9 standard deviations. Dr. Erickson further noted that in the prior examinations Petitioner had a positive

straight leg raise test on the right side with occasional paresthesia reported in the first through the fourth toes. Petitioner reported he was feeling much better and did not require further epidural steroid injection. Petitioner reported pain levels between 1 and 0 out of 10. Dr. Erickson opined that the neurophysiological testing suggest that Petitioner sustained a genuine injury which he has improved. Dr. Erickson discharged Petitioner from care without any work restrictions. (PX 13).

Petitioner testified that he did not work from May 5, 2017 through April 25, 2018. (T. 27). Petitioner testified that after receiving his light duty restrictions, he notified Respondent. Petitioner testified that he also sent Respondent his light duty restrictions via facsimile. Petitioner testified that he did not receive TTD benefits while off work. Petitioner testified that, prior to April 3, 2017, he never had lumbar pain or discomfort or received any medical treatment. (T. 36, 37). Petitioner testified that since his work accident he continues to experience discomfort after lifting heavy items. (T. 37).

Alex Lopez testified for Respondent. Mr. Lopez was Petitioner's supervisor. Mr. Lopez testified that Petitioner did not report experiencing a work injury on either April 3, 2017 and May 5, 2017, (T. 53,54). Mr. Lopez testified that Petitioner requested to go home early on May 5, 2017 because he was wearing a new pair of boots and he was not feeling good. Mr. Lopez testified that he let Petitioner go home after lunch because he was a good worker. Mr. Lopez testified the following day, May 6, 2017, Petitioner contacted him and advised him that he was hurt, the previous day at work, and that he had gone to the hospital. (T. 55,56). Mr. Lopez testified that after receiving Petitioner phone call, he contacted the project manager and reported Petitioner's accident. (T. 57).

Mr. Lopez testified that normally two people pick up the drywall and install it. Mr. Lopez testified that the drywall is carried on a cart and drywall weights between 30-50 pounds depending upon the thickness of the drywall. (T. 77).

Dr. Marc Soriano, who performed a Section 16 examination, on July 18, 2017, testified that he is a neurosurgeon who no longer has a clinical practice or performs surgery. Dr. Soriano testified that he now performs consulting work in the areas of medical or legal issues.

Dr. Soriano testified that Ptitioner reported carrying drywall, on May 3, 2017, weighing 80 pounds, when he felt a sharp pain in his low back after setting it down. Petitioner continued working until May 5, 2017, when his pain increased in the midline at L5-S1 and began to radiate

into the right side of his back and down the lateral portion of his right thigh, calf, and into the toes. Petitioner also reported that his pain was constant, was associated with numbness and he has been unable to work since May 5, 2017. (RX 1).

Dr. Soriano testified that he reviewed the MRI which showed degenerative changes including a bulging right paracentral disc at L4-5 and facet and ligamentous hypertrophy with some mild central canal stenosis without compression of neuroforamen at either L4 or L5. Dr. Soriano testified that he did not see a condition on the MRI that would cause radiculopathy. The examination showed pain with range of motion testing. Dr. Soriano testified that Petitioner extended only about 10 degrees before experiencing pain in the midline of his back. Dr. Soriano also noted that Petitioner's reported pain during lateral bending to the right at 10 degrees located in the L5-S1 area. Dr. Soriano opined that he found positive Waddell's signs. (RX 1).

Dr. Soriano testified that Petitioner's current condition did not have any relationship to the original injury of April 3, 2017 based upon the lack of any positive physical exam findings and lack of any correlated MRI findings. Dr. Soriano further testified that as of July 18, 2017, Petitioner did not require further medical treatment. Dr. Soriano testified that Petitioner's subjective complaints in one spot with leg pain and numbness were out of proportion to any findings during his examination and the radiological studies. Dr. Soriano testified that as of July 18, 2017, Petitioner could work full duty. (RX 1).

Dr. Soriano testified that if Petitioner had an injury on May 5, 2017, it would have been an unverifiable soft tissue injury such as a sprain or strain of the muscles, ligaments or tendons. Dr. Soriano testified that he could not find an explanation for the pain or numbness going down Petitioner's right leg. Dr. Soriano testified that the MRI did not show any pressure on any of the L4-5 or S1 nerve roots. Dr. Soriano further testified that Petitioner had longstanding degenerative changes and that there was no evidence that any of them were aggravated or made worse beyond a normal progression. Dr. Soriano opined that there was no relationship between the reported accident and any finding on his examination or any other examinations. Dr. Soriano further opined that there was no causal relationship between the injuries of April 3, 2017 and May 5, 2017 and that MRI findings. Dr. Soriano also opined that the facet injections and physical therapy after July 2017 were not reasonable or necessary. Dr. Soriano testified there was no reason to undergo physical therapy 4 to 5 months after the injury because the effective period for therapy was between the first 4 to 6 weeks. (RX 1).

On cross-examination, Dr. Soriano testified that when he said there was no documentation showing that Petitioner was injured at work he obtained that from information from a supervisor's report and that he was not referring to Petitioner's medical records. Dr. Soriano testified that the letter was addressed to whom it may concern.[1] (RX 1, pgs. 44, 45).

Dr. Soriano also testified that it was possible that his interpretation was different than the radiologist interpretation of the MRI. (RX 1, pg. 47). Dr. Soriano testified that he did not include in his report the bulging discs at aL4-5 and L5-S1 found in the MRI because they were just simple bulges and were not relevant. Dr. Soriano opined that the 4 ½ mm disc herniation found by the radiologist was a bulge, not a herniation. Dr. Soriano testified the disc was not herniated because there was no tear of the anulus and 4 mm was not really anything that he would call a herniation. Dr. Soriano further testified that when he uses the term unverifiable soft tissue injury, it means that there is nothing objective that we see on either the radiologic studies or the physical exam. (RX 1, pg.48).

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 sustained an accident that arose out of and in the course of his employment, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner has proved by the preponderance of the evidence that he sustained an accident that arose out of and in the course of his employment.

Petitioner testified that, on May 5, 2017, he was injured when he bent over to lift a piece of drywall when he felt "big pain" in his lower back. Petitioner testified that the pain was different from the pain he had after the first accident because now unable to pick up drywall. Petitioner testified that he told his supervisor, Alex Lopez, what happened. Later that day, Petitioner sought medical treatment at the MacNeal Hospital emergency room. At that time, Petitioner reported pain from his right leg moving up to his back after lifting drywall at work.

[1] Dr. Soriano was referring to a letter dated May 16, 2017 allegedly authored by Alex Lopez, Petitioner's supervisor. *See Respondent Exhibit #4.* Mr. Lopez testified the letter was a copy of an email he sent to Mr. Brian Garsha, the safety coordinator. Mr. Lopez testified that he drafted the email on Brian Barsha's computer and also sent it to Brian Garsha. The letter was not signed by Alex Lopez. (T. 72-73). The letter was found to be inadmissible at trial. (T. 98-100).

Petitioner indicated that he was experiencing tingling down his leg. The examination showed mild to moderate tenderness over approximately the 5th lumbar vertebrae, mild to moderate lumbosacral paravertebral spasm on the right and left sides of the low back with a moderately abnormal straight leg raise test with the right leg. The Arbitrator notes that Petitioner provided similar histories to his other treating physicians. Dr. Jain diagnosed lumbar facet syndrome, lumbar discogenic pain, and lumbar radiculopathy. Dr. Erickson also noted that the EMG, dated July 7, 2017, suggested abnormalities of the L5 and S1 nerve roots on the right side. Dr. Erickson further noted Petitioner had no history of a prior injury and had been working for 15 years as a carpenter before the injury. Dr. Erickson opined that Petitioner sustained a lifting injury on April 3, 2017 with some progression over the next two months followed by partial spontaneous relief.

With respect to issue (E) was timely notice of the accident given, the Arbitrator finds as follows:

Petitioner testified that he provided notice of the accident to his supervisor, Alex Lopez. The Arbitrator notes that Respondent denies receiving notice of the accident, Respondent's witness, Alex Lopez testified that he received notice of the accident on May 6, 2017, the day after the accident. Mr. Lopez testified that upon receiving notice of the accident, he advised the safety coordinator of the accident. The Arbitrator finds that Petitioner proved by the preponderance of the evidence that Respondent was provided proper notice pursuant to the Act. The giving of notice under the Act is jurisdictional and a prerequisite of the right to maintain a preceding under the act. However, the legislature has mandated a liberal construction on the issue of notice. *S&H Floor Covering v. The Worker's Compensation Comm'n*, 870 N.E.2d 821 (2007).

With respect to issue (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

When a worker's physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment. *Sisbro v. Indust. Com'n*, 207 Ill.2d 193, 205 (2003). Workers need only prove that some act or phase of employment was a causative factor in her ensuing injuries. *Land and Lakes Co. v. Indust. Com'n*, 359 Ill.App.3d 582, 592 (2005). The work-related task need not even be the sole or principal causative factor of the injury, as long the work is a causative factor. *See Sisbro*, 207

Ill.2d at 205. Even if the claimant has a preexisting degenerative condition which makes him more vulnerable to injury, recovery for an accidental injury will not be denied as long as she can show that her employment was also a causative factor. *Id.* At 205. Employers are to take their employees as they find them. *A.C.&S v. Industrial Commission*, 710 N.E.2d 8347 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (1982).

Causal connection between work duties and an injured condition may be established by a claim of events including claimant's ability to perform duties before the date of an accident and inability to perform same duties following date of accident. *Darling v. Industrial Commission*, 176 Ill.App.3d 186, 530 N.E.2d 1135 (First Dist. 1988). A claimant's prior condition need not be a of good health prior to the accident, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition, it is the resulting deterioration from whatever the previous condition had been. *Schroeder v. Illinois Worker's Compensation Comm'n*, 4-16-0192WC (Fourth Dist. 2017).

The Arbitrator has carefully reviewed and considered all medical evidence along with the testimony. The Arbitrator concludes that Petitioner has proven by the preponderance of the evidence that his current lumbar spine condition of ill-being is causally related to his work accident of May 5, 2017.

Prior to May 5, 2017, Petitioner was working for Respondent. After the May 5, 2017 accident, Petitioner's condition deteriorated, and he was unable to work. Petitioner testified he never had prior complaints of any pain in his lumbar spine prior to his April 3, 2017 and May 5, 2017 accidents and he had not received any prior medical treatment for his lumbar spine. After the May 5, 2017 accident. At the hospital, Petitioner reported pain from his right leg moving up to his back after lifting drywall at work. Petitioner indicated that he was experiencing tingling down his leg. The examination showed mild to moderate tenderness over approximately the 5th lumbar vertebrae, mild to moderate lumbosacral paravertebral spasm on the right and left sides of the low back with a moderately abnormal straight leg raise test with the right leg. Petitioner was diagnosed with low back pain and proscribed Toradol, Flexeril and a Lidoderm patch. After being released from MacNeal Hospital, Petitioner started treating with Dr. Snook, a chiropractor, with New Life Medical Center.

The Arbitrator finds the opinions of Drs. Snook, Thurston, Jain and Erickson more persuasive than the opinions of Dr. Soriano. On June 1, 2017, Petitioner underwent a lumbar MRI at Berwyn Diagnostic Imaging. The MRI showed a right asymmetrical disc bulge at L3-L4 with a concentric disc bulge at L5-S1 and a 4.5 mm right central herniation at L4-L5. (PX 8). Dr. Jain noted that Petitioner's low back pain would tingle down his right leg and that the pain was worse with standing, bending backwards and sudden movements. Dr. Jain diagnosed lumbar facet syndrome, lumbar discogenic pain, and lumbar radiculopathy. Dr. Jain recommended bilateral L3-L4, L4-L5, and L5-S1facet joint injections. In his medical records, Dr. Jain opined that Petitioner's symptoms were directly related to the injury and that the treatment rendered had been reasonable and necessary. Dr. Erickson noted that the MRI showed a right central disc herniation at L4-5, measuring 4-5 mm. Dr. Erickson also noted that the EMG, dated July 7, 2017, suggested abnormalities of the L5 and S1 nerve roots on the right side. Dr. Erickson further noted Petitioner had no history of a prior injury and had been working for 15 years as a carpenter before the injury. Dr. Erickson opined that Petitioner sustained a lifting injury on April 3, 2017 with progression.

The Arbitrator does not find the opinions of Dr. Soriano to be persuasive. The Arbitrator notes that Dr. Soriano based his opinions, in part, upon a document, allegedly authored by Mr. Lopez, titled to whom it may concern. The document was not allowed into evidence. The Arbitrator notes several issues regarding the reliability of the document. Mr. Lopez testified that he created the document on his supervisor's computer and then emailed to document to his supervisor. Despite creating the document on his supervisor's computer and emailing it to his supervisor, the document was address to "whom it may concern". The Arbitrator finds Mr. Lopez's testimony regarding the creation of the document not to be credible. Dr. Soriano testified that he based his opinion, in part, upon that document. On cross-examination, Dr. Soriano testified that his opinion was based upon no documentation showing that Petitioner was injured at work which he obtained from a supervisor's report addressed to "whom it may concern." (RX 1, pgs. 44, 45). The Arbitrator notes that Petitioner's medical records from MacNeal Hospital, Dr. Snook, Dr. Jain and Dr. Erickson describe that Petitioner was injured at work lifting drywall.

The Arbitrator also notes that Dr. Soriano testified that it was possible that his interpretation of the MRI was different than the radiologist interpretation of the MRI. (RX 1, pg. 47). Dr. Soriano testified that he did not include the bulging discs at aL4-5 and L5-S1 in his

report because they were just simple budges and not relevant. Dr. Soriano further testified the 4 ½ mm disc herniation found by the radiologist was a bulge, not a herniation. Despite Dr. Soriano disagreement with the interpretation of the MRI findings he did not include the exitance of the existence of the bulge or his disagreement with the radiologist in his report. The Arbitrator finds the failure to include the finding of a bulge or his disagreement with the radiologist interpretation of the MRI in is his report undermines his opinions. Dr. Soriano testified that he agreed a bulge existed, but he decided not to include that finding in his report. The Arbitrator finds that the failure to include a finding in a report, which existed, undermines the persuasiveness of Dr. Soriano's opinions.

With respect to issue (J); Whether the medical services provided were reasonable, the Arbitrator concludes the following:

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).

Petitioner treated at MacNeal Hospital on May 5, 2017. The amount currently outstanding for MacNeal Hospital is $3,126.63 (PX. 1, at 2-4). There is a physician bill for CEP America for the same date of service. The outstanding balance due CEP America is $473.00 (PX 2, at 2). There is also a radiology bill for the same date of service from RadAdvantage Illinois in the amount of $78.00 (PX. 3, at 1).

Petitioner received medical treatment from New Life Medical Center and the amount outstanding is $18,815.00 (PX 4, at 2-3). Petitioner underwent a nerve conduction study at New Life Medical Center, with Dr. Thurston on June 19, 2017, and the amount outstanding for that test is $5,004.00 (Px. 5, at 2).

Petitioner underwent an x-ray of the lumbar spine on May 15, 2017 at Specialized Radiology Consultants. The amount due Specialized Radiology Consultants is $80.00 (PX. 6, at 2). Petitioner was proscribed durable medical equipment from G&U Orthopedics. The amount due G&U Orthopedics is $5,586.34 (PX 7, at 2). Petitioner underwent an MRI of the lumbar spine on June 1, 2017 at Berwyn Diagnostic Imaging. The amount due Berwyn Diagnostic Imaging is $1,950.00 (PX 8, at 2).

Petitioner treated with Dr. Jain at Pinnacle Pain Management Specialists. The amount due Pinnacle Pain Management Specialists is $3,686.00 (PX 9, at 2). Petitioner also received treatment from Pinnacle Interventional Pain Associates. The outstanding balance is $8,935.00 (PX. 10, at 2). An anesthesia charge in the amount of $2,072.00 is due to Windy City Anesthesia. (PX. 12, at 2-4). Petitioner underwent an SSEP at Neurological Specialists on March 9, 2018. The outstanding balance is $1,500.00 (PX 11, at 2).

Petitioner treated with Dr. Erickson at American Center for Spine and Neurosurgery. The amount outstanding for American Center for Spine and Neurosurgery is $700.00 (PX. 13, at 2). Petitioner was prescribed medications which he procured from Metro Health Solutions. The amount due Metro Health Solutions is $2,280.60 (PX 14, at 2-5) and the amount due Premier Healthcare Services is $3,400.00 (PX 15, at 2-4), and the amount due EQMD is $2,410.82. (PX. 16, at 2).

The Arbitrator finds that Petitioner's treatment was reasonable and necessary to diagnose, relieve, or cure the effects of the claimant's injury. As such, the Arbitrator orders Respondent to pay to Petitioner the outstanding medical amounts contained in Petitioner's exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 pursuant to sections 8(a) and 8.2 of the Act, subject to medical fee schedule.

With respect to issue (K), whether Petitioner is entitled to TTD benefits, 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 (emphasis added); *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

Petitioner claims to be entitled to TTD benefits from May 5, 2017 through April 25, 2018, representing 51 weeks of TTD benefits.

During this 51-week period, Petitioner was either off-work or had light duty restrictions. Petitioner testified that he presented his work restrictions to Respondent and was told his restrictions could not be accommodated. (T 35-36). Petitioner testified that he returned to work on April 25, 2018. Dr. Erickson released Petitioner from medical care without restrictions on May 5, 2018. The Arbitrator finds that Petitioner proved by the preponderance of the evidence that he was entitled to TTD benefits from May 6, 2017 through April 24, 2018. As such, the Arbitrator awards Petitioner TTD benefits from May 6, 2017 through April 24, 2018.

In support of the Arbitrator's related to issue (L), the nature and extend of Petitioner's injury, the Arbitrator makes the following conclusions:

Section 8.1b of the Illinois Workers' Compensation Act ("Act") addresses the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b (LEXIS 2011). Specifically, Section 8.1b states:

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
> (i) the reported level of impairment pursuant to subsection (a);
> (ii) the occupation of the injured employee;
> (iii) the age of the employee at the time of the injury;
> (iv) the employee's future earning capacity; and
> (v) evidence of disability corroborated by the treating medical records.

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.* Considering these factors in light of the evidence submitted at trial, the

Arbitrator addresses the factors delineated in the Act for determining permanent partial disability.

With regard to subsection (i) of Section 8.lb(b), the reported level of impairment pursuant to Section 8.1b(a), the Arbitrator notes that neither party submitted into evidence an AMA impairment rating. Thus, the Arbitrator considers the parties to have waived their right to do so and assigns no weight to this factor.

With regard to subsection (ii) of Section 8.lb(b), the occupation of the injured employee, Petitioner testified that he was a drywall hanger which required him to lift sheets of drywall which could weigh up to 80 pounds. The Arbitrator gives this factor some weight in determining the level of disability.

With regard to subsection (iii) of Section 8.lb(b), the age of the employee at the time of the injury. Petitioner was 39 years old. The Arbitrator notes that as the body ages, the ability of the body to recover from the effects of an injury decreases. The Arbitrator gives this factor some weight in determining the level of disability.

With regard to subsection (iv) of Section 8.lb(b), the employee's future earning capacity. Petitioner did not proffer any evidence that his future earning capacity has been adversely impacted by his injury. As such, the Arbitrator gives this factor no weight when determining the level of disability.

With regard to subsection (v) of Section 8.lb(b), evidence of disability corroborated by the treating medical records. Petitioner testified that he experiences discomfort when lifting heavy items. (T. 37). The Arbitrator notes that Petitioner reported to Dr. Erickson pain levels of 1 to 0 out of 10 on May 5, 2018. The Arbitrator finds that Petitioner's testimony was constant with the pain levels he was experiencing when released from medical treatment. Petitioner underwent significant conservative treatment and was able to return to work full duty. As such, the Arbitrator gives this factor great weight when determining the level of disability.

In consideration of the factors enumerated in Section 8.1b, which does not simply require a calculation, but rather a measured evaluation of all five factors of which no single factor is conclusive on the issue of permanency, the Arbitrator finds that Petitioner suffered permanent partial disability to the extent of 6% of man as a whole pursuant to § 8(d)2 of the Act.

With regards to issue (M), whether penalties or fees should be imposed upon Respondent, this Arbitrator finds the following:

Petitioner seeks penalties pursuant to Sections 19 and 16 of the Act based on Respondent's failure to pay temporary total disability (TTD) benefits and medical benefits. The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he is entitled to penalties and attorney's fees. As such, Petitioner's claim for penalties is hereby denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC013870
Case Name	ACOSTA,DANIEL RANGEL v. RG CONSTRUCTION SVCS, INC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0219
Number of Pages of Decision	19
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Jonathan Schlack
Respondent Attorney	Robert Newman

DATE FILED: 5/3/2021

/s/ Stephen Mathis, 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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Daniel Rangel Acosta,

Petitioner,

vs. NO: 17 WC 13870

RG Construction 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 accident, notice, causal connection, medical expenses, benefit rates, temporary disability, permanent disability and evidentiary rulings, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 2, 2020 is hereby affirmed and adopted.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $4,000.00. No bond is required for the removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 3, 2021

/s/ *Stephen J. Mathis*

Stephen J. Mathis

o-3/3/2021
44

/s/ *Thomas Tyrrell*

Thomas Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ACOSTA, DANIEL RANGEL
Employee/Petitioner

Case# **17WC013870**
17WC013873

R G CONSTRUCTION SERVICES INC
Employer/Respondent

On 1/2/2020, 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 1.56% 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:

4069 JONATHAN SCHLACK LAW OFFICE
CHRISTOPHER BASSMAJI
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CHICAGO, IL 60601

0481 MACIOROWSKI SACKMANN & ULRICH
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105 W ADAMS ST SUITE 2200
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Daniel Rangel Acosta
Employee/Petitioner

v.

R.G. CONSTRUCTION SERVICES, INC
Employer/Respondent

Case # 17 WC 13870

Consolidated cases: 17 WC 13873

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 **September 9, 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 **April 3, 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 $**94,328.00**; the average weekly wage was $**1,814.00**.

On the date of accident, Petitioner was **39** years of age, ***married*** with **3** 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

Respondent shall pay Petitioner permanent partial disability benefits 5 weeks, because the injuries sustained caused 1% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

The Petition for penalties and fees is denied.

Respondent shall pay Petitioner compensation that has accrued from April 3, 2017 through September 9, 2019 and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

12/27/2019
Date

JAN 2 - 2020

Procedural History

Daniel Rangel Acosta (hereafter referred to as "Petitioner') filed two Application of Adjustment of Claim both allege an injury to Petitioner's low back. In Case number 17 WC 13870 Petitioner alleges a low back injury that occurred on April 3, 2017. In that case, Petitioner did not seek medical care or miss time from work. In case number 17 WC 13873 Petitioner alleges a second injury to his low back that occurred on May 5, 2017. In that case, Petitioner received medical treatment and missed time from work. Both cases were tried on September 9, 2019 and separate decisions have been issued on each case.

In the instant case (*i.e.* 17 WC 13870) the disputed issues are: (1) whether Petitioner sustained an accidental injury that arose out of and in the course of his employment, (2) whether Respondent received notice of the accident within the time limits stated in the Act, (3) whether Petitioner's current condition of ill-being is causally connected to the injury, (4) whether respondent is liable for unpaid medical bills, and (5) the nature and extent of Petitioner's injury. Petitioner is also seeking penalties and fees pursuant to sections 19(k), 19(l), and 16 of the Act. (Arb. Ex. #1).

Finding of Fact

Petitioner testified that he started working for Respondent in February of 2017 as a drywall installer. (T.14, 19). Petitioner testified that as a drywall installer, his duties included bending over, picking up sheets of drywall from the ground, placing the sheets of drywall on the wall for installation, and nailing the drywall to the wall. Petitioner testified that a sheet of drywall could weigh up to 80-90 pounds. (T. 15, 16).

Petitioner testified that on April 3, 2017, he was carrying and lifting a piece of drywall weighing between 80-90 pounds when he felt pain in his back and right leg. Petitioner testified that he believes he told his supervisor, Alex Lopez, that he was in pain. Petitioner testified that the pain wasn't so bad, and he was able to continue working. Petitioner testified that he took over-the-counter medicine and that he was doing better with the medicine. (T. 16, 17).

Petitioner testified that he did not experience any pain or discomfort in his lumbar spine prior to April 3, 2017 (T. 36). Petitioner also testified that, prior to April 3, 2017, he was not actively treating or seeking medical treatment for his lumbar spine (T.37).

Petitioner testified that he was able to continue working until May 5, 2017. Petitioner testified that on that day he was bent over lifting a piece of drywall when he felt "big pain" in his

lower back. Petitioner testified that the pain was different from the pain he experienced in the first accident because now he was unable to pick up drywall. Petitioner testified that he told his supervisor, Alex Lopez, what happened, and Mr. Lopez told him to go home and to go fix himself. (T. 17-21).

Later that day, on May 5, 2017, Petitioner sought medical treatment at MacNeal Hospital emergency room. Petitioner reported pain from his right leg moving up to his back after lifting drywall at work. Petitioner indicated that he was experiencing tingling down his leg. The examination showed mild to moderate tenderness over approximately the 5th lumbar vertebrae, mild to moderate lumbosacral paravertebral spasm on the right and left sides of the low back with a moderately abnormal straight leg raise test with the right leg. Petitioner was diagnosed with low back pain and proscribed Toradol, Flexeril and a Lidoderm patch. (RX 1),

After being released from MacNeal Hospital, Petitioner started treating with Dr. Snook, a chiropractor, with New Life Medical Center. The medical records dated, May 8, 2017, stated Petitioner sustained a work-related injury on May 5, 2017 when he was carrying drywall and felling intense pain in his low back and right leg. Dr. Snook opined the injury was a "direct result of injury sustained at work". Petitioner was diagnosed with lumbar spine sprain, lumbar spine pain, and lumbar radiculopathy. Petitioner was restricted from work. (PX 4).

Petitioner continued treatment with New Life Medical Center and on May 15, 2017, Petitioner underwent an x-ray of the lumbar spine at Specialized Radiology Consultants which noted biomechanical alterations. (PX 6). Petitioner continued treatment with New Life Medical Center and, on May 27, 2017, Petitioner was given an updated work status restricting him from work. (PX 4).

On May 30, 2017, Petitioner returned to Dr. Snook. At that time, Petitioner reported low back pain located predominately on the midline with hot sensation and weakness in his right lower extremity. Petitioner was diagnosed with lumbar spine sprain, lumbar spine pain, and lumbar radiculopathy from a work-related injury. Petitioner continued to treat at New Life Medical Center. An MRI was recommended, and Petitioner was referred to a pain management doctor. Dr. Snook also recommended durable medical equipment, which was provided by G&U Orthopedic. (PX 4, 7).

On June 1, 2017, Petitioner underwent a lumbar MRI at Berwyn Diagnostic Imaging. The MRI showed a right asymmetrical disc bulge at L3-L4 with a concentric disc bulge at L5-S1 and a 4.5 mm right central herniation at L4-L5. (PX 8).

On June 9, 2017, Petitioner was treated by Dr. Jain at Pinnacle Pain Management Specialists. The records state that Petitioner sustained an injury at work while lifting drywall when he felt pain in his lower back. The records further indicate that after reporting the accident to his supervisor, Petitioner went home but his pain continued to worsen causing him to go to the emergency room. Dr. Jain noted that Petitioner's low back pain that tingled down the right leg and the pain worsen with standing, bending backwards and sudden movements. Dr. Jain diagnosed lumbar facet syndrome, lumbar discogenic pain, and lumbar radiculopathy. Dr. Jain recommended bilateral L3-L4, L4-L5, and L5-S1facet joint injections. In his records, Dr. Jain opined that Petitioner's symptoms were directly related to the injury and that Petitioner's treatment was reasonable and necessary. On June 14, 2017 Petitioner underwent bilateral L3-L4 and L4-L5 facet joint injections. (PX. 10).

On June 19, 2017, Petitioner underwent a Neurological Consultation and Electrodiagnostic Examination with Dr. Thurston, a chiropractic Neurologist, with New Life Medical Center at the request of Dr. Snook. Dr. Thurston noted that Petitioner sustained a work-related injury, while carrying drywall when he felt sudden pain in his low back and right lower extremity on May 5, 2017. Dr. Thurston performed an NCV/EMG, which revealed mild-moderate right lumbar radiculitis involving the L5, S1 dermatomal distributions. (PX 5).

On June 26, 2017, Petitioner was re-evaluated by Dr. Snook. At that time, Petitioner reported that he was experiencing burning low back pain aggravated by walking and standing. Dr. Snook diagnosed disc displacement of the lumbar spine, lumbar spine pain, and lumbar radiculopathy. (PX 4).

On July 18, 2017, Petitioner was examined by Dr. Soriano, a neurosurgeon, pursuant to Section 12 of the Act.

On July 29, 2017, Petitioner returned to Dr. Snook. At that time, Petitioner reported low back pain, numbness and tingling down the right lower extremity. Petitioner was diagnosed with disc displacement of the lumbar spine, lumbar spine pain, and lumbar radiculopathy from the work-related injury. Petitioner continued to treat with Dr. Snook until August 18, 2017. At that time, Dr. Snook referred Petitioner for a neurological consultation. (PX. 4).

On August 30, 2017, Petitioner presented to Dr. Robert Erickson, of the American Center for Spine and Neurosurgery. Petitioner reported that he was injured on April 3, 2017 while carrying drywall, but he was able to continue working until May 5, 2017 when he sustained an injury that caused a distinct problem. Petitioner complained of low back pain, tingling involving his right leg extending into the foot. Petitioner reported that those symptoms had improved but the low back pain remained. Petitioner reported his pain level as 4 out of 10. (PX 13).

Dr. Erickson's examination showed a positive straight leg raise test on the right side at 35 degrees. The Lasegue maneuver was positive. Petitioner experienced pain with lumbar extension. Dr. Erickson reviewed the MRI impression of June 1, 2017 and noted the MRI showed a right central disc herniation at L4-5, measuring 4-5 mm. Dr. Erickson also noted that the EMG, dated July 7, 2017, suggested abnormalities of the L5 and S1 nerve roots on the right side. Dr. Erickson further noted Petitioner had no history of a prior injury and had been working for 15 years as a carpenter before the injury. Dr. Erickson opined that Petitioner sustained a lifting injury on April 3, 2017 with some progression over the next two months followed by partial spontaneous relief. Dr. Erickson recommended SSEP testing of the lower extremities. Dr. Erickson issued light duty work restrictions consisting of no carrying or lifting greater than 20 pounds. (PX 13).

Petitioner treated with Dr. Jain from July 6, 2017 through October 2, 2017. Dr. Jain also recommended lumbar injections. Dr. Jain recommended physical therapy and he took Petitioner off work. (PX 9).

On August 21, 2017, Petitioner treated with Dr. Snook until October 30, 2017. Dr. Snook issued light duty work restrictions consisting of avoiding construction work involving heavy lifting and repetitive bending. (PX 4).

On October 31, 2017, Petitioner followed up with Dr. Jain who noted that Petitioner's pain had improved. Dr. Jain discharged Petitioner from pain management. In his records, Dr. Jain opined that Petitioner's symptoms were directly related to the injury and that Petitioner's medical treatment was reasonable and necessary. PX 9).

On March 9, 2018, Petitioner underwent the SSEP examination previously recommended by Dr. Erickson. On May 5, 2018, Petitioner return to Dr. Erickson who noted that the SSEP examination suggested a moderate delay at the L5 nerve root on the right side at 0.9 standard deviations. Dr. Erickson further noted that in the prior examinations Petitioner had a positive

straight leg raise test on the right side with occasional paresthesia reported in the first through the fourth toes. Petitioner reported he was feeling much better and did not require further epidural steroid injection. Petitioner reported pain levels between 1 and 0 out of 10. Dr. Erickson opined that the neurophysiological testing suggest that Petitioner sustained a genuine injury which he has improved. Dr. Erickson discharged Petitioner from care without any work restrictions. (PX 13).

Petitioner testified that he did not work from May 5, 2017 through April 25, 2018. (T. 27). Petitioner testified that after receiving his light duty restrictions, he notified Respondent. Petitioner testified that he also sent Respondent his light duty restrictions via facsimile. Petitioner testified that he did not receive TTD benefits while off work. Petitioner testified that, prior to April 3, 2017, he never had lumbar pain or discomfort or received any medical treatment. (T. 36, 37). Petitioner testified that since his work accident he continues to experience discomfort after lifting heavy items. (T. 37).

Alex Lopez testified for Respondent. Mr. Lopez was Petitioner's supervisor. Mr. Lopez testified that Petitioner did not report experiencing a work injury on either April 3, 2017 and May 5, 2017, (T. 53,54). Mr. Lopez testified that Petitioner requested to go home early on May 5, 2017 because he was wearing a new pair of boots and he was not feeling good. Mr. Lopez testified that he let Petitioner go home after lunch because he was a good worker. Mr. Lopez testified the following day, May 6, 2017, Petitioner contacted him and advised him that he was hurt, the previous day at work, and that he had gone to the hospital. (T. 55,56). Mr. Lopez testified that after receiving Petitioner phone call, he contacted the project manager and reported Petitioner's accident. (T. 57).

Mr. Lopez testified that normally two people pick up the drywall and install it. Mr. Lopez testified that the drywall is carried on a cart and drywall weights between 30-50 pounds depending upon the thickness of the drywall. (T. 77).

Dr. Marc Soriano, who performed a Section 16 examination, on July 18, 2017, testified that he is a neurosurgeon who no longer has a clinical practice or performs surgery. Dr. Soriano testified that he now performs consulting work in the areas of medical or legal issues.

Dr. Soriano testified that Ptitioner reported carrying drywall, on May 3, 2017, weighing 80 pounds, when he felt a sharp pain in his low back after setting it down. Petitioner continued working until May 5, 2017, when his pain increased in the midline at L5-S1 and began to radiate

into the right side of his back and down the lateral portion of his right thigh, calf, and into the toes. Petitioner also reported that his pain was constant, was associated with numbness and he has been unable to work since May 5, 2017. (RX 1).

Dr. Soriano testified that he reviewed the MRI which showed degenerative changes including a bulging right paracentral disc at L4-5 and facet and ligamentous hypertrophy with some mild central canal stenosis without compression of neuroforamen at either L4 or L5. Dr. Soriano testified that he did not see a condition on the MRI that would cause radiculopathy. The examination showed pain with range of motion testing. Dr. Soriano testified that Petitioner extended only about 10 degrees before experiencing pain in the midline of his back. Dr. Soriano also noted that Petitioner's reported pain during lateral bending to the right at 10 degrees located in the L5-S1 area. Dr. Soriano opined that he found positive Waddell's signs. (RX 1).

Dr. Soriano testified that Petitioner's current condition did not have any relationship to the original injury of April 3, 2017 based upon the lack of any positive physical exam findings and lack of any correlated MRI findings. Dr. Soriano further testified that as of July 18, 2017, Petitioner did not require further medical treatment. Dr. Soriano testified that Petitioner's subjective complaints in one spot with leg pain and numbness were out of proportion to any findings during his examination and the radiological studies. Dr. Soriano testified that as of July 18, 2017, Petitioner could work full duty. (RX 1).

Dr. Soriano testified that if Petitioner had an injury on May 5, 2017, it would have been an unverifiable soft tissue injury such as a sprain or strain of the muscles, ligaments or tendons. Dr. Soriano testified that he could not find an explanation for the pain or numbness going down Petitioner's right leg. Dr. Soriano testified that the MRI did not show any pressure on any of the L4-5 or S1 nerve roots. Dr. Soriano further testified that Petitioner had longstanding degenerative changes and that there was no evidence that any of them were aggravated or made worse beyond a normal progression. Dr. Soriano opined that there was no relationship between the reported accident and any finding on his examination or any other examinations. Dr. Soriano further opined that there was no causal relationship between the injuries of April 3, 2017 and May 5, 2017 and that MRI findings. Dr. Soriano also opined that the facet injections and physical therapy after July 2017 were not reasonable or necessary. Dr. Soriano testified there was no reason to undergo physical therapy 4 to 5 months after the injury because the effective period for therapy was between the first 4 to 6 weeks. (RX 1).

On cross-examination, Dr. Soriano testified that when he said there was no documentation showing that Petitioner was injured at work he obtained that from information from a supervisor's report and that he was not referring to Petitioner's medical records. Dr. Soriano testified that the letter was addressed to whom it may concern.[1] (RX 1, pgs. 44, 45).

Dr. Soriano also testified that it was possible that his interpretation was different than the radiologist interpretation of the MRI. (RX 1, pg. 47). Dr. Soriano testified that he did not include in his report the bulging discs at aL4-5 and L5-S1 found in the MRI because they were just simple bulges and were not relevant. Dr. Soriano opined that the 4 ½ mm disc herniation found by the radiologist was a bulge, not a herniation. Dr. Soriano testified the disc was not herniated because there was no tear of the anulus and 4 mm was not really anything that he would call a herniation. Dr. Soriano further testified that when he uses the term unverifiable soft tissue injury, it means that there is nothing objective that we see on either the radiologic studies or the physical exam. (RX 1, pg.48).

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 sustained an accident that arose out of and in the course of his employment, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner proved by the preponderance of the evidence that he sustained an accidental injury that arose out of and in the course of his employment. Petitioner testified that on, April 3, 2017, he bent over and picked up a piece of drywall from the floor and experienced pain in his back and right leg. Petitioner testified that after experiencing the pain, he reported the injury to his supervisor, Alex Lopez. Petitioner testified that he did not seek any medical treatment and did not miss any time from work. Petitioner testified that he took over-the-counter medication to relieve the pain. Petitioner continued working until his accident of May 5, 2017. The Arbitrator finds that Petitioner provided a similar history to his other treating

[1] Dr. Soriano was referring to a letter dated May 16, 2017 allegedly authored by Alex Lopez, Petitioner's supervisor. *See Respondent Exhibit #4.* Mr. Lopez testified the letter was a copy of an email he sent to Mr. Brian Garsha, the safety coordinator. Mr. Lopez testified that he drafted the email on Brian Barsha's computer and also sent it to Brian Garsha. The letter was not signed by Alex Lopez. (T. 72-73). The letter was found to be inadmissible at trial. (T. 98-100).

physician. Petitioner testified that he never had any prior complaints of any pain in his lumbar spine and had not undergone prior medical treatment to his lumbar spine. Dr. Erickson opined, in his records, that Petitioner sustained a lifting injury on April 3, 2017 with some progression over the next two months.

With respect to issue (E) was timely notice of the accident given, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner proved by the preponderance of the evidence that he provided timely notice of the accident as required under the Act. The Arbitrator found the testimony of Petitioner to be credible. Petitioner testified that he reported the accident to his supervisor, Mr. Lopez, on April 3, 2017. The giving of notice under the Act is jurisdictional and a prerequisite of the right to maintain a preceding under the act. However, the legislature has mandated a liberal construction on the issue of notice. *S&H Floor Covering v. The Worker's Compensation Comm'n*, 870 N.E.2d 821 (2007).

With respect to issue (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

When a worker's physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment. *Sisbro v. Indust. Com'n*, 207 Ill.2d 193, 205 (2003). Workers need only prove that some act or phase of employment was a causative factor in her ensuing injuries. *Land and Lakes Co. v. Indust. Com'n*, 359 Ill.App.3d 582, 592 (2005). The work-related task need not even be the sole or principal causative factor of the injury, as long the work is a causative factor. *See Sisbro*, 207 Ill.2d at 205. Even if the claimant has a preexisting degenerative condition which makes him more vulnerable to injury, recovery for an accidental injury will not be denied as long as she can show that her employment was also a causative factor. *Id.* At 205. Employers are to take their employees as they find them. *A.C.&S v. Industrial Commission*, 710 N.E.2d 8347 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (1982).

The Arbitrator has carefully reviewed all of the evidence and finds that Petitioner has proved by the preponderance of the evidence that his current lumbar spine condition of ill-being is causally related to his work accident of April 3, 2017. Dr. Erickson opined that Petitioner sustained a lifting injury on April 3, 2017. Petitioner testified that he was employed by Respondent as a drywall installer. As a drywall installer, his duties included bending over,

picking up sheets of drywall from the ground, placing the sheets of drywall on the wall for installation, and then nailing the drywall to the wall. The sheets of drywall weigh approximately 80-90 pounds. Petitioner testified that, on April 3, 2017, he was bending over to pick up drywall from the floor when, upon lifted the drywall, he felt pain in his low back and right leg. Dr. Erickson opined, in his records, that Petitioner sustained a lifting injury on April 3, 2017 with some progression over the next two months. The Arbitrator finds that Petitioner's testimony was corroborated by medical evidence.

With respect to issue (J), Whether the medical services provided were reasonable, the Arbitrator concludes the following:

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). Petitioner testified that he did not seek medical treatment for his work accident of April 3, 2017. Petitioner failed to prove that Respondent is liable for medical bills. As such, Petitioner's claim for medical bills for the April 3, 2017 accident is denied.

With respect to issue (L), the nature and extend of Petitioner's injury, the Arbitrator makes the following conclusions:

Section 8.1b of the Illinois Workers' Compensation Act ("Act") addresses the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b (LEXIS 2011). Specifically, Section 8.1b states:

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records.

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.* Considering these factors in light of the evidence submitted at trial, the Arbitrator addresses the factors delineated in the Act for determining permanent partial disability.

With regard to subsection (i) of Section 8.1b(b), the reported level of impairment pursuant to Section 8.1b(a), the Arbitrator notes that neither party submitted into evidence an AMA impairment rating. Thus, the Arbitrator considers the parties to have waived their right to do so and assigns no weight to this factor.

With regard to subsection (ii) of Section 8.1b(b), the occupation of the injured employee, Petitioner testified that he was a drywall hanger which required him to lift sheets of drywall which could weigh up to 80 pounds. The Arbitrator gives this factor some weight in determining the level of disability.

With regard to subsection (iii) of Section 8.1b(b), the age of the employee at the time of the injury. Petitioner was 39 years old. The Arbitrator notes that as the body ages, the ability of the body to recover from the effects of an injury decreases. The Arbitrator gives this factor some weight in determining the level of disability.

With regard to subsection (iv) of Section 8.1b(b), the employee's future earning capacity. Petitioner did not proffer any evidence that his future earning capacity has been adversely impacted by his injury. As such, the Arbitrator gives this factor no weight when determining the level of disability.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records. Petitioner did not undergo any medical treatment for his injuries. As such, the Arbitrator gives this factor no weight when determining the level of disability.

In consideration of the factors enumerated in Section 8.1b, which does not simply require a calculation, but rather a measured evaluation of all five factors of which no single factor is conclusive on the issue of permanency, the Arbitrator finds that Petitioner suffered permanent partial disability to the extent of 1% of man as a whole pursuant to § 8(d)2 of the Act.

With respect to issue (M), penalties, the Arbitrator finds as follows:

Petitioner is seeking penalties and attorney's fees pursuant to Sections 16(k), 19(l) and 16 of the Act. Petitioner did not seek medical treatment and was not denied TTD benefits. As such, Petitioner's claim is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC036045
Case Name	GOLDMAN, SHERI v. THE GAP INC, C/O CT CORP
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0220
Number of Pages of Decision	7
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Andrew Kriegel
Respondent Attorney	Monica Kiehl

DATE FILED: 5/5/2021

/s/Marc Parker, 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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sheri Goldman,
Petitioner,

vs. No. 16 WC 036045

The Gap, Inc., Banana Republic, LLC,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, permanent partial disability, and penalties and 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.

I. FINDINGS OF FACT & PROCEDURAL HISTORY

Petitioner, a 62-year-old assistant manager, was employed by Respondent at one of its stores. On November 12, 2016, Petitioner was decorating her store when she fell from a step stool. Her left ankle twisted, her left foot slipped between the steps on the stool, and she landed on her left knee. She felt immediate pain in her left ankle and knee.

Petitioner was transported by ambulance to the Emergency Department at Advocate Condell Medical Center, where she provided a consistent history of accident and complained of left knee and left foot/ankle pain and swelling. X-rays revealed that her left patella was fractured and would require surgical repair; her left foot was negative for fracture. The following day, Dr. Gregory Caronis performed knee surgery to excise multiple pieces of the inferior pole of the patella and suture the patella tendon. The knee was immobilized and Petitioner was discharged from the hospital two days later.

Petitioner began physical therapy in January 2017 and remained off work as there was no sitting work available at her store. She continued with physical therapy and began working two hours per day in March 2017. By April 2017, Dr. Caronis noted that Petitioner had a left ankle strain, which he felt might be compensatory due to Petitioner's left knee injury and residual quadriceps weakness.

Petitioner then completed 10 sessions of work conditioning for both her ankle and knee complaints. Upon discharge, the physical therapist found that she was able to work at the sedentary level due to limited left knee and ankle mobility, increased pain with tasks requiring flexion, decreased general strength and endurance, and decreased balance for asymmetrical tasks.

In July 2017, Petitioner returned to Dr. Caronis who noted that Petitioner's left ankle pain had persisted and ordered an MRI to look for occult pathology. The MRI of the left ankle was performed and revealed abnormal signals, which Dr. Caronis noted could be degenerative or could be post-traumatic bone bruises or contusions. The doctor discontinued Petitioner's work hardening on August 7, 2017, when Petitioner reported right knee pain in addition to her left knee and ankle complaints. Dr. Caronis hoped that after a few weeks of rest, Petitioner would recover from her "transient inflammation." He returned her to work full duty except for restricting her use of ladders and limiting her lifting to 30 pounds.

Several days later, on August 13, 2017, Petitioner was walking across her backyard when her left knee buckled, causing her to fall forward onto her right hand. She heard her wrist snap and felt immediate pain. At the Emergency Room at Advocate Condell, she reported that her left knee had buckled, causing her fall. X-rays revealed a fractured distal radius and ulna, and Petitioner's right wrist was casted.

Petitioner followed up with Dr. Caronis on August 14, 2017 for her right wrist and left knee. She explained that she thought her left knee buckled because it was weak and tired from work conditioning. Petitioner did not report pain in either knee on that visit.

On September 28, 2017, Petitioner's wrist cast was removed. She returned to Dr. Caronis on November 6, 2017 at which point he found her at MMI with regard to her left knee and discharged her. On January 16, 2018, Petitioner returned for re-evaluation of her right wrist. Dr. Caronis administered a cortisone injection but did not recommend any further treatment at that time.

Petitioner's claim proceeded to an arbitration hearing nine months later, on October 31, 2018 and November 19, 2018. The issues in dispute included causal connection, medical expenses, permanent partial disability, and penalties and fees. The parties stipulated that all TTD/TPD had been paid, with no overpayment credited to Respondent.

In the decision filed May 29, 2019, the Arbitrator found that only Petitioner's left knee injury was causally related to her November 12, 2016 accident and awarded benefits related to her left leg. He found that Petitioner's current conditions of ill-being as to her left ankle, left elbow, right knee, and right wrist were not causally related to her work injury. The Arbitrator

awarded Petitioner certain medical bills and 12.5% loss of use of her left leg for her patella fracture.

II. CONCLUSIONS OF LAW

A. Causal Connection

The Commission affirms the Arbitrator's finding on causal connection with regard to Petitioner's left knee but views the record differently and additionally finds that Petitioner established that her right wrist and left ankle conditions are causally related to her November 12, 2016 accident.

In concluding that Petitioner failed to prove that her left ankle condition was causally related to her work November 12, 2016 accident, the Arbitrator mistakenly believed that Petitioner had not initially complained of ankle pain. However, after Petitioner fell from the step stool on November 12, 2016, she reported to the emergency room and to Dr. Caronis that she fell from the stool when her left ankle twisted and slipped between the steps on the stool. She complained of immediate pain and swelling to not only her left knee, but also to her left ankle. Although her knee injury was more pressing, Petitioner continued to complain of left ankle pain during physical therapy and work conditioning. Dr. Caronis was sufficiently concerned about Petitioner's ankle pain that he eventually ordered an MRI. The MRI, performed on July 28, 2017, revealed degenerative conditions and/or post-traumatic bone bruising. Dr. Caronis suspended Petitioner's work conditioning to allow her ankle and other injuries to recover. Based on the foregoing, the Commission finds that Petitioner established that she suffered a soft tissue injury to her left ankle at the time of her work accident. This ankle strain continued to present problems during her left knee recovery throughout physical therapy and work conditioning. Thus, the Commission finds that Petitioner's left ankle condition of ill-being is causally related to the accident at work on November 12, 2016.

With regard to Petitioner's right wrist, the record reflects that Petitioner had just been released back to full duty when her left leg buckled, and she fell in her backyard on August 13, 2017. She went that same day to the emergency room at Advocate Condell Medical Center, where she reported a consistent mechanism of injury: that her left knee had buckled and caused her to fall forward onto her right wrist. Petitioner repeated this mechanism of injury to Dr. Caronis who examined her the following day on August 14, 2017. The record reveals no evidence to rebut Petitioner's description of the occurrence and establishes that Petitioner had, in fact, previously complained of weakness in her left knee and fearfulness of falling to her physical therapist and to Dr. Caronis. Indeed, Petitioner reported to Dr. Caronis that she felt her left knee was tired and weak as a result of the work conditioning. Ultimately, Petitioner was found to have suffered a right wrist fracture and remained casted for six weeks. Dr. Caronis provided a steroid injection on January 16, 2018 for residual complaints.

"Every natural consequence that flows from an injury that arose out of and in the course of the claimant's employment is compensable unless caused by an independent intervening accident that breaks the chain of causation between a work-related injury and an ensuing

disability or injury." *Vogel v. Ill. Workers' Comp. Comm'n,* 354 Ill. App. 3d 780, 786 (2005). Based upon Petitioner's unrebutted history of fall due to weakness in her left knee, the Commission finds that her right wrist fracture was causally related to her November 12, 2016 work accident.

B. Medical Expenses

Based upon his determination that Petitioner's left ankle and right wrist injuries were not causally related to her work accident, the Arbitrator denied Petitioner's claim for payment of medical expenses related to the right wrist. There were no separate medical expenses incurred for treatment of Petitioner's left ankle injury, as Petitioner received physical therapy treatment for both her left ankle and left knee simultaneously. Because the Commission has found the both the left ankle and right wrist conditions are causally related to the accident at work, Respondent is ordered to pay all outstanding amounts related to treatment of Petitioner's fractured wrist at the fee schedule rate, pursuant to §8(a) and §8.2 of the Act.

With regard to the left knee, the Arbitrator found Respondent liable for all medical expenses related to treatment of Petitioner's left knee with the exception of a bill totaling $1,096.00, from Best Practices Inpatient Care.

> [T]he medical bill submitted does not reflect the services provided, the facility associated, or the physician. There are no medical records provided that reflect the services provided were for the left knee or in relation to the work injury. Essentially, Petitioner did not provide the proper information or evidence for the Arbitrator to determine if these charges are in any way related to the work injury or that they are medically necessary or appropriate.

Arb. Dec., p. 8.

The Commission finds that Petitioner did provide sufficient evidence that the bill was related to treatment for her work injury. The procedural codes on the bill at Petitioner's Exhibit 7 indicate that the medical services consisted of patient intake, follow-up, and discharge from a medical facility. The statement identifies Petitioner as the patient and the dates coincide with the dates Petitioner was hospitalized at Advocate Condell Medical Center. Advocate's records were also admitted and document the services performed by the Best Practices hospitalists. Petitioner was treated at the hospital at that time for only left knee related issues, so services provided by a hospitalist would necessarily be causally related to her work accident. The bill was produced subject to a subpoena from Petitioner and was certified as accurate by a Best Practices agent. The Arbitrator admitted Petitioner's Exhibit 7 without objection. The Commission finds that the bill is sufficient to provide the requisite information, especially when viewed in conjunction with Petitioner's Exhibit 4, the medical records from Advocate Condell Medical Center. The Commission finds Respondent liable for the fee schedule amount for the Best Practices bill, pursuant to §8(a) and §8.2 of the Act.

C. Permanent Partial Disability (Left Leg–Knee, Left Foot–Ankle, Right Hand–Wrist)

On review, Petitioner seeks an increase in the permanency awarded by the Arbitrator for her left knee injury and further seeks permanent partial disability awards for her left ankle and right wrist injuries.

The Arbitrator reviewed the §8.1b(b) factors to be considered in awarding permanent partial disability and awarded Petitioner 12.5% loss of use of the left leg for her knee injury. Based upon his determination that Petitioner's left ankle sprain and right wrist fracture were not causally related to her work accident, the Arbitrator awarded no permanent partial disability for those injuries. The Commission weighs the evidence differently and assigns the following weights to the five factors enumerated in §8.1b(b).

(1) AMA impairment ratings were not provided, so no weight is given to this factor.
(2) Occupation: Petitioner was employed as an assistant manager in a retail store. Following treatment for her fractured knee, she was able to return to the same position and perform her regular duties, which included climbing ladders and carrying boxes. Some weight is given to this factor.
(3) Age: Petitioner was 62 at the time of her accident. She may have several years of work-life ahead during which her injuries may affect her performance. She also may develop more arthritis as a result of her fractured patella and right wrist. The Commission gives this factor significant weight.
(4) Future earning capacity: No evidence of a diminished earning capacity was offered, so this factor is entitled to no weight.
(5) Evidence of disability corroborated by medical records: Petitioner underwent surgery for her fractured patella, six weeks of immobilization, extensive physical therapy and work conditioning, and continues to have limitations and residual complaints. She testified that she had difficulty standing up after bending down; she cannot perform yoga or clean her bathroom floor; and she needs to ice her knee after a busy day. Petitioner's fractured right wrist was casted for six weeks. Her left ankle twisted at the time of the accident and continued to cause Petitioner pain and restricted movement during her physical therapy and work conditioning. The Commission gives significant weight to this factor.

Based upon its review of the foregoing factors, the Commission finds that Petitioner's left knee injury resulted in 20% loss of use of her left leg for the fractured patella, 2.5% loss of use of her left foot for her ankle soft tissue injury, and 15% loss of use of her right hand for her wrist fracture.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 29, 2019, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of medical expenses is modified, and Respondent shall pay Petitioner the outstanding reasonable and necessary medical expenses, including the bill from Best Practices, incurred in treating her left knee, left ankle, and right wrist injuries, pursuant to §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $413.32 per week for a total period of 77.925 weeks, for the reason that Petitioner's left knee injury caused the 20% loss of use of the left leg as provided in §8(e)12 of the Act (43 weeks); her left ankle injury caused 2.5% loss of use of the left foot as provided in §8(e)11 of the Act (4.175 weeks); and her right wrist injury caused 15% loss of use of the right hand as provided in §8(e)9 of the Act (30.75).

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 injuries.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $32,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 5, 2021

/s/ *Marc Parker*

o-4/1/21
mp/dak
68

/s/ *Barbara N. Flores*

/s/ *Christopher A. Harris*

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0220

GOLDMAN, SHERI
Employee/Petitioner

Case# **16WC036045**

THE GAP INC C/O C T CORP
Employer/Respondent

On 5/29/2019, 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 2.32% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5625 GRAUER & KRIEGEL LLC
ANDREW J KRIEGEL
1300 E WOODFIELD RD SUITE 205
SCHAUMBURG, IL 60173

5001 GAIDO & FINTZEN
GAIL BEMBNISTER
30 N LASALLE ST SUITE 3010
CHICAGO, IL 60602

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

SHERI GOLDMAN
Employee/Petitioner

v.

THE GAP INC., c/o CT CORP
Employer/Respondent

Case # **16** WC **036045**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Paul Seal, Arbitrator of the Commission, in the city of **Waukegan and Geneva**, on **October 31, 2018, and November 19, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 12, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being ***is*** causally related to the accident in relation to the left knee only.

In the year preceding the injury, Petitioner earned $35,820.72; the average weekly wage was **$688.86**.

On the date of accident, Petitioner was **62** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of **$0** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$0**.

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

ORDER

- *The Arbitrator finds Petitioner proved that her current condition of ill-being only to her left knee is related. The Arbitrator further finds Petitioner's current condition of ill-being as to the left ankle, left elbow, right knee, and right wrist are not related to the work injury.*
- *The Arbitrator orders Respondent to pay directly to Petitioner the Lincolnshire Orthopedics Advocate Medical Group medical bills for the date of service August 7, 2017, for the x-ray of the right knee as provided in Section 8(a) and Section 8.2 of the Act, but not to exceed $15.28. Respondent is entitled to a credit for any medical services paid.*
- *The Arbitrator orders Respondent to pay directly to Petitioner the Midwest Diagnostic Pathology medical bills as provided in Section 8(a) and Section 8.2 of the Act, but not to exceed $204.00. Respondent is entitled to a credit for any medical services paid. All other medical bills are denied.*
- *Petitioner is entitled to $413.32 per week for a period of 31.625 weeks, because the injuries sustained involving the left knee resulted in permanent partial disability to the left knee to the extent of 12.5% loss of use of the left leg pursuant to section 8(e) of the Act, totaling $13,071.25. No permanent partial disability is awarded for the left ankle, left elbow, right knee, and right wrist.*
- *Penalties and fees under sections 19 and 16, respectively, are denied.*

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

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

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

Signature of Arbitrator

May 14, 2019
Date

ICArbDec. p.3

MAY 29 2019

The Arbitrator finds the following facts:

Petitioner, Sheri Goldman, testified that on November 12, 2016, she was employed for Respondent, The Gap, as an assistant manager. Petitioner testified that on November 12, 2016, while at work, she was standing on a step stool decorating the store and the stool moved and she fell. Petitioner felt pain to her left knee, ankle, and elbow.

Petitioner was taken by ambulance to Advocate Condell Medical Center. Petitioner was diagnosed with a comminuted fracture of the left patella and a sprain of the left ankle. Petitioner underwent an excision of the inferior pole of the patella and advancement on November 13, 2016. Petitioner was released from the hospital on November 15, 2016. [PX 4] Following her release, Petitioner testified that she felt pain to her left ankle and knee. No complaints were reported in the medical records regarding the left ankle or left elbow.

In January 2017, Petitioner began physical therapy for the left knee, and in July 2017, Petitioner began work conditioning for the left knee until August 4, 2017. The August 7, 2017, medical records indicate that Petitioner felt pain to the right knee following work conditioning. Petitioner was diagnosed with acute pain of the right knee. No pain was mentioned to the left knee. [PX 4].

Petitioner testified that on August 13, 2017, she was in her backyard and her left knee buckled and she fell forward on her right wrist. This was a Sunday. Petitioner went to the emergency room and was diagnosed with a colles' fracture of the right radius. Petitioner was placed in a cast for six weeks. On August 14, 2017, according to the medical records, Petitioner stated both of her knees were without pain after resting for the weekend. On August 24, 2017, the strain to the right knee was resolved. [PX 4]

On September 28, 2017, X-rays of the right wrist showed a healed distal radius fracture in reasonable alignment. Petitioner did not have complaints regarding the right knee. [PX 4]

Petitioner was released to full duty work at maximum medical improvement on November 6, 2017. The treating physician noted that Petitioner made an excellent recovery. Petitioner had no complaints of pain. Petitioner told the treating physician that she had returned to work in a full capacity, including climbing ladders. Petitioner had recently decorated her store for Christmas. [PX 4]

On January 16, 2018, Petitioner returned for treatment regarding the right wrist. Petitioner received an injection and received no further treatment for the right wrist. [PX 4]

Petitioner testified she has had difficulty bending and getting up again, which she does daily. On busy days, her knee swells, and she will ice her knee on days she does more walking. She has difficulty cleaning her bathroom and cannot get on a ladder or step stool. Petitioner testified that she is no longer able to do yoga. Petitioner did not provide testimony regarding any difficulty to the left ankle or right wrist. Petitioner further testified she works 32 – 40 hours a week, which was the same pre-injury. Petitioner further testified she now makes $17.89 an hour and made $15.29 an hour prior to the injury.

In connection with the Arbitrator's decision regarding Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator concludes as follows.

After weighing the entirety of the evidence presented, the Arbitrator finds that Petitioner's current condition of ill-being as to the left knee is related to the work injury. The

Arbitrator further finds that Petitioner's current condition of ill-being as to the left ankle, left elbow, right knee, and right wrist are not related to the work injury.

As to the left ankle, Petitioner was diagnosed with a strain. Petitioner did not provide any testimony as to any ongoing problems or issues related to the left ankle and there were no complaints following July 17, 2017.

As to the left elbow, Petitioner testified feeling pain to the left elbow following the work injury. However, Petitioner did not testify as to any ongoing problems or issues following the initial injury date. Furthermore, the medical records do not reflect Petitioner reporting any problems to the left elbow and no diagnosis or treatment as related to the left elbow were provided.

As to the right knee, the Arbitrator finds Petitioner's current condition of ill-being as to the right knee is not related to the work injury. Following work conditioning, Petitioner was diagnosed with a strain to the right knee. Petitioner did not provide any testimony as to any ongoing problems or issues related to the right knee, and she actually testified that the strain was resolved. The medical records reflect that the strain was resolved in August 2017. The Arbitrator further finds that the left elbow injury is not related to the work injury. Petitioner testified to pain to the left elbow following the fall, but there is no diagnosis or mention in the medical records.

As to the right wrist injury, the Arbitrator finds the right wrist injury is not related to the work injury. Petitioner testified that on Sunday, August 13, 2017, her left knee buckled while in her backyard and she fell, injuring her right wrist. Whether this fall occurred can be questioned – but, the dispute centers more around whether any alleged fall was caused by the left knee

buckling, and therefore, flowing from the work injury. In making this determination, the Arbitrator notes Petitioner's inconsistent testimony with her medical records histories.

First, the Arbitrator notes that Petitioner discontinued work conditioning on August 4, 2017. Further, Petitioner testified that her left knee gave out, but on August 7, 2017, complained only of pain to the right knee, not left. Finally, on August 14, 2017, a Monday, the day following her alleged fall, Petitioner reported that both knees were without pain after resting for the weekend. Given the inconsistencies and all of the evidence, the Arbitrator finds that Petitioner did not prove any fall on August 13, 2017, is related to the work injury, and therefore, Petitioner's current condition of ill-being is not related to the work injury. Furthermore, the Arbitrator finds that Petitioner did not testify to any ongoing complaints or issues with the right wrist.

In connection with the Arbitrator's decision regarding Issue J, were the medical services that were provided to Petitioner reasonable and necessary and has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator concludes as follows.

Petitioner claims the following medical bills are outstanding:

- Best Practice Inpatient Care, totaling $1,096.00. Submitted into evidence one sheet of paper with handwriting of "Best Practices Inpatient Care." The patient's name is Sheri Goldman, and the dates of services listed are from November 12 – 15, 2016. However,

the medical bill submitted does not reflect the services provided, the facility associated, or the physician. There are no medical records provided that reflect the services provided were for the left knee or in relation to the work injury. Essentially, Petitioner did not provide the proper information or evidence for the Arbitrator to determine if these charges are in any way related to the work injury or that they are medically necessary or appropriate. Therefore, Respondent is not liable for these services.

- Midwest Diagnostic Pathology, $204.00. This is for dates of service November 12 – 14, 2016, in connection with services rendered at Condell Medical Center. It is further noted that this was for pathology in relation to a surgery performed. Given the evidence at trial and medical records, the Arbitrator orders Respondent to pay directly to Petitioner for the Midwest Diagnostic Pathology medical bills as provided in Section 8(a) and Section 8.2 of the Act, but not to exceed $204.00. Respondent is entitled to a credit for any medical services paid.
- Lincolnshire Orthopedics Advocate Medical Group, $1,541.00. First, the Arbitrator notes that Petitioner's cover page alleges $1,541.00 outstanding, but the medical bill reflects a total outstanding balance of $639.02. The outstanding balances are as follows:
    - August 7, 2017 - $15.28
    - August 14, 2017 - $522.89
    - August 24, 2017 - $62.91
    - September 28, 2017 - $37.94

The Arbitrator notes that the August 14, 24, and September 28, 2016, dates of services reflected in the medical records are related to the right wrist and are therefore not related to the work injury per findings above. The August 7, 2017, date of service is for an x-ray

of the right knee. While Petitioner's current condition of ill-being related to the right knee is not related to the work injury, the records reflect a strain to the right knee due to work conditioning. The Arbitrator orders Respondent to pay directly to Petitioner for the Lincolnshire Orthopedics Advocate Medical Group medical bills for the date of service August 7, 2017, for the x-ray of the right knee as provided in Section 8(a) and Section 8.2 of the Act, but not to exceed $15.28. Respondent is entitled to a credit for any medical services paid.

- Condell Medical Center, $2,186.00. This is related to the right wrist, and therefore, not causally related to the work injury. Therefore, the Arbitrator finds Respondent is not liable for this medical bill.
- Infinity Health Care Physicians, $883.00. This is related to the right wrist, and therefore, not causally related to the work injury. Therefore, the Arbitrator finds Respondent is not liable for this medical bill.
- Integrated Imaging Consultants, $39.00. This is related to the right wrist, and therefore, not causally related to the work injury. Therefore, the Arbitrator finds Respondent is not liable for this medical bill.

In connection with the Arbitrator's decision regarding Issue L, what is the nature and extent of the injuries, the Arbitrator concludes as follows.

As the Arbitrator has found that there is no causal connection between the right wrist, left elbow, left ankle, and right knee and the work injury, the Arbitrator further concludes that there is no permanent partial disability as to these body parts. The Arbitrator additionally notes, with

including the findings above, Petitioner did not testify to any problems or ongoing complaints regarding these body parts.

Regarding the left knee, pursuant to Section 8.1(b) of the Act, the Arbitrator addresses Petitioner's permanent partial disability as follows:

i. There is no AMA impairment rating provided by either party. As such, the Arbitrator gives no weight to this factor.

ii. Petitioner's occupation at the time of the accident was as an assistant manager. Petitioner is employed in the same position, but now makes $2.60 an hour more. The Arbitrator gives this significant weight.

iii. Petitioner was 62 years of age at the time of her accident and will likely not have a significant work life left. Therefore, the Arbitrator gives significant weight to this factor.

iv. Petitioner has not proven her future earning capacity has been unaffected by the accident, given that she testified she now works the same hours as she did pre-injury and makes $2.60 more an hour. Therefore, the Arbitrator gives significant weight to this factor.

v. Petitioner testified she has trouble bending and standing up. Petitioner testified she is unable to do yoga or clean the bathroom floor. Petitioner testified she ices her knee after long days. Petitioner testified she has spoken to the physician's assistant, but she has not returned for any medical treatment. There is no evidence of ongoing medication. Further, the medical records support an "excellent recovery," and that Petitioner admitted she is able to climb ladders at work. The November 6, 2017, medical records further reflect that Petitioner reported no complaints of pain. Therefore, the Arbitrator gives moderate weight to this factor.

After applying the facts of the instant case to the factors enumerated by Section 8.1b of the Act, the Arbitrator determines that Petitioner sustained permanent partial disability to the extent of 12.5% loss of use of the left leg under section 8(e) of the Act, or 31.625 weeks. This totals $13,071.25.

In connection with the Arbitrator's decision regarding Issue M, should penalties or fees be imposed upon Respondent, the Arbitrator concludes as follows.

The evidence of record proves no vexatious, dilatory or unreasonable behavior by Respondent. Accordingly, the Arbitrator finds that Petitioner is not entitled to penalties or fees under sections 19 and 16 of the Act, respectively. Petition for same is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC028147
Case Name	PEREZ, NOE v. STATE OF ILLINOIS/IDOT
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0222
Number of Pages of Decision	10
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Patricia Lannon Kus
Respondent Attorney	Danielle Curtiss, Aaron Wright

DATE FILED: 5/6/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Noe Perez,
Petitioner,

vs. No: 18 WC 028147

State of Illinois Department of Transportation,
Respondent.

DECISION AND OPINION ON REVIEW

Petition for Review having been timely filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability, and nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Respondent notes on review that the Arbitrator failed to credit Respondent with a $141.16 overpayment of temporary total disability. Petitioner concedes in his reply brief that Respondent overpaid temporary total disability by one day for $141.16. As the parties have agreed on this issue, the Commission modifies the Arbitrator's Decision to credit Respondent with an additional $141.16, the amount of overpayment.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 28, 2020, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is to receive credit for one day overpayment of temporary total disability in the amount of $141.16.

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

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

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 6, 2021

/s/ *Marc Parker*
Marc Parker

mp/dk
o-4/15/21
68

/s/ *Barbara N. Flores*
Barbara N. Flores

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

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0222
NOTICE OF ARBITRATOR DECISION

PEREZ, NOE Case# **18WC028147**
Employee/Petitioner

STATE OF ILLINOIS/IDOT
Employer/Respondent

On 10/17/2019, 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 1.62% 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:

0320 LANNON LANNON & BARR LTD
MICHAEL S ROLENC
200 N LASALLE ST SUITE 2820
CHICAGO, IL 60601

6149 ASSISTANT ATTORNEY GENERAL
DANIELLE CURTISS
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CHICAGO, IL 60601

1430 CMS BUREAU OF RISK MANAGEMENT
WORKERS' COMPENSATION MANGER
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

OCT 17 2019

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

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

Noe Perez
Employee/Petitioner

v.

State Of Illinois/IDOT
Employer/Respondent

Case # **18** WC **28147**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **September 5, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **July 25, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**77,075.96**; the average weekly wage was $**1,482.23**.

On the date of accident, Petitioner was **49** years of age, ***married*** with **1** dependent child.

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

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

Respondent shall be given a credit of $**705.82**for TTD, $**0** for TPD, $**0** for maintenance, and $**4,399.10** for other benefits, for a total credit of $**5,104.92**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**988.15**/week for **1-4/7** weeks, commencing **July 26, 2018** through **August 5, 2018**, as provided in Section 8(a) of the Act.

Respondent shall be given a credit of $**705.82** in temporary total disability benefits paid.

Petitioner also received full pay for 5 policy days before temporary total disability benefits commenced. Respondent is entitled to a credit for the 5 policy days only up to the temporary total disability rate of $988.15.

Respondent shall pay to Petitioner reasonable and necessary medical services, pursuant to the medical Fee Schedule, Grundy Radiologist $34.00, Dr. Daniel Clark $719.00, Parkview Orthopedics $145.00 and Midwest Hand Care $1,296.00, as provided in Section 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**813.87**/week for **15.375** weeks, because the injuries sustained caused **7.5% loss of use of the left hand,** 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.

Arbitrator Anthony C. Erbacci

October 15, 2019
Date

OCT 17 2019

FACTS:

Petitioner testified on July 25, 2018, he was employed by the State of Illinois, Department of Transportation, as a lead lead worker. His job duties included overseeing the safety and the management of his crews. He was also involved in the production of his crews. He had been employed with the State for approximately 18 years.

On July 25, 2018, Petitioner testified that he was working on I-80 near US-30 when his crew had to remove a very large cabinet television which was dumped on the highway. They were lifting the television and it fell on his left hand, smashing his hand onto the steel bed of the truck.

Immediately thereafter, Petitioner testified it felt like lightning struck his hand. He had immediate pain to the fingers. He testified they were three times their regular size. He also testified to blood coming out of the fingertips.

Petitioner testified he drove himself to Morris Hospital. His left hand was examined and x-rayed. He was diagnosed with contusions to the left second, third and fourth fingers. There was a subungual hematoma on the left third finger. The fingers were each splinted.

Petitioner testified he then came under the care of his primary care physician, Dr. Daniel Clark, on August 1, 2018. Dr. Clark diagnosed a crush injury of his left hand and fingers. He advised Petitioner could return to work on August 6, 2018.

At the August 8, 2018 visit with Dr. Clark, Petitioner was complaining of pain and numbness to his second and third fingers and an inability to bend them.

Petitioner returned to Dr. Clark on August 22, 2018 still complaining of pain and sometimes a shock that goes to the elbow. The tip of his middle finger had turned purple and he was unable to flex his fingers. There was noted swelling and discoloration of the left middle finger and decreased range of motion of the third and fourth fingers. Dr. Clark recommended Petitioner see an orthopedic physician.

On August 31, 2018, Petitioner came under the care of Dr. William Baylis of Parkview Orthopedics. Petitioner was complaining of left hand pain and mostly finger pain to the long more so than the index finger. Hypersensitivity to the tips of the fingers was noted. He was also complaining of numbness and tingling to the index and long fingers. Dr. Baylis diagnosed a crush injury to the left hand involving mostly the left index and long fingers. He recommended occupational therapy and light-duty work.

On September 6, 2018, Petitioner began his physical therapy at Midwest Hand Care.

On September 20, 2018, Petitioner returned to Dr. Clark and advised he was much improved. Dr. Clark recommended an additional two weeks of physical therapy.

On September 28, 2018, Petitioner returned to Dr. Baylis who noted full range of motion but still some weakness, numbness and pain near the left index MCP joint. Dr. Baylis recommended an additional four weeks of occupational therapy and sedentary work.

On October 25, 2018, Petitioner was discharged from physical therapy. At the last visit, it was noted there was minimal scar tissue thickening. There was mild numbness at the IF distal to the PIP joint and minimal hypersensitivity at the IF/MF pulps. Grip strength was diminished on the left as compared to the right.

Petitioner returned to Dr. Baylis on October 26, 2018. He reported full range of motion, but slight paresthesias to the tip of the index finger. He reported no tenderness or pain on the date of exam. Dr. Baylis advised Petitioner could return to full-duty work as of October 29, 2018.

Petitioner returned Dr. Bayliss on December 18, 2018 and continued to complain of soreness and cold intolerance on his left hand. Dr. Bayliss noted that Petitioner should wear a glove on his left hand if it is colder than 45 degrees outside. Dr. Bayliss opined that the soreness was just going to take time to get better. No surgery was recommended. Petitioner was discharged at this visit.

Petitioner has not returned to the doctor since 2018 when he was released from Dr. Bayliss's care.

Petitioner testified that between August 6, 2018 and October 29, 2018, he was working light-duty per the doctor's orders. He testified that he was able to do his regular job during this period because his job is more managerial as opposed to doing the grunt work. Petitioner also testified that his job is not an indoor type of job. His job requires him to be outside supervising and managing his work crews. Petitioner also testified that he would wear a glove on his left hand when the temperature was below 45°.

With regard to his current condition, Petitioner testified he has lost some mobility in his left hand and that he has difficulty making small repairs and difficulty holding nuts and bolts. He testified he has had pain in the three fingers on a couple of occasions in the cold weather. He also testified that on multiple occasions he did not feel his hand becoming cold and would have to use his right hand to touch and feel his left hand to warm it up. Petitioner testified he does not take any medication and he is currently employed in the same position with the Respondent that he was in on the date of accident. His salary has remained the same.

Petitioner testified he is right hand dominant.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Arbitrator finds Petitioner met his burden of establishing that his current condition of ill-being is causally related to the work accident. Petitioner testified that he never had pain in his 2nd, 3rd, and 4th left fingers prior to the accident. The medical records and testimony establish that Petitioner sought medical care the day the accident occurred which resulted in a diagnosis of subungual hematoma and eventually a crushing injury. Petitioner underwent occupational therapy and returned

to work modified duty on August 6, 2018, and full duty on October 29, 2018. Petitioner was released from Dr. Bayliss's care on December 18, 2018.

Petitioner has established by a preponderance of the evidence that the current condition of ill being as described above is causally related to the accidental injury sustained on July 25, 2018.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

Petitioner placed into evidence the following medical bills as Petitioner's Exhibit #5:

Grundy Radiologists 7/25/18	$ 34.00
Dr. Daniel Clark 8/1, 8/8, 8/22, 9/20/18	$ 719.00
Parkview Orthopedics 12/18/18	$ 145.00
Midwest Hand Care 10/16, 10/17, 10/23, 10/24/18	$1,296.00

The medical bills submitted by Petitioner were all for treatment rendered to Petitioner's left hand and fingers as a result of this injury. There are medical records contained in Petitioner's Exhibits #1-4 which support the bills placed into evidence.

The Arbitrator finds that Respondent is liable for payment of all of the aforementioned medical bills pursuant to the Medical Fee Schedule in Section 8.2 of the Workers' Compensation Act to the extent that they have not already been paid.

In Support of the Arbitrator's Decision relating to (K.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

Petitioner was off work due to the finger injuries from July 26, 2018 through August 5, 2018. He returned to work modified duty on August 5, 2018. Petitioner stipulated that he was paid his full salary from July 26, 2018 through August 1, 2018. Respondent then paid Temporary Total Disability benefits beginning August 2, 2018 through August 6, 2018.

The Arbitrator finds Petitioner is entitled to Temporary Total Disability benefits from July 26, 2018 through August 4, 2018.

The Arbitrator finds that Petitioner was overpaid temporary total disability by one day.

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

Petitioner sustained a crush injury to his left hand. The medical findings and Petitioner's complaints involving his left hand as contained in the findings of fact are incorporated herein.

Pursuant to Section 8.1b of the Act, the following factors are to be considered in determining the level of permanent disability for accidental injuries occurring on or after September 1, 2011:

(i) The reported level of impairment;
(ii) The occupation of the injured employee;
(iii) Age of employee at the time of injury;
(iv) The employee's future earning capacity;
(v) Evidence of disability corroborated by the medical records.

With regard to subsection (i) of Section 8.1b(b) of the Act, 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 Section 8.1b(b) of the Act, the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was able to return to his regular job as a lead lead worker following the injury. The Arbitrator, therefore, gives greater weight to this factor.

With regard to subsection (iii) of Section 8.1b(b) of the Act, the Arbitrator notes that Petitioner was 49 years old at the time of the accident. Because of his age, Petitioner will need to live with the effects of this injury for a longer period of time. The Arbitrator, therefore, gives greater weight to this factor.

With regard to subsection (iv) of Section 8.1b(b) of the Act, Petitioner's future earnings capacity, the Arbitrator notes that Petitioner testified he is earning the same amount of money as he was at the time of this accident. The Arbitrator, therefore, gives some weight to this factor.

With regard to subsection (v) of Section 8.1b(b) of the Act, the evidence of disability corroborated by the treating medical records, the Arbitrator has considered Dr. Baylis's comments in his December 18, 2018 report that reflect that Petitioner has a little cold intolerance and soreness with gripping and occasional sharp pain mostly to his index finger. He also noted paresthesia to the distal volar tip of the left index finger. He recommended Petitioner wear a glove at 45° or below and opined that it was going to take time to get better. The Arbitrator, therefore, gives greater weight to this factor.

Based on the above, the Arbitrator finds that Petitioner sustained a permanent partial disability to his left hand to the extent of 7.5% thereof.

In Support of the Arbitrator's Decision relating to (N.), Is Respondent due any credit, the Arbitrator finds and concludes as follows:

Respondent submitted a payment ledger establishing that medical bills were paid, which totaled $4,399.10. Respondent is therefore entitled to credit for the medical bills it paid. Regarding TTD, the parties stipulated that Respondent paid $705.82 in temporary total disability benefits. Respondent is entitled to a credit for that amount.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC009034
Case Name	BARAJAS, VINCENTE VENEGAS v. KEHE FOODS
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0223
Number of Pages of Decision	8
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Robert Cozzi
Respondent Attorney	Adam Wilhelm

DATE FILED: 5/7/2021

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF KANKAKEE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VICENTE VENEGAS BARAJAS,

Petitioner,

vs. NO: 18 WC 9034

KEHE FOOD DISTRIBUTORS, INC.,

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

On page three, in the first sentence under the "Facts" section, we correct the Decision to reflect that Petitioner's accident occurred on August 29, 2016, instead of 2019.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 30, 2019, is hereby affirmed and adopted with the clerical correction noted above.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired

without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

Since no award was made in this case, no bond for the removal of this cause to the Circuit Court by Respondent is required. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 7, 2021

/s/ *Maria E. Portela*

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

SE/
O: 3/9/21
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

21IWCC0223

BARAJAS, VINCENTE VENEGAS
Employee/Petitioner

Case# **18WC009034**

18WC010956

KEHE FOODS DISTRIBUTORS INC
Employer/Respondent

On 9/30/2019, 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 1.86% 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:

0208 GALLIANI DOELL & COZZI LTD
ROBERT J COZZI
77 W WASHINGTON ST SUITE 1601
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4696 POULOS & DiBENEDETTO LAW PC
ADAM M WILHELM
850 W JACKSON BLVD SUITE 405
CHICAGO, IL 60607

STATE OF ILLINOIS)
)SS.
COUNTY OF KANKAKEE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Vincente Barajas Venegas
Employee/Petitioner

v.

KeHE Food Distributors, Inc.
Employer/Respondent

Case # **18** WC **9034**

Consolidated cases: **18 WC 10956**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Kankakee**, on **August 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. ☐ 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 29, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**52,000.00**; the average weekly wage was $**1,000.00**.

On the date of accident, Petitioner was **27** years of age, ***single*** with **3** dependent children.

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

Respondent shall be given a credit for any benefits paid as a result of the accident of August 29, 2016.

ORDER

No benefits are awarded herein.

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

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

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

Arbitrator Anthony C. Erbacci

September 27, 2019
Date

SEP 30 2019

FACTS:

On August 29, 2019, the Petitioner sustained undisputed accidental injuries arising out of and in the course of his employment with the Respondent as a palletizer. The Petitioner testified that he was walking backwards while carrying a case when he tripped over a rail and fell backwards, landing on his back onto a pallet. The Petitioner testified that he noticed pain in his back and reported his injury to his supervisor. The Petitioner was then sent to Physician's Immediate Care Center for treatment.

The medical records reflect that the Petitioner presented to Physician's Immediate Care Center on September 1, 2016 complaining of low back pain. The physical examination revealed restriction of motion; spasm of the lumbar muscles and tenderness of the lumbar spine. He was diagnosed with a sprain of the lumbar spine and prescribed medication. He was released to return to light duty work.

The Petitioner returned a week later and reported little improvement. An MRI was ordered. When he returned on September 15, 2016, physical therapy was prescribed. The MRI was performed on September 21, 2016 and showed spondylosis with minimal antegrade spondylolisthesis. By September 29, 2016, the Petitioner reported improvement.

The Petitioner's final visit was on October 13, 2016. The note for that date reflects that he reported feeling better except when sitting. He asked his doctor to release him from care and was found to be fit to return to work without restriction as of October 13, 2016. The final diagnosis was lumbar strain. The petitioner indicated that he had no further problems with his low back and sought no further treatment until he sustained another accident on January 11, 2018. The treating physician noted at the final visit that he sustained no permanent disability.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Petitioner sustained an undisputed accidental injury to his low back on August 29, 2016. He received medical treatment at Physicians Immediate Care, including physical therapy. Petitioner was diagnosed as having suffered a lumbar strain and was released to return to work without restrictions at his regular job duties as of October 13, 2016. The treating physician noted at the time of his release that the Petitioner sustained no permanent disability as a result of his injury and no physician has opined that the Petitioner's current condition of ill-being is causally related to the accident of August 29, 2016.

Therefore, the Arbitrator finds that the Petitioner sustained a lumbar strain as a result of the work injury of August 29, 2016 but that the Petitioner's current condition of ill-being is not causally related to his accident of August 29, 2016.

In Support of the Arbitrator's Decision relating to (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

The Petitioner has requested that he is entitled to prospective medical services in connection with the August 29, 2016 low back injury. The Petitioner testified that he completed treatment for this injury as of October 13, 2016, at which time he returned to his regular job for Respondent and worked full duty at his position. The Arbitrator has found that the Petitioner's current condition of ill-being, for which the request for medical services, including an L5-S1 lumbar fusion, is made, is not causally related to the August 29, 2016 work injury. Therefore, the Arbitrator finds that the Petitioner is not entitled to any prospective medical services as a result of the August 29, 2016 injury.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC010956
Case Name	BARAJAS, VINCENTE VENEGAS v. KEHE FOODS
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0224
Number of Pages of Decision	13
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Robert Cozzi
Respondent Attorney	Adam Wilhelm

DATE FILED: 5/7/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Vincente Venegas Barajas,

Petitioner,

vs. NO: 18WC010956

Kehe Foods Distributors, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 14, 2019 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 $20,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 7, 2021

MEP/ypv
o030921
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/s/ *Maria E. Portela*

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

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

21IWCC0224

BARAJAS, VINCENTE VENEGAS
Employee/Petitioner

Case# **18WC010956**
18WC009034

KEHE FOODS DISTRIBUTORS INC
Employer/Respondent

On 11/14/2019, 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 1.55% 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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0208 GALLIANI DOELL & COZZI LTD
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77 W WASHINGTON ST SUITE 1601
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF KANKAKEE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION
19(b)

Vincente Barajas Venegas
Employee/Petitioner

v.

KeHE Food Distributors, Inc.
Employer/Respondent

Case # **18** WC **10956**

Consolidated cases: **18 WC 9034**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Kankakee**, on **August 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. ☒ 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, **January 11, 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 $**52,000.00**; the average weekly wage was $**1,000.00**.

On the date of accident, Petitioner was **29** years of age, ***single*** with **3** dependent children.

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

Respondent shall be given a credit of $**23,238.40** for TTD, $**0** for TPD, $**0** for maintenance, and $**11,103.65** for other benefits, for a total credit of $**34,342.05**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**666.67**/week for **77 1/7** weeks, commencing **February 21, 2018** through **August 15, 2019**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $**3,030.00**, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given credit for all medical benefits that have been paid,

Respondent shall authorize and pay the reasonable and necessary costs associated with the L5-S1 spinal fusion prescribed for the Petitioner by Dr. Templin, 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.

Arbitrator Anthony C. Erbacci

October 21, 2019
Date

NOV 14 2019

FACTS:

The Petitioner testified that on January 11, 2018, he was employed by the Respondent as palletizer and that he had begun that employment in July of 2014. The Petitioner testified that prior to beginning his employment with the Respondent, he had never injured his back, nor had he treated with a physician for a low back problem. The Petitioner described that his job as a palletizer, required him to lift cases weighing between 5 – 75 lbs. off of a line and stack them on a pallet which was on the floor. The Petitioner testified that the line was at waist level and that the pallet itself weighed between 20 – 60 lbs. The Petitioner described that, in the course of a day, he would have to carry 10 – 30 pallets to his work station on the line. He would stack each pallet with boxes to a height of approximately 7 feet. He would then wrap the loaded pallet in plastic sheeting. In May of 2017, his job was modified. He continued to perform his palletizing duty for 30% of the day but would operate a fork lift 70% of the day.

On August 29, 2016 the Petitioner sustained an undisputed work injury when, while lifting a box, he stumbled backwards over a rail and struck his low back onto a pallet. The Petitioner reported the incident to his supervisor and was later sent to the Physician's Immediate Care Center for treatment. The medical records reflect that the Petitioner was diagnosed with a sprain of the lumbar spine and prescribed medication. An MRI was ordered and physical therapy was prescribed. The MRI was performed on September 21, 2016 and showed spondylosis with minimal antegrade spondylolisthesis. By September 29, 2016, the Petitioner reported improvement. The Petitioner's final visit was on October 13, 2016 and he reported feeling better except when sitting. The Petitioner was released him from care and was found to be fit to return to work without restriction as of October 13, 2016. The final diagnosis was lumbar strain and the treating physician noted that the Petitioner sustained no permanent disability as a result of the injury. The Petitioner indicated that he had no further problems with his low back and sought no further treatment until January 11, 2018.

The Petitioner testified that while he was working on January 11, 2018, he bent over to lift up a pallet which was laying on the ground. He testified that, as he was lifting the 40 lb. pallet, he heard a crack in his lower back. He could not continue working and reported his injury to his supervisor, Glen. He also noticed that the low back pain was radiating down his right leg. He was sent by his supervisor to the Premier Occupational Health facility, the respondent's company clinic. The records of the facility reflect that he provided a history of injuring his low back while lifting a pallet. The physical examination showed restriction of motion and tenderness. He was prescribed medication and diagnosed with a strain of the muscles, fascia and tendons of the low back. He was placed on restricted duty. When he returned on January 18, 2018, he was no better. Physical therapy was prescribed.

The Petitioner thereafter received treatment at the Physician's Immediate Care Center on January 25, 2018. The triage history reflects, "back pain – lower back: lifting a pallet," although another history reflects, he was lifting a box when he hurt himself. The physical examination showed restriction of motion; right paraspinal muscle spasms; and positive straight leg raising on the right. He was diagnosed with a sprain of the ligament of the low back, prescribed medication and released to return to work with restrictions.

When the Petitioner returned on February 1, 2018, he reported that the pain had not improved. He was sent for physical therapy. At the return visit of February 8, 2018, he was sent for an MRI

which was performed on February 13, 2018. The study revealed a right central disc bulge and superimposing small right subarticular protrusion with annular tear which was abutting the S1 nerve root.

Following the MRI, the Petitioner was next seen on February 21, 2018 at Hinsdale Orthopedics. He provided a history of injuring his lower back on January 11, 2018 when he was picking up a pallet and felt a pop in his back. The physical examination revealed tenderness and restriction of motion. He was diagnosed with a right leg radiculopathy and a right disc protrusion at L5-S1. He was instructed to continue physical therapy, undergo an injection and remain off of work.

When seen on March 21, 2018, the Petitioner again complained of low back pain radiating down his right leg. The physical examination revealed a positive straight leg raising on the right and an injection was once again recommended. He was kept off of work. On April 13, 2018, he was examined by orthopedic surgeon, Dr. Gary Templin. Dr. Templin reviewed the MRIs and noted the disc protrusion at L5-S1 abutting the S1 nerve root as well as facet arthropathy on the right and the potentially a L5 pars fracture bilaterally. Physical therapy was temporarily halted because it was not helping him and it was recommended that he undergo the injection in his back. Dr. Templin instructed the Petitioner to remain off of work.

At the visit of May 26, 2018, Dr. Templin ordered a CT scan which was performed on July 6, 2018. When Dr. Templin reviewed the CT scan on July 12, 2018, he indicated that it also showed bilateral pars fractures at L5. He indicated that a transforaminal injection should be administered at the right L5 level. If the problem continues, surgical intervention should be considered. The injection was performed on August 3, 2018 by Dr. Patel.

When the Petitioner returned to Dr. Templin on August 31, 2018, it was reported that the injection did not provide significant relief and physical therapy provided only minimal benefit. Dr. Templin recommended a fusion of the L5-S1 level. The Petitioner returned to Dr. Templin on March 22, 2019. He was again diagnosed with radicular low back pain into the right leg and pars fracture which was aggravated by the work injury. Dr. Templin again recommended surgery.

The Petitioner testified that following the recommendation for surgery, he was sent by his employer for an examination on October 10, 2018 with Dr. Babak Lami. After the examination, all benefits were terminated. The Petitioner testified he wishes to undergo the prescribed surgery and would, in fact, undergo the surgery prescribed by Dr. Templin if it were ordered by the Commission.

The Petitioner testified that, currently, he notices pain in his lower back with pain which radiates down his right leg. He has difficulty with the everyday activities of life including walking distances and bending. He takes Advil and Tylenol for the pain. He attempted to return to work in January of 2019 in a warehouse. He was only able to last four hours due to disabling back pain.

Dr. Gary Templin testified that he is a board-certified orthopedic surgeon and that 99% of his practice relates to spinal surgeries. He performs approximately 350 spinal surgeries per year including lumbar fusion.

Dr. Templin testified that when the Petitioner was first seen at Hinsdale Orthopedics on February 21, 2018 by his physician's assistant, Kelly Burgess, he provided a history of injuring his low

back on January 11, 2018 while picking up a pallet at work. He previously had a back injury in 2016 but responded well to therapy and returned back to his regular work. Imaging studies consisting of MRIs were reviewed and revealed a right disc protrusion at L5-S1 impinging the right S1 nerve root. This finding correlated with the complaints of right leg pain. He was diagnosed with a L5-S1 disc protrusion with right leg radiculopathy. Physical therapy and an injection were recommended. When seen on March 21, 2019, weakness and tingling in his right leg and calf were noted and found to be significant. He also exhibited a positive straight leg raising on the right. These findings correlated to the S1 distribution as seen in the MRI findings of S1 nerve root abutment.

Dr. Templin first examined the Petitioner on April 18, 2018 and complaints of low back pain radiating down the right leg were noted. He reviewed the MRI films and concurred with the radiologist's finding of a disc protrusion disc protrusion on the right side at L5-S1 and also noted a possible pars fracture. A pars fracture occurs at the junction between the facet joint and the pedicle. The physical findings correlated with the radiographic findings of a pars fracture as well as a disc herniation impinging the S1 nerve root. He concurred with the need for an injection.

A CT scan was performed on July 6, 2018. Dr. Templin reviewed the CT scan films on July 12, 2018 and indicated that they revealed bilateral pars fracture at L5, and moderate foraminal stenosis to the right. Dr. Templin noted that the CT scan was consistent with the MRI and the physical findings. He again recommended an injection. The Petitioner underwent the injection on August 4, 2018 and returned to Dr. Templin on August 31, 2018. He reported that pain radiating from his low back into his right leg was no better. Dr. Templin recommended that the petitioner undergo a fusion at L5-S1.

Dr. Templin testified that the Petitioner's diagnosis is L5-S1 spondylosis with pars fracture and a herniated disc at L5-S1 causing radiculopathy. Dr. Templin testified that in his opinion, the condition was caused by the injury of January 11, 2018. The pars fracture may have pre-existed but the injury of January 11, 2018 aggravated his condition. All the treatment the Petitioner underwent was reasonable and necessary. The L5-S1 fusion will decompress the irritated nerve in the lower back and stabilize the pars fracture. The need for the surgery was the accident of January 11, 2018. The Petitioner continues to be disabled up to the present time and until he undergoes the surgery.

Dr. Babak Lami testified that he is a board-certified orthopedic surgeon. The petitioner told him that he injured his low back when he was lifting a pallet weighing approximately 20 lbs. and felt a pop in his back. He further reported right posterior thigh and calf pain. Dr. Lami testified that he reviewed the records of the Physician's Immediate Care Center and Hinsdale Orthopedics. He testified that he also reviewed the MRI films for the study that was performed on February 13, 2018 and that he noted only mild degenerative changes at L5-S1 which did not compromise any of the nerves. There was also a bulge at L5-S1. Dr. Lami noted that the Petitioner previously reported that he was injured back in 2016 and had three months of physical therapy and came back to work.

Dr. Lami testified that the physical examination of the Petitioner revealed restriction of the low back and flexion, extension and side bending to the right; normal strength, reflexes and sensation in the leg; and negative straight leg raising. His diagnosis was low back pain with a small component of right leg symptoms and mild degenerative changes at L5-S1. He did not believe that the condition was related to the January 11, 2018 accident because the mechanism of injury was "very trivial." He further felt that the Petitioner's subjective complaints and perception of disability were out of

proportion to the physical findings. He opined that the Petitioner was at maximum medical improvement and was capable of returning to full duty work. Dr. Lami testified that he was later provided with additional materials consisting of the MRI of September 21, 2016 and a CT scan film from July 6, 2018, and that after review of those materials, his conclusions remained the same.

The respondent offered into evidence video of two days of surveillance of the Petitioner for the dates of July 4th and 5th, 2015. The video shows the Petitioner driving an automobile; walking about at a grocery store and garage sale; and carrying a small grocery bag.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

The Petitioner credibly testified that he injured his low back on January 11, 2018 while lifting a 40 lb. pallet off the ground. He felt a "crack" or "pop" in his back. He reported the injury immediately to his supervisor. The Respondent did not call the supervisor to rebut the Petitioner's testimony. Thereafter, the Petitioner completed an accident report on that same date in which he reported that he injured his low back while lifting a pallet. He was sent to the company clinic, Premier Occupational Health, and provided a consistent accident history of injuring his low back while lifting a pallet. When seen at the Physician's Immediate Care Center on January 25, 2018, there are two separate histories reported. The first indicates that he injured his lower back when lifting a pallet while the second indicates it occurred when lifting a box. All other recorded histories to medical care providers, therapists and Dr. Lami, reflect that he injured his low back while lifting a pallet.

The Arbitrator finds that the Petitioner sustained accidental injuries arising out of and in the course of his employment on January 11, 2018.

In Support of the Arbitrator's Decision relating to (E.), Was timely notice of the accident given to Respondent, the Arbitrator finds and concludes as follows:

The Petitioner testified that after he injured himself, he went right away to his supervisor and told him that he had injured himself. He completed an accident report and was sent to the company clinic. The Respondent introduced no evidence contradicting the Petitioner's testimony.

The Arbitrator finds that the Petitioner provided timely notice of his accident to the Respondent.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Petitioner testified that he never injured his low back or treated with any physician for low back problems prior to the first work accident of August 29, 2016. The Petitioner sustained a low back strain as a result of a work injury on August 29, 2016. (See Arbitrator's Decision with respect to

18 WC 9034) The Petitioner testified that after treating and working light duty for approximately ten weeks following that accident, he returned to his normal job activities on a full duty basis. He felt good and did not return for any further treatment for his low back until he re-injured his low back on January 11, 2018.

Following the second work injury, the Petitioner reported it promptly and sought immediate medical treatment. The Petitioner testified that he experienced right leg pain following the January 11, 2018 accident which he had never experienced before in his life. The records reflect complaints of right leg pain and the physical examination thereafter documented positive straight leg raising on the right side.

The Petitioner underwent an MRI on February 13, 2018 which revealed a right disc protrusion at the L5-S1 level abutting the right S1 nerve root. The MRI performed on September 21, 2016, approximately sixteen months prior to the accident of January 11, 2018, did not show a disc protrusion abutting the S1 nerve root according to the radiologist report and the testimony of the treating physician, Dr. Templin. Furthermore, the disc protrusion identified in the MRI performed subsequent to the January 11, 2018 accident showed that the disc was protruding to the right side and abutting the right S1 nerve root which clinically correlates with the Petitioner's complaints of right leg pain.

Dr. Templin diagnosed two conditions of ill-being: L5-S1 disc protrusion with S1 nerve root abutment causing right radiculopathy and a pars fracture at the L5 level. Dr. Templin credibly testified that both of these conditions are causally related to the Petitioner's work injury of January 11, 2018. Dr. Templin testified that the Petitioner's MRI prior to the date of the accident did not show the disc protrusion with nerve root abutment and the one following the accident did. Furthermore, the pars fracture may have existed prior to the accident of January 11, 2018 but was aggravated and became symptomatic as a result of that injury.

Dr. Lami, the Respondent's examining physician, opined that the Petitioner sustained a lumbar strain injury as a result of the accident of January 11, 2018 and that the abnormalities as seen in the MRI are degenerative in nature. Dr. Lami did, however, concede that lifting a pallet off the ground could cause a disc protrusion with nerve abutment. His testimony that a disc impinging a nerve is a "nothing" finding and that lifting a wooden pallet off the ground is a "trivial act" is not persuasive.

While the Arbitrator notes the opinions and testimony of Dr. Lami, the Arbitrator finds that the opinions and testimony of Dr. Templin are sufficiently credible and persuasive so as to satisfy the Petitioner's burden of proof. The Arbitrator further finds the opinions and testimony of Dr. Templin to be more persuasive than those of Dr. Lami.

Based upon the foregoing, and having considered the totality of the evidence adduced at hearing, the Arbitrator finds that the Petitioner's current condition of ill-being, L5-S1 disc protrusion with nerve root abutment and L5 pars fracture are causally related to the Petitioner's work accident of January 11, 2018. The Arbitrator bases his finding on the testimony of the Petitioner; the MRIs that were performed both prior and subsequent to the date of the accident; the records of treatment from Premier Occupational Health, Physician's Immediate Care Center and Hinsdale Orthopedics; and the testimony of Dr. Templin.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

The Petitioner offered into evidence a medical bill from the Physician's Immediate Care for physical therapy performed from February 2, 2018 through and including March 9, 2018. The bill reflects charges for physical therapy totaling $7,341 with payments of $2,256 and adjustments of $1,955 leaving a balance of $3,030. The Arbitrator finds that the treatment was reasonable, necessary and causally related to the work injury and awards payment of the bill according to the fee schedule to the petitioner. The Respondent shall receive credit for all amounts paid.

In Support of the Arbitrator's Decision relating to (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

The Petitioner's treating physician has recommended an L5-S1 spinal fusion to address an L5-S1 disc protrusion with S1 nerve root abutment and an L5 pars fracture. Dr. Templin testified that the Petitioner has exhausted all forms of conservative treatment for the conditions including physical therapy and an injection. Dr. Lami, the Respondent's examining physician, does not believe that the Petitioner requires further treatment of any kind. The Arbitrator has found that the opinions and testimony of Dr. Templin are sufficiently credible and persuasive so as to satisfy the Petitioner's burden of proof. The Arbitrator has further found the opinions and testimony of Dr. Templin to be more persuasive than those of Dr. Lami.

The Arbitrator, therefore, awards prospective medical treatment to the Petitioner and orders the Respondent to authorize and pay for an L5-S1 spinal fusion along with all associated costs of the procedure. The Arbitrator bases his finding on the testimony of the Petitioner; the MRI showing an L5-S1 disc protrusion abutting the S1 nerve root; and the opinion of his treating orthopedic surgeon, Dr. Gary Templin.

In Support of the Arbitrator's Decision relating to (L.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The parties have agreed and stipulated that the Petitioner was temporarily and totally disabled from February 21, 2018 through and including the date of his independent medical examination with Dr. Lami on October 10, 2018. The Petitioner claims entitlement to temporary total disability benefits thereafter through the date of the hearing.

The Petitioner underwent an MRI on February 18, 2019 which revealed a herniated disc that was abutting the S1 nerve root. He thereafter began treating at Hinsdale Orthopedics where he came under the care of Dr. Gary Templin. The MRI findings were noted and the Petitioner was taken off of work as he underwent physical therapy and an injection. The physical examination with his treating physician thereafter documented significant objective findings which including positive straight leg raising on the right side and significant restriction of motion. Physical therapy and injections were not

successful in alleviating the Petitioner's condition and he has been kept off of work by his treating physician pending authorization for the surgery. The Petitioner testified that he continues to notice significant pain in his lower back radiating to his lower leg. This restricts him in his activities of daily lifting and his ability to walk longer distances. The Petitioner was placed under surveillance for two days and he was not found to be engaging in any substantial physical activity.

After Dr. Lami diagnosed the Petitioner with a sprain and released him to return to full duty work, the Petitioner attempted to return to work but lasted only a half day at a warehouse job. He testified that he noted significant problems in his back and was unable to perform the bending and other activities necessary to perform his job.

The Arbitrator finds that the Petitioner was temporarily totally disabled from February 21, 2018 through and including August 15, 2019, a period of 77 1/7 weeks. The Arbitrator bases his finding on the opinion of the Petitioner's treating physician; the objective pathology noted in the MRI studies; and the testimony of the Petitioner.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC016571
Case Name	MCGAHA, NATHANIEL L v. DOLLAR GENERAL CORPORATION
Consolidated Cases	
Proceeding Type	8(a)/19(h) Petition
Decision Type	Commission Decision
Commission Decision Number	21IWCC0225
Number of Pages of Decision	37
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Heidi Hoffee
Respondent Attorney	PETER SINK

DATE FILED: 5/7/2021

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NATHANIEL MCGAHA,

Petitioner,

vs. NO: 19 WC 16571

DOLLAR GENERAL CORP.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §8(b) having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, wage calculation, temporary total disability benefits, medical benefits, prospective medical treatment, permanency, penalties and fees, and application of §19(m) 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).

Factual background

Petitioner sustained a work-related injury which arose out of and in the course of employment on December 31, 2018. The record of accident and testimony are consistent in that Petitioner was moving a rolltainer when his elbow went back and hit another rolltainer when he was trying to loosen it in an aisle. (T. 19) Petitioner immediately reported the accident and went for medical evaluation wherein he was diagnosed with an elbow fracture. (T. 21, Px5) Petitioner was given a cast and sling, placed on light duty, referred to orthopedics, and told to seek additional medical care if the pain persisted more than 3 weeks. (Px5)

On January 9, 2019, Petitioner presented to Dr. Miller's office for treatment of his elbow fracture. The x-rays were obscured by his cast. He was told he could discontinue the sling and was

told to wear a compression sleeve and given work restrictions of no lifting greater than 5 pounds with the left hand and no pushing, pulling or lifting with the left arm. (Px6)

On February 6, 2019, Petitioner returned to Dr. Miller's office where his history of present illness noted an onset injury that occurred on December 31, 2018 when hitting his elbow at work. He reported a "new injury recently when falling through the ice trying to save his dog from drowning." Petitioner indicated in his testimony that the injury was to his knee, and his upper extremities were not impacted in this incident. (T. 36) Petitioner's current restrictions remained in effect. (Px6) He reported to occupational therapy on February 18, 2019, with a diagnosis of left upper extremity pain due to a closed fracture of left olecranon process, triceps tendinitis, and olecranon bursitis. (Px5)

On March 6, 2019, Petitioner returned to Dr. Miller's office. At this visit he described new pain in his left hand that presented about 3-4 weeks ago and denied a new injury to the left elbow. He also reported a claw hand and an EMG was recommended. (Px6) His work restrictions were continued. (Px6) Petitioner's EMG was not approved until May 31, 2019. (Px6)

On June 11, 2019, Petitioner underwent an EMG. He stated that the symptoms began after he fractured his left elbow at work. On June 13, 2019, Dr. Miller's office advised Petitioner his EMG showed carpal and cubital tunnel syndromes. (Px6) On July 24, 2019, Dr. Miller recommended surgery and at that point took Petitioner off work. (Px6)

Petitioner underwent an independent medical examination with Dr. Li on September 5, 2019. Petitioner's current diagnosis per Dr. Li was left cubital tunnel and left carpal tunnel syndromes. Dr. Li affirmatively stated that this was not related to the injury of December 31, 2018. The basis of this opinion was that Petitioner did not start complaining of symptoms related to these conditions until March of 2019 and related the onset of symptoms to a time that coincided with Petitioner falling into an icy pond to rescue his dog. Dr. Li believed that these conditions were likely pre-existing but made symptomatic by the February 2, 2019 incident. Dr. Li opined that the x-ray showed a fracture which would be consistent with some acute elbow pain initially and the EMG is consistent with his current diagnosis. Ultimately, Dr. Li also opined that the December 31, 2018 incident resulted in a contusion of the elbow that would have completely resolved 3 months after his injury. Dr. Li concluded that Petitioner's current subjective complaints are due to an unrelated ice incident of February 2, 2019. (Rx1 and Rx2)

Petitioner ultimately underwent carpal and cubital tunnel release surgery on December 23, 2019. (Px6) On January 7, 2020, Dr. Miller's office recommended an EMG of Petitioner's right arm and noted he was doing well post-operatively. Petitioner was given 2 more weeks of restricted duty. (Px6)

Analysis

Petitioner met his burden that he sustained an accident arising out of and in the course of his employment. Petitioner met his burden that he sustained an elbow fracture as a result of the December 31, 2018 incident. However, Petitioner did not meet his burden that his current condition of ill-being is causally related to the December 31, 2018 work incident. Additionally, Petitioner did

not prove he is entitled to penalties or an award under Section 19(m) of the Act and therefore the Commission affirms that portion of the Arbitrator's decision.

There is no medical opinion in evidence that causally relates Petitioner's carpal and cubital tunnel conditions in either his left arm (or unconfirmed condition in his right arm) to his work activities. The only causal opinion in this case is in the form of an IME report dated September 5, 2019 by Dr. Li who opined that there was a fracture related to the work accident that resolved, but that the carpal and cubital tunnel syndromes were aggravated by an intervening accident on February 2, 2019.

Although the Commission does not find that there was an intervening accident that took place on February 2, 2019, the Commission finds that the conditions of carpal and cubital tunnel syndromes were different than the injury diagnosed as a result of the accident and, therefore, a medical opinion would be necessary to causally connect those conditions to the work accident. The only medical causation opinion in this case is that the fracture should have resolved in approximately 3 months post-accident, and that the carpal and cubital tunnel conditions were not related to his work accident.

Petitioner did not present with symptoms of his current condition until approximately three months post-accident, and one month after jumping into the ice to save his dog. As there is no opinion causally linking Petitioner's carpal and cubital tunnel syndromes to his initial injury and fractured elbow, Petitioner failed to prove the carpal and cubital tunnel conditions were causally related to the work accident on December 31, 2018.

As Petitioner failed to prove his current condition of ill-being was causally connected to the accident on December 31, 2018, the Commission reverses the Arbitrator's decision regarding temporary total disability benefits. All of the temporary total disability benefits the Arbitrator awarded corresponded to a period of time during which Petitioner was taken off work due to his carpal and cubital tunnel syndromes and pending surgery.

Additionally, the Commission modifies the award of medical expenses and reverses the award of prospective medical care. The Commission finds Dr. Li's opinion that the elbow fracture should have been resolved within 3 months of the injury persuasive and therefore awards the medical expenses through the visit of March 6, 2019. Any treatment after that date, including the EMG, subsequent surgery and prospective medical care is not work related and therefore denied.

In order to receive additional compensation under 820 ILCS 305/19(m), the Petitioner must cite to a specific violation of a health and safety standard under the Health and Safety Act. As the Petitioner failed to do so, the Commission affirms the Arbitrator's decision of denial of benefits under Section 19(m) of the Act.

Finally, the Commission affirms the Arbitrator's decision that the Petitioner did not prove entitlement to penalties. Although Respondent's theory of an intervening accident was not persuasive, Respondent had a medical causation opinion on which it relied to justify denial of benefits. Accordingly, Respondent's denial of benefits to Petitioner was not sufficiently vexatious and unreasonable to warrant fees and penalties.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $131.00 for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that 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 $231.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 7, 2021

/s/ *Maria E. Portela*

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

MEP/dmm
O: 030921
49

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

21IWCC0225

McGAHA, NATHANIEL
Employee/Petitioner

Case# **19WC016571**

DOLLAR GENERAL CORP
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:

4617 HOFFEE LAW FIRM
HEIDI A HOFFEE
109 W MAIN ST
FAIRFIELD, IL 62837

1886 LEAHY EISENBERG & FRAENKEL
NICHOLAS NAVARRO
33 W MONROE ST SUITE 1100
CHICAGO, IL 60603

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)

NATHANIEL MCGAHA
Employee/Petitioner

v.

DOLLAR GENERAL CORP
Employer/Respondent

Case # **19** WC **016571**

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 **Collinsville**, on **1/24/2020**. 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 atty **costs: safety violation 19(m)**

FINDINGS

On the date of accident, **12/31/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**7095.36**; the average weekly wage was $**798.29.**

On the date of accident, Petitioner was **39** years of age, ***single*** with **1** 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 of $20,092.98, as provided in Sec 8(a) of the Act and subject to the fee schedule.

Respondent shall pay Petitioner temporary total disability benefits of $532.19/week for 26 weeks, commencing 07/24/19 through 01/21/20, as provided in Section 8(b) of the Act.

Respondent shall pay to Petitioner no attorney fees, as provided in Section 16 of the Act; no penalties, as provided in Section 19(k) of the Act; and no penalties, as provided in Section 19(l) of the Act.

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

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

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

Edward Lee
Signature of Arbitrator

3/23/20
Date

ICArbDec19(b)

APR 9 - 2020

STATE OF ILLINOIS
ILLINOIS WORKERS' COMPENSATION COMMISSION

NATHANIEL MCGAHA
Employee/Petitioner

v. Case # **19** WC **016571**

DOLLAR GENERAL CORP.
Employer/Respondent

ADDENDUM TO ARBITRATION DECISION

PROCEDURAL HISTORY

Petitioner filed an Application for Adjustment of Claim on 06/07/2019. Petitioner filed a NMO, 19(b) petition and a petition for penalties for the 11/05/19 Mt. Vernon docket. On 10/29/2019, Respondent filed a 19(b) response, a response to the petition for penalties and a notice of motion/motion to dismiss. Respondent never sought a ruling on its motion to dismiss; however, the statements made in the motion to dismiss and supporting affidavit, became the subject of Petitioner's Supplemental Petition for Penalties, Fees and Costs, filed with the Commission on 12/05/2019.

This case was continued from Mt. Vernon in November to Herrin in December, then to Collinsville in January of 2020. An Amended Application, amending the location of the accident, was filed on 01/06/2020.

A 19(b)/8(a) hearing was held on 01/24/2020 in Collinsville before The Honorable Ed Lee. He admitted the stipulation sheet into evidence as Arbitrator's exhibit 1. (AX1)(Tr. 5) The issues

in dispute are accident, causal connection, average weekly wage, medical, which includes past, present and future medical, TTD, 19(k), 19(l) penalties and attorney's fees. (Tr. 4)

The Application For Adjustment of Claim (AX2), Petitioner's exhibit list (AX3), and Respondent's exhibit list (AX4) were also admitted into evidence as Arbitrator's exhibits. (Tr. 5-7).

During the hearing, Petitioner moved to conform the pleadings to the proof of a safety violation. This is discussed in the decision below along with other section 19 penalties discussed in the body of the decision below.

FACTS

EMPLOYMENT AND WAGES

Nathaniel McGaha ("Petitioner") testified that, about two weeks prior to the hearing, he received an email that said he was no longer employed for Dollar General ("Respondent"). (Tr. 8-9)

Petitioner had worked for Respondent since October of 2018. He was hired on 10/02/2018, contingent on passing a background check. (Tr. 9) He started working during the third week of October (Tr. 9-10) He was paid hourly. (Tr. 10-11) The first two weeks were spent doing computer-based learning and and the cash register. (Tr. 10)

A job verification form states that Petitioner's rate of pay was $15.00 per hour and the job code was store manager candidate. (PX4)

On 10/02/2018, Petitioner was given a document titled, "Physical Requirements to Work in a Store." (PX4) He was asked to review the list of physical requirements necessary to work in a position at a Dollar General Store. His initials would indicate that he was able to perform the

essential job functions with or without a reasonable accommodation. The list included the following: frequent bending, stooping and kneeling to run check out station, stock merchandise and unload trucks; which may also require the ability to push and/or pull rolltainers for stocking merchandise; frequent handling of merchandise and equipment such as handheld scanners, pricing guns, box cutters, merchandise containers, two-wheel dollies, U-boats and rolltainers, and frequent and proper lifting of up to 40 pounds; occasional lifting of up to 55 pounds. (PX 4)

Petitioner testified that he was scheduled to work five days a week. (Tr. 11) He missed three days the first week and a couple days the second week. He missed a total of five days the first two weeks. (Tr. 11)

Petitioner started as a store manager on 12/01/2018 (Tr. 12) At that time, his earnings changed from hourly to salary plus bonuses. (Tr. 12) The email from the district manager shows that Petitioner's salary as manager was $41,511. (Tr. 13)

Petitioner's net wages were deposited directly into his bank account. His bank records show these deposits. (PX1, Tr. 13-14) His gross wages were 21% more than his net wages. (Tr. 14-15) His W2 shows his gross total wages in 2018. (PX1, Tr. 15)

JOB DUTIES

Petitioner's job duties as store manager involved a lot of physical labor. That was all that the job is - it's lifting, moving non-stop, replenishing the store. (Tr. 15) Petitioner's store was one of the busiest stores and one of the smallest stores in the state. It was mandatory front door delivery early in the morning because they had no room for backstock. (Tr. 17)

Deliveries were on Tuesday and Saturday mornings. Petitioner arrived at 3:00 a.m. to prep the store and then they did a front door delivery of anywhere from 20 to 25 rolltainers, not

counting the totes. The employees got there at four o'clock in the morning and they just busted it out because the store's so small, if you left all the rolltainers in the store, you couldn't even move; nobody could even come in the store. (Tr. 16)

The rolltainers look exactly like in the photograph when they come off the truck. (PX 2, Tr. 17) As a rule, there are 100 boxes per rolltainer. There are 20 to 25 25 rolltainers each Tuesday and each Saturday. There are also totes. The photograph shows a picture of the totes that came in off a truck, broken down. (PX 3, Tr. 17) Once everything was put up, Petitioner put the totes in a rolltainer. (Tr. 18) The group exhibit of photographs is the store where Petitioner worked. (PX 3, Tr. 18)

ACCIDENT

On 12/31/2018, the truck came as a typical day. Nearing the end of it, Petitioner was trying to clear the floor. A rolltainer jammed in an aisle so he pulled it to loosen it. When he did his left elbow went back and hit another rolltainer. He instantly heard it pop and saw swelling. (Tr. 19-20) His fingers were tingly. (Tr. 30) He went to his office and called the workmen's comp number for accidents. (Tr. 19-20) On the day of the accident, he had numbness and tingling. His fingers were tingly. (Tr. 30)

MEDICAL TREATMENT

12/31/2018

Respondent admitted in its 19(b) response that it chose Petitioner's medical providers. (PX 11) Respondent directed Petitioner to go to Fairfield Memorial Hospital ("FMH"). (Tr. 20) On 12/31/18 at 12:15 p.m., Petitioner reported pulling on a container when his hand slipped off and forcefully hit another container. He heard/felt a snap upon impact. (PX 5)

Petitioner had sharp, left elbow pain from a direct blow at work on 12/31/2018. His pain was 8/10. He reported numbness and tingling with certain movements. The pinky side of his arm up past the elbow alternated from numb to shooting pain. He was given a Toradol injection. (PX 5)

The radiologist's impression was enthesophyte at the attachment of the triceps tendon on the olecranon with transverse lucency through the base that may represent a fracture with associated overlying soft tissue swelling. On 01/09/19, the radiologist found that the overlying cast obscured some detail of the fracture in the olecranon spur but no significant change was identified. (PX5)

His diagnoses were left elbow pain and closed fracture of the left elbow. A cast and a sling were applied. Norco, Tramadol and ibuprofen 800 mg. were prescribed. He was to ice the elbow for 20 minutes every hour. Petitioner was released to light duty pending orthopedic evaluation. A referral was made to Wabash General Hospital Orthopedic Clinic ("WGH") for further treatment. (PX 5)

01/09/2019

On 01/09/2019, Petitioner went to WGH for an initial evaluation of his left elbow pain. The onset of the injury was on 12/31/2018 due to hitting his elbow while working at Dollar General. He denied a prior injury to his elbow. (PX 6)

Petitioner reported throbbing and shooting pain in his left elbow. Pain level - left elbow was 7/10. Neurological symptoms were positive. Examination of Petitioner's left elbow revealed swelling and TTP over the olecranon. (PX 6)

The x-ray from 12/31/18 was reviewed. It showed a small avulsion fracture off the tip of the olecranon. A second left elbow x-ray was done. It showed splint immobilization and the fracture. The radiologist reported that the cast obscured the fracture in the olecranon spur. No significant change was identified. (PX 5) (PX 6)

The diagnosis was pain, left elbow. (PX 5) Petitioner was advised to discontinue the sling and wear a compression sleeve. (PX 6)

A work note was provided no lifting greater than 5 pounds with the left hand; no pushing, pulling or lifting with the left arm. (PX 6)

On February 2, 2019 in between Petitioner's first visit at WGH on January 9 and his second visit on February 6, Petitioner's dog fell in the lake beside his house. He went to get his dog and fell in the lake getting her out. He crawled out of the lake. He scraped his knee up pretty good getting out of it but nothing else. ("*Dog Rescue*")(Tr. 35-36)

02/06/2019

On 02/06/2019, Petitioner followed-up for his left elbow pain. The onset was on 12/31/2018 due to hitting elbow in Dollar General. He reported a new injury recently when falling through the ice trying to save his dog from drowning. He is experiencing some pain today. He has been wearing the compression sleeve. (PX 6)

Neurological symptoms were negative. He had some tenderness over the olecranon and pain with full pronation and supination. (PX 6)

The physician exam indicated left triceps tendonitis and left elbow olecranon bursitis. He recommended that Petitioner begin OT. He was to continue his current work restrictions until

further notice and follow-up in 4 weeks to assess progress in OT. The diagnosis was left triceps tendonitis and closed fracture of left olecranon process, with routine healing. (PX 6)

FMH - OCCUPATIONAL THERAPY - 02/18/2019

On 02/18/2019, Petitioner began occupational therapy at FMH for left upper extremity pain due to closed fracture of left olecranon process, triceps tendinitis and olecranon bursitis. He reported that he had an injury at work on 12/31/18 while working as manager of the Dollar Store in Albion, Illinois. He went to urgent care and was placed in a cast for one week. He then used a Tubigrip compression wrap on the left elbow to assist with management of pain. He was on light duty with weight restrictions of no lifting greater than 5 to 7 pounds. His regular job duties required lifting boxes up to 150 pounds periodically overhead and especially on days of inventory receiving. (Tr. 39; PX5)

The therapist documented that he had significant complaints of pain during typical volitional movement of left dominant upper extremity and dominant hand causing him to have great difficulty and complaints of pain during light duty as store manager of Dollar General Store. Grip strength testing of the left hand produced sharp, shooting pain from the olecranon up toward the shoulder and down to the hand with pain rating at 8 during grip strength testing. His pain was constant at 5 to 6 and was sharp, shooting, radiating, aching, tingling and constant. Pain episodes were several times every hour especially during work hours. (PX5)

Petitioner attended therapy on 02/18/19 and 03/04/19. He missed several appointments because he was working. The notes reflect that he called in on 3/11 stating that he was called into work and unable to attend the remaining sessions that week. The work comp case manager

was notified. Petitioner testified that he had to work 28 or 29 consecutive days so he had to cancel some of the appointments, and he did no-show one or two times. (Tr. 39; PX 5)

On 03/20/2019, Petitioner called OT to advise that his MD put OT on hold pending the EMG &/or procedure on the elbow. (PX5) Petitioner testified that the doctor had called and said until we get the nerve stimulus we're going to do away with physical therapy. (Tr. 39) If it was a pinched nerve, common with broken elbows, therapy would do the opposite as far as improving it. Dr. Miller's office cancelled therapy after two trips. (Tr. 38-39; PX5)

03/06/2019

Petitioner returned to WGH to follow up for left elbow pain. He was experiencing a sharp "electrical" pain in his left hand. Pain presented about 3 to 4 weeks ago. He denied a new injury to the left elbow. He described a locking in his left hand. He had hypersensitivity in his left elbow. He reported getting a claw hand when he felt the shooting pain. (PX 6)

An x-ray of the left hand performed on 03/06/19 due to pain all over and when using hand it contracts and tenses up for the past 4 to 5 weeks. The x-ray showed no acute osseous abnormality. (PX5)

Neurological symptoms were positive. No improvement was noted. The diagnosis was ulnar neuropathy of left upper extremity. An EMG of the LUE was ordered to further diagnose his ulnar neuropathy. Work note was provided to continue current restrictions. (PX 6)

03/19/2019 & 03/20/2019

On March 19, 2019, Adjuster Wright called the RN. She told her that Petitioner was no showing for PT appts. She had not received a copy of the note from 03/06/2019. After looking at the note, the RN stated that the patient needed a LUE EMG to r/o ulnar neuropathy. The RN noted, "[s]he got really quiet.

She stated that they would have to go over the notes to see if they can do anything, because he had an intervening accident to his elbow." (PX 6)

On March 20, 2019, upon being advised that Petitioner's PT is on hold pending the results of the EMG, Adjuster Wright "stated very abruptly, why does he even need an EMG. The nurse told her that the test will check for ulnar neuropathy. She stated that was related to the incident where Petitioner jumped into the pond to save his dog? The nurse stated that is not in the office note of 3/6/19. Adjuster Wright told the WGH nurse that Petitioner had been no showing for PT and that Respondent did not know whether the EMG would be approved. Respondent stated that the decision might be on hold until Kayla returns from vacation. The nurse faxed the 3/6/19 office note to the adjuster. (PX 6)

06/11/2019

On 06/11/2019, an EMG/NCV was performed at WGH. The history was a 6 month pain and paresthesia LUE. Symptoms began after he fractured his elbow at work. There was no family history of neurological disorders. The findings were positive at the left ulnar nerve across the elbow, focal demyelination involving both motor and sensory components. The left median nerve across the carpal tunnel had the same findings.

06/13/2019

On 06/13/2019, Petitioner returned to WGH. He reported numbness in all fingers of the left hand. If he made a fist, pain radiated up his LUE like fire shooting up his left arm. His sleep has been disrupted. He was experiencing the same symptoms in his RUE. (PX 6)

Neurological symptoms were positive. He had paresthesia, muscle weakness and numbness in extremity. The NCS showed a compromise of the left ulnar nerve across the elbow

with evidence of focal demyelination of the ulnar nerve. Both motor and sensory components of the median nerve were involved. (PX 6)

A left elbow ulnar nerve decompression with possible transposition was recommended. Petitioner was instructed to brace his left wrist at night and at work. It was also recommended that he wear an elbow pad at night for 6 weeks before proceeding with surgery. He was to follow up in 6 weeks. (PX 6)

3 MONTHS LATER

On 05/31/2019, Adjuster Wright stated that for diagnostic purposes only, approval was given for the LUE EMG. She would fax written approval when she had time. (PX 6)

The RN notified Petitioner that the LUE EMG had been approved. He told her that his right arm was also very sore and tender from compensating for his weakened left arm. She would schedule an appointment with the PA Kayla. (PX 6)

On 06/20/19, Adjuster Wright called requesting that the 06/13/2019 office note and the EMG report. The RN faxed the records. (PX 6)

07/24/2019

On 07/24/2019, Petitioner followed up at WGH for his left ulnar neuropathy. He reported no improvement from wearing the left wrist brace and compression sleeve over the left elbow. He was constantly having weakness and dropping objects due to diminished sensation in the left wrist and hand.

Petitioner was to remain off of work until further notice pending a left wrist carpal tunnel release and a left elbow ulnar nerve decompression with possible transposition. (PX 6)

07/25/2019

On 07/25/2019, the RN faxed a request for surgery, office notes and the EMG to Adjuster Wright. (PX 6)

08/06/19 to 09/05/2019

On 08/06/2019, the RN completed and signed the FMLA for and faxed it to Matrix. (PX 6)

On 08/19/2019, the RN noted the vm from Petitioner that the employer denied the surgery. The WC adjuster scheduled him to see another specialist for a second opinion/IME. She called to tell him they did not need to see him until WC makes their final decision. (PX 6)

On 09/05/2019, at 12:47 p.m., the RN placed a call to the Matrix 888-644-3550 regarding a medical certification form to be completed. She left a vm for Nate's claim examiner Ashur Sawa's ("Ashur") to return her call to discuss the patient's work status and the need for a medical certification form to be completed. (PX 6) .

On 09/05/2019 at 12:58 p.m., the RN noted in the WGH records that she placed a call to Nate to check on his work status. Nate stated that he was currently at his appointment for his IME. She explained that they had received a letter from DG stating that all treatment is denied as of 7/26/19. She asked him to check into this and get back with our office. She would await a return call from Nate and/or Ashur with Matrix. (PX 6)

On 09/05/2019, at 1:05 p.m., Ashur returned her call and stated that yes he did need an updated medical certification form to estimate when Nate could potentially return to work. The RN would discuss with Kayla and complete form as requested. (PX 6)

09/16/2019 - 10/03/2019

On 09/16/2019 4:26 p.m., the CMA called Nate to see what his work status is. He stated that he has not worked since Kayla took him off work. He went to an IME done on 9/4/19 and he has not heard the outcome. He states she has a lawyer involved now and that they have to give him the IME outcome. He states once he hears from them he will contact us. If he does need surgery based off IME then he wants us to do the surgery. Please discuss with Kayla about filling out the FMLA forms and the return to work form. (PX 6)

On 09/17/2019 10:39 a.m., the RN noted that Kayla stated to wait until we receive the results of his IME before filling out either RTW or FMLA forms. Forms placed back in green folder. (PX 6)

On 10/03/2019 at 9:51 a.m. the RN received a TC from the patient he stated that he and his lawyer are going to court against workman's comp. He stated that eventually he will be able to have his surgery that he needs. He stated that he is having excruciating pain in his left arm, and was wondering if Kayla could call something in for him for pain. He stated that he has been taking Tylenol and Ibuprofen and it just is not helping. (PX 6)

On 10/03/2019 at 5:00 p.m., the RN called in an order for Tramadol HCL, 1 tablet every 12 hours as needed and notified Petitioner. (PX 6)

SURGERY

On 12/10/2019, Petitioner returned to WGH for pre-op left ulnar nerve decompression with transposition and left carpal tunnel release on 12/23/2019. The onset of his pain was on 12/31/18 due to hitting his elbow while working at Dollar General. He failed coonservative measures of formal PT and wrist braces and use of the elbow pad. (PX 6)

On 12/23/2019, Justin Miller, M.D. performed a left wrist open carpal tunnel release and a left elbow ulnar nerve decompression with anterior subcutaneous transposition at WGH. A splint was to remain in place until follow up in 10-14 days for suture removal. He was to perform wrist and finger range of motion and elevation to help reduce pain and swelling. (PX 6)

Petitioner's first follow-up visit after surgery was on 01/07/2020. He reported much improvement in left elbow/wrist pain. He had remained in the sling at all times. . He reported that he was experiencing similar symptoms in the right wrist/elbow due to repetitive motion from lifting. He denied any injury to the right wrist/elbow. This started when he hurt his left arm and was using his right arm more at work. (PX 6)

On examination of the right elbow, Petitioner had positive ulnar nerve compression and positive ulnar nerve subluxation. An upper extremity neurovascular exam was positive for Phalen's and Tinel's signs. (PX 6)

Sutures were removed. Work restrictions of no heavy lifting over 10 - 15 pounds with left had for 2 weeks were stated. (PX 6)

A RUE EMG was ordered for diagnosis of Petitioner's symptoms in his right arm and hand. He was to follow up prn for the LUE and return after the RUE EMG. His diagnosis was right wrist pain and right elbow pain. (PX 6)

PETITIONER'S TESTIMONY
MEDICAL TREATMENT - CAUSAL CONNECTION - TTD

Direct examination

Petitioner testified that his elbow had fluid on it. The swelling was bigger around than a silver dollar but smaller than a tennis ball. (Tr. 54) It was obviously noticeable. It was fluid that

was hanging off of it. Petitioner had never had bursitis before. It lasted about four to six weeks. After two weeks it started going down. (Tr. 22)

Petitioner testified that he had two x-rays of his left elbow total. (Tr. 22)

He remained under work restrictions (no lifting greater than 5 pounds with the left hand; no pushing, pulling or lifting with the left arm) until 7/24/19 when he was taken off of work pending surgery. (Tr. 23)

Respondent did not accommodate his work restrictions. (Tr. 23) Respondent's light duty consisted of giving the store an extra 26 hours a week. The 26 hours is essentially irrelevant when you can't get somebody to work. It takes a month to hire someone and Respondent pays minimum wage so they may get another job. (Tr. 25)

LIGHT DUTY RESTRICTIONS NOT ACCOMMODATED

Petitioner was on light duty from the time of the accident until he was taken off work on July 24th to have surgeries. (Tr. 24)

Respondent's light duty accommodations consisted of giving an extra 26 hours a week to his store but that didn't benefit him. He could barely lift with his left arm. The 26 hours was irrelevant when he couldn't get anyone to come in to work. Respondent paid minimum wage. In February, Petitioner lost three employees so he was cut down. Sometimes it took a month to get somebody hired. By then they might have another job. As far as giving him people to work, Respondent gave him none. (Tr. 25)

During the time he was on light duty, his job required him to lift more than five pounds. It was non-stop work. (Tr. 25) The work required pushing and pulling with his left hand. He tried to protect his left hand by accommodating with his right hand. This went on for seven months.

(Tr. 26) Respondent was completely aware of it. (Tr. 25) Petitioner complained many times to Respondent that the work was causing him to have symptoms in his upper extremities. (Tr. 26-27) He told his district manager many times. He called the woman at HR many times. He told Dr. Miller. He and Alisha Wright, the adjustor ("Adjuster Wright"), contacted each other back and forth. No changes were made to accommodate his restrictions after he complained. Everything stayed the same. The hours had changed, but there was no other help. (Tr. 27)

Petitioner continued working after the accident until July 24th when he was taken off work pending surgery. (Tr. 28) There were two other employees also working light duty when he was supposed to be on light duty. (Tr. 28) Petitioner had limited help during that time. (Tr. p. 29) In February (2019), Petitioner lost three employees. As far as giving him people to work, Respondent gave him none. He could barely lift with his left arm. (Tr. 25) His job on Respondent's light duty required him to lift more than five pounds. Respondent was completely aware of it. (Tr. 25-26)

The work required pushing and pulling with his left hand. He tried to protect his left hand by using his right hand for seven months. (Tr. 26)

On March 6 (2019), a nerve conduction study was ordered. Adjuster Wright did not authorize it until the day Petitioner hired an attorney on May 30th. (AX2; Tr. 26)

Petitioner complained many times about the work causing symptoms in his upper extremities on Respondent's light duty. He talked to his district manager many times. He called the woman at HR many times and that's in the system. He talked to Dr. Miller. He contacted Adjuster Wright. They contacted each other back and forth about it. (Tr. 26-27) Despite his complaining, no changes were made to accommodate his work restrictions. He had limited help.

Hours were added, but he received no other help. Two other employees were also on light duty at the same time. (Tr. 27-29)

After Adjuster Wright finally approved the nerve conduction study (5/30/2019), surgery was scheduled and he was taken completely off of work (07/24/2019). Since the nerve testing was approved, Petitioner assumed he would get the surgery, get it done and go back to work. (Tr. 31) Then, he got a phone call stating we're not approving it. (Tr. 28)

Petitioner remained off of work from 07/24/2019 until 01/07/2020. (Tr. 32) During this time, he was unemployable - he had a restriction so he couldn't work. Respondent told him nothing. (Tr. 28)

Prior to the accident on 12/31/2018, Petitioner had never been diagnosed with any fractures of his upper extremities, neuropathies, carpal tunnel, ulnar neuropathy, bursitis. He was never diagnosed with high blood pressure, diabetes, arthritis of the upper extremities or thyroid disorder. He never had similar symptoms from repetitive use in the past. He never had any problems. (Tr. 29-30)

On 07/24/2019, Petitioner was taken off of work. He remained off of work until 01/07/2020. (Tr. 31-32) He applied for a medical card to get this fixed but he made too much money. After three months without pay, his medical card was approved. (Tr. 32)

Petitioner had surgery on December 23rd (2020). (Tr. 35) The surgery improved his symptoms. (Tr. 40) Dr. Miller released him to light duty on 01/07/2020 (14 days) then full duty on 01/21/2020. (Tr. 35) While he was on light duty recovering from surgery, he received an email from the Respondent that stated his employment was terminated. (Tr. 34)

Petitioner has not been released from treatment. Dr. Miller's office has ordered a nerve test on his right arm. (Tr. 35)

On February 2, 2019, after Petitioner's first visit at WGH on January 9 and before his second visit on February 6, Petitioner's dog fell in the lake beside his house. He went to get his dog and fell in the lake getting her out. He crawled out of the lake. He scraped his knee up pretty good getting out of it but nothing else. ("*Dog Rescue*")(Tr. 35-36)

Prior to the *Dog Rescue,* no one had determined that his elbow fracture had healed. He was still on light duty. (Tr. 36)

Respondent's claim that he re injured his left elbow in the *Dog Rescue* and went to an emergency room is false. (Tr. 36-37) No record exists of that. He never went to an ER after the *"Dog Rescue."* He never injured himself in the lake. (Tr. 37)

The next office visit after the *Dog Rescue* was on the 6th (02/06/19). Petitioner's symptoms were improved. (Tr. 37)

In February (2019), Petitioner had a couple occupational therapy sessions at FMH. However, Dr. Miller said that a pinched nerve is common with broken elbows, so physical therapy would not be helpful. The doctor said until we get the nerve stimulus, we're doing away with therapy. (Tr. 38-39) Petitioner canceled some appointments, but he did no-show one or two times because he had to work. He worked 28 or 29 consecutive days. (Tr. 39)

By the March 6th (2019) visit, Petitioner had shooting pains in his arm. She said it could be the nerve. Petitioner thought a lot of it had to do with three employees leaving causing him to have to work for 28 or 29 consecutive days. (Tr. 37)

After Respondent denied his benefits (08/06/2019), Petitioner traveled to Bloomington for an IME with Dr. Li on September 5th (2019). (Tr. 40)

While Petitioner waited in the waiting room to see Dr. Li, he received two calls about his case, prior to being evaluated. One call was from the Matrix, an agent of Respondent. He was told to report back to work on the 14th (09/14/2019). He responded that he was getting ready to go into an IME for them, but they said this is what we had to relay to you. (Tr. 42)

The other phone call was from WGH. (Tr. 42) The content of this call is in the notes of WGH and the number is shown in screenshot of Petitioner's incoming calls, in evidence. (Tr. 43) Before he even went to the IME, they called and said you're no longer covered through insurance. (Tr. 44)

Dr. Li reviewed a video of the *Dog Rescue* and a video of Petitioner playing pool. Dr. Li stated in his report that Petitioner told him that he could not use his left upper extremity at all. Petitioner testified that this is absolutely not true. (Tr. 44)

Regarding the pool tournament, Petitioner testified that he had already made a TV commitment prior to the work accident. His pool cue weighs 20 ounces, within his work restrictions. (Tr. 45)

When Petitioner left the tournament, he went directly to work. A truck was waiting on him so he went to do the truck at 3:00 a.m. (Tr. 46)

Dr. Li found some connection between *Dog Rescue* and Petitioner's symptoms, even though Petitioner wasn't injured in the *Dog Rescue*. His right upper extremity or his left, either one, weren't injured. (Tr. 46)

During that time, Petitioner tried to call and set up this nerve stimulus. Adjuster Wright said - - which is in the record, why, because you hurt yourself saving your dog. Petitioner said, no, he did not. She said there's an intervening accident, says right here. He told her that he scraped his leg. (Tr. 47)

On December 20th (2019), Respondent sent Petitioner a letter denying his request for leave because work comp was not authorizing this case. They called and told him everything was cancelled - they're not paying for anything. He had not worked one year to qualify for FMLA. That's why he had to deal with the Matrix. Unless workers' comp approved his lost time, his leave was unauthorized. (Tr. 49)

On January 13 (2020), Respondent sent an email to Petitioner about his "voluntary resignation." He immediately called the number in the email and got a recording. The message said we'll respond to your message so he said he did not resign from his job. (Tr. 48)

Petitioner testified that the safety regulations at the time of his accident required that Respondent accommodate work restrictions for safety. Workmen's comp and the district manager had to work together to make sure that work restrictions were accommodated. Since then, Respondent changed this policy, completely eliminating light duty. (Tr. 52)

. He had a compression cast so it held the fluid down. (Tr. 55) The compression sleeve could be seen in the video. It looked gross more than anything. He had pain but he still had to work. (Tr. 55-56) Two weeks after the accident, he did not have a claw hand. (Tr. 56) He was able to do things with his left arm, but could not lift as much. (Tr. 57)

CONCLUSIONS OF LAW ON DISPUTED ISSUES

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

Yes. Under the Act, an injury is compensable if it arises out of and in the course of the claimant's employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003). "'In the course of employment' " refers to the time, place and circumstances surrounding the injury" while "[t]he 'arising out of' component is primarily concerned with causal connection." *Id.* at 203, 797 N.E.2d at 672.

In the course of employment

The Arbitrator finds that Petitioner established, by a preponderance of the evidence, that he sustained an injury in the course of his employment. Petitioner testified regarding the time, place and circumstances surrounding the injury. He was injured on 12/31/2018, while at work. He had been unloading rolltainers. He was attempting to clear the isles when a rolltainer was jammed in an aisle. He pulled the rolltainer to loosen it and his left elbow went back and hit another rolltainer. (Tr. 19-20)

Arising out of employment

"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 Comm'n,* 2016 IL App (3d) 150500WC, 67 N.E.3d 571. "Risks are distinctly associated with employment when, at the time of injury, 'the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties.' " *Id.* (quoting *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d

52, 58, 541 N.E.2d 665, 667 (1989)) "A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his duties." *Orsini v. Industrial Comm'n,* 117 Ill. 2d 38, 45, 509 N.E.2d 1005, 1008 (1987).

The Arbitrator finds that Petitioner established, by a preponderance of the evidence, that his injuries arose out of his employment. Petitioner testified first regarding his job duties. His job consisted of lifting, moving non-stop, replenishing the store. (Tr. 15-16) The Albion store was one of the smallest and one of the busiest stores. Deliveries of merchandise were on Tuesdays and Saturdays. He arrived on those mornings around 3:00 a.m. to prep his store for a front door delivery. He had employees to assist with putting up the stock. The store was too small to have the rolltainers inside the store so the employees would arrive at 4:00 p.m. They would bust it out so they could open the store. (Tr. 16-17)

Petitioner testified that he received 20 to 25 rolltainers. The rolltainers coming off the truck look exactly like the photo in PX2. (PX2) A rolltainer has around 100 boxes per rolltainers. There are 20 to 25 rolltainers every Tuesday and Saturday morning. After everything in the totes is put away the empty totes are placed on a rolltainer. The rolltainers and totes are accurately depicted at the Albion store in the photographs. (PX3) (Tr. 17-28)

Petitioner testified that, on 12/31/2018, the truck arrived as usual. It was nearing the end and he was trying to clear the floor. A rolltainer jammed in an aisle so he pulled it to loosen it and when he did his left elbow went back and hit another rolltainer. (Tr. 19)

Based upon this evidence, Petitioner established that at the time of his injury, he was performing acts he was instructed to perform by his employer or acts which he might reasonably

be expected to perform incident to his assigned duties. Therefore, his injury resulted from a risk distinctly associated with his employment.

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

Yes. The Arbitrator finds that Petitioner established, by a preponderance of the evidence, that he sustained left wrist carpal tunnel syndrome, left cubital tunnel syndrome, bursitis and tendonitis, and right upper extremity neuropathies, including right carpal tunnel syndrome (PX 6; RX 1), as a result of the work accident on 12/31/2018 and its sequelae.

Petitioner instantly heard his left elbow pop and he saw swelling after his left elbow hit another rolltainer. (Tr. 19-20) His fingers were tingly. (Tr. 30) His diagnosis based upon objective findings from the EMG/NCV, were left cubital tunnel and left carpal tunnel syndrome. (PX 6; RX 1) He was also diagnosed with bursitis and tendonitis (PX 6) His symptoms were aggravated by a 7 month course of work duties outside of his light duty restrictions.

"Every natural consequence that flows from an injury that arose out of and in the course of one's employment is compensable under the Act absent the occurrence of an independent intervening accident that breaks the chain of causation." *National Freight Industries v. Workers' Compensation Comm'n,* 2013 IL App (5th) 120043WC, 993 N.E.2d 473.

"A work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being." *Vogel v. Industrial Comm'n,* 354 Ill. App. 3d 780, 786, 821 N.E.2d 807, 812 (2005).

Petitioner established that he was in good health prior to the accident. He had no prior fractures or neuropathies in his upper extremities and there is no evidence that he had risk factors for the development of neuropathies prior to the accident.

Petitioner's testimony regarding the onset of his left upper extremity symptoms at the time of the accident and the aggravation of his symptoms and development of neuropathic symptoms in his right upper extremity is consistent with the medical records, including FMH on the date of accident and WGH beginning 1/9/19 as well as Petitioner's testimony regarding the physically demanding job duties and Respondent's failure to accommodate his work restrictions is consistent with the occupational therapy records as well as WGH documentation of Petitioner's

In addition to the medical records he did not review and the work duties he did not discuss, his analysis of an intervening accident here vs. his analysis in Par Electric is clearly contradictory.

Here, Petitioner had not been released from treatment. He had just started treatment after the work injury. In January, the symptoms in his left arm and hand, prior to the *Dog Rescue*, were significant with a pain level of 7/10 described as throbbing and shooting. Neurological symptoms were positive. He denied any prior injury to his elbow. Work restrictions were placed that day on his ability to work as a result of the work injury. They were no lifting greater than 5 pounds with the left hand. No pushing, pulling or lifting with the left arm. (PX 6)

He had to perform heavy lifting on a frequent basis. Petitioner reported that he attempted to protect his LUE which was worsening with his job duties by overcompensating with his right arm.

Dr. Li's report states that Petitioner complained of symptoms in his right elbow and hand. Petitioner stated that, as a result of favoring his left upper extremity, he began to develop symptoms of numbness and tingling in the thumb and index finger of the right hand that persisted. He did all the work with his right hand and that is what caused his right-handed numbness and tingling to come about. He denied any preexisting conditions.

Dr. Li opined that Petitioner has right carpal tunnel syndrome and Dr. Miller has documented the clinical symptoms and ordered an EMG of the right upper extremity for further diagnosis. (PX 6; RX 1)

As result of the 7 month course of work duties outside of his light duty restrictions for his left elbow and left hand, Petitioner developed similar symptoms in his right elbow and right hand that he had to overuse in order to work outside of his light duty restrictions due to the condition of his left elbow and left hand. Petitioner continued working outside of his restrictions until Dr. Miller took him off of work on 07/24/2019 pending surgery. (PX 6)

Accordingly, the Arbitrator finds Petitioner's condition to be causally connected to his injury.

G. What were Petitioner's earnings?

Petitioner's W2 shows his gross total wages in 2018. (PX1, Tr. 15) His gross wages were 21% more than his net wages. (Tr. 14-15) Petitioner's net wages were deposited directly into his bank account. His bank records show these deposits. (PX1, Tr. 13-14)

Petitioner testified that he started working during the third week of October (Tr. 9-10) He was paid hourly. (Tr. 10-11) The first two weeks were spent doing computer-based learning and and the cash register. (Tr. 10)

Petitioner was scheduled to work five days a week. (Tr. 11) He missed three days the first week and a couple days the second week. He missed a total of five days the first two weeks. (Tr. 11)

Petitioner started as a store manager on 12/01/2018 (Tr. 12) At that time, his earnings changed from hourly to salary plus bonuses. (Tr. 12) The email from the district manager shows that Petitioner's salary as manager was $41,511. (Tr. 13)

Based upon Petitioner's testimony and the documents offered into evidence regarding his wages, Petitioner established, by a preponderance of the evidence, that his earning during 2018 were $7095.36 and that his average weekly wage, working in the position he was hired for, Store Manager, calculated under the third method in section 10 of the Act was $798.29

H. 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 radiologists' bills for reading the x-rays at FMH (12/31/18, 01/09/2019, 03/06/2019) was listed on the 19(b) petition and provided to Respondent's attorney on 10/21/2019. (PX 13) In January of 2020, the bill remained unpaid by Respondent. (PX 7)

Dr. Li opined that all medical treatment to date (09/05/2019) was reasonable, necessary and appropriate. (RX 1) On 12/23/19, the IME doctor reaffirmed his 09/05/2019 opinions. (RX 2)

Dr. Miller performed surgery on 12/23/19. The Arbitrator finds that the current outstanding charges from WGH are set forth in PX 7. The Arbitrator concludes that Petitioner has established, by a preponderance of the evidence, that the medical services that were provided

to Petitioner were reasonable and necessary and that Respondent has not paid all appropriate charges for all reasonable and necessary medical services.

Based upon this evidence, all medical bills for treatment for Petitioner's left upper extremity and right upper extremity through 01/07/2020 were reasonable and necessary.

The Arbitrator concludes that Respondent is responsible for the payment of the outstanding medical bills in PX 7 in the amount of $19,961.98 and $131.00.

K. Is Petitioner entitled to any prospective medical care?

Yes, based upon the Arbitrator's finding of a causal connection between the Petitioner's right and left upper extremity conditions and the work accident, Petitioner is entitled to prospective medical care for a reasonable period for the healing of his left upper extremity after surgery. He is also entitled to prospective medical care for his right upper extremity.

WGH released Petitioner from treatment for his left upper extremity 15 days after surgery on 12/23/2020. He was told to return as needed. This was on 01/07/2020, the first follow-up visit after his surgery. A release this soon after surgery is premature. He has not healed from surgery. Petitioner is entitled to prospective medical care with regard to his left upper extremity to allow a reasonable period of time for healing before it is determined that he is at maximum medical improvement. (PX 6)

Petitioner continues with treatment for his right upper extremity. WGH ordered an EMG/NCV of Petitioner's right upper extremity. (PX 6)

Dr. Li diagnosed Petitioner with right carpal tunnel syndrome based upon his clinical examination. Objective evidence, an EMG of the right upper extremity, had not been performed

at the time of the IME. (RX1). Therefore, the Arbitrator awards prospective medical care as recommended by Dr. Miller

L. What temporary benefits are in dispute? TTD

The Arbitrator finds that Petitioner has established, by a preponderance of the evidence, that he was temporarily totally disabled from 07/24/2019 to 01/21/2020, a period of 26 weeks.

This timeframe is supported by Petitioner's testimony and by the records of Wabash General Hospital. The petitioner was taken off of work on 07/24/2019 and remained off work until 01/07/2020. On 01/07/2020, he was released to light duty for 14 days, unaccommodated by Respondent, until his full duty release on 01/21/2020. (PX 6)

M. Should penalties or fees be imposed upon Respondent?

The Arbitrator did not find the Respondent's pool to tournament video and dog rescue defense (intervening accident) persuasive. However, it was not sufficiently vexation and unreasonable to warrant attorney fees and 19(k&l) penalties. Therefore, the Arbitrator denies same.

O. Violation of Safety Standard.

The Arbitrator finds. the Petitioner did not establish a safety standard which Respondent disregarded. Therefore, the Arbitrator does not factor Sec(19m) of the Act in this Decision.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC033240
Case Name	NOAH, TERRY v. CRETE CARRIER CORP
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0226
Number of Pages of Decision	11
Decision Issued By	Thomas Tyrrell, Commissioner

Petitioner Attorney	Daniel Capron
Respondent Attorney	Nicole Breslau

DATE FILED: 5/7/2021

/s/ Thomas Tyrrell, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Terry Noah,

Petitioner,

vs. NO: 17 WC 33240

Crete Carrier Corp.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, temporary total disability, medical expenses and prospective medical treatment, affirms the Decision of the Arbitrator, as corrected herein, said decision being attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission notes that the Arbitrator found "Respondent shall be given a credit of $30,910.40." (Arb.Dec., p.2). However, the Arbitrator neglected to mention the basis for this credit. The Commission hereby corrects this oversight to show that Respondent is entitled to a credit in the amount of $30,910.40 for temporary total disability paid per the parties' stipulation. (See Arb.Ex.1).

Furthermore, the Commission notes that the Arbitrator neglected to rule on the objections made during the course of the deposition testimony of Dr. Thoma (PX1) and Dr. Forsythe (RX2). The Commission notes that it has gone ahead and ruled on these objections in the margins of the aforementioned deposition transcripts.

All else is otherwise affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed 4/2/20, is hereby affirmed and adopted with changes as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $438.89 per week for a period of 79-1/7 weeks, from 7/27/18 through 1/31/20, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall authorize and pay for prospective medical treatment in the form of the prescribed left total knee replacement surgery and all reasonable and necessary costs, 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 of the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $25,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 7, 2021

/s/ *Thomas J. Tyrrell*

TJT: pmo
o 3/9/21
51

/s/ *Maria E. Portela*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0226
NOTICE OF 19(b) ARBITRATOR DECISION

NOAH, TERRY
Employee/Petitioner

Case# **17WC033240**

CRETE CARRIER CORPORATION
Employer/Respondent

On 4/2/2020, 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 0.10% 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:

2208 CAPRON & AVGERINOS PC
DANIEL F CAPRON
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

0507 RUSIN & MACIOROWSKI LTD
NICOLE Z BRESLAU
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF LaSALLE)

☐ 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)

Terry Noah
Employee/Petitioner
v.
Crete Carrier Corporation
Employer/Respondent

Case # **17** WC **33240**

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 **Ottawa**, on **January 31, 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. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. X Is Petitioner entitled to any prospective medical care?
L. X What temporary benefits are in dispute?
☐ TPD ☐ Maintenance X TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **April 24, 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 $**34,233.68**; the average weekly wage was $**658.34**.

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 $**30,910.40**.

ORDER

Respondent shall pay for the total knee replacement surgery and all ancillary costs pursuant to Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $438.89/week for 79 1/7 weeks, commencing July 27, 2018 through January 31, 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.

Jason A. Mgatz

Signature of Arbitrator

4-1-2020
Date

ICArbDec19(b)

APR 2 - 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION

TERRY NOAH,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 17 WC 33240
	)	
CRETE CARRIER CORPORATION,	)	
	)	
Respondent.	)	

ADDENDUM TO THE DECISION OF THE ARBITRATOR

Findings of Fact

This matter comes before the Arbitrator on remand from a decision of Arbitrator Erbacci which was issued in the wake of a hearing pursuant to Section 19(b) of the Act on July 26, 2018. That decision established that Petitioner sustained a compensable accident while working for Respondent as an over-the-road truck driver on April 24, 2017; that the accident resulted in an injury to Petitioner's left knee; that Petitioner remained temporarily totally disabled from working on account of the accident; and, most significantly, that Petitioner was entitled to proceed with treatment for his left knee as prescribed by his treating orthopedic surgeon, Dr. Bruce Thoma. Neither party filed a Petition for Review of Arbitrator Erbacci's decision and it is final.

At the time of the earlier hearing, Dr. Thoma had recommended a series of Visco supplementation injections for Petitioner's left knee, to be followed—if necessary—by cartilage transplant surgery.

Petitioner underwent an updated MRI of his left knee on November 5, 2018. (PX 1, p. 11) This study, when compared with an earlier MRI, showed greater irregularity in the lateral compartment of Petitioner's knee with involvement of the cartilage and the bone beneath the cartilage. Still present were the arthritic changes in the medial compartment of the knee. (PX 1, p. 12)

On November 14, November 21, and November 28, 2018, Euflexxa, a Visco supplement, was injected into Petitioner's left knee. When Petitioner returned to Dr. Thoma on January 23, 2019, he reported no improvement from the injections. (PX 1, p. 15) At that point, Dr. Thoma discussed three surgical alternatives with Petitioner: cartilage transplantation, a partial knee replacement or a total knee replacement. (PX 1, p. 18) Following that discussion, it was agreed to proceed with a total knee replacement. (PX 1, p. 21)

On March 21, 2019, Petitioner was examined at Respondent's request pursuant to Section 12 of the Act by Dr. Brian Forsythe. Dr. Forsythe concluded that Petitioner was not a candidate for any surgery to his left knee because the x-rays and MRI studies reflected only mild degenerative changes. A total knee replacement was felt to be particularly inadvisable given Petitioner's relatively young age. He

felt that Petitioner had attained maximum medical improvement and was capable of returning to work subject to the "light-to-medium duty" restriction reflected on an FCE which had been conducted on May 17, 2018. (RX 1, p. 25-27)

Petitioner returned to Dr. Thoma on May 7, 2019 at which time the doctor reviewed Dr. Forsythe's report. Nonetheless, Dr. Thoma still felt that a total knee replacement "was more likely than not to help him and improve his quality of life." (PX 1, p. 25)

Dr. Thoma retired from the practice of medicine on January 1, 2020. (PX 1, p. 38) Petitioner consulted with his partner, Dr. Anthony Levenda, on January 30, 2020 at which time Dr. Levenda indicated he would perform the total knee replacement surgery. (PX 2)

Petitioner testified he has not sustained any intervening accidents to his left knee. Regarding his current condition, his left knee throbs, clicks, pops and gives out. He prefers a total knee replacement to the previously recommended cartilage transplant based on his own research which led him to believe he would experience a better outcome.

Conclusions of Law

In support of the Arbitrator's decision on whether Petitioner's current condition of ill-being is causally connected to the accident ("F"), the Arbitrator concludes as follows:

The initial decision by Arbitrator Erbacci pursuant to Section 19(b) of the Act established that Petitioner's left knee condition was causally connected to his accident of April 24, 2017. That determination is *res judicata*. Nothing has happened since the initial 19(b) hearing to have severed causation. Petitioner testified that he has sustained no new accidents involving his left knee and there is no evidence to the contrary.

Based on the foregoing, the Arbitrator concludes that the current condition of Petitioner's left knee remains causally connected to the accident of April 24, 2017.

In support of the Arbitrator's decision on whether Petitioner is entitled to prospective medical treatment ("K"), the Arbitrator concludes as follows:

The Arbitrator is presented with a medical dispute between Dr. Thoma and Dr. Forsythe. Both doctors testified by evidence deposition.

Dr. Thoma feels that a total knee replacement is an acceptable alternative to a cartilage transplant procedure. Although Petitioner is a bit young to undergo such a surgery, currently 46 years of age, all conservative treatment modalities have failed to relieve his symptoms. Without surgery, Petitioner will be consigned to ongoing pain and disability in his left knee.

Dr. Forsythe feels that the current condition of Petitioner's left knee does not meet the criteria for a total knee replacement and that it would be of no clinical value. X-rays show only mild arthritis and the degree of narrowing is nowhere near what is typically required for a knee replacement.

On balance, the Arbitrator finds Dr. Thoma's opinions to be more persuasive for the following reasons:

1. Regarding the current condition of Petitioner's left knee, Dr. Thoma testified that, in effect, x-rays are good; MRI's are better; arthroscopic evaluation is best. (PX 1, p. 29) He likened it to observing a thick slice of Swiss cheese: from the side, it looks fine; from the front, it is full of holes. (PX 1, p. 32) Relying only on diagnostic tests is akin to looking at a slice of Swiss cheese from the side.

2. Based on his personal observation during arthroscopic surgery, Dr. Thoma has described Petitioner's arthritis as "severe," despite the lack of narrowing on x-rays. It goes "down to bone or almost, with just a thin little bit of cartilage left..." (PX 1, p. 36) The surgery showed multiple loose bodies, unstable medial fibrocartilage over the central weight bearing area, and a Grade IV lesion in the back of the knee. (PX 1, p. 45) Grade IV is "as bad as it gets." (PX 1, p. 46) Dr. Thoma personally observed this; Dr. Forsythe did not.

3. Based on his observations of Petitioner across an extended period, Dr. Thoma does not feel that Petitioner has engaged in symptom magnification or malingering. (PX 1, p. 39) Dr. Forsythe disagrees, but this is the same conclusion that was considered and rejected by Arbitrator Erbacci in the first 19(b) hearing.

4. Dr. Forsythe's opinion would leave Petitioner with no solution for his ongoing knee pain. He would be permanently relegated to "light-to-medium duty," which Dr. Forsythe admits is a "significant restriction from the job he had been doing at the time he was injured." (RX 1, p. 44-45)

5. Not only does Dr. Forsythe feel that Petitioner's total knee replacement is unnecessary, he feels that *any* surgery is unnecessary. This opinion conflicts with Arbitrator Erbacci's decision that Petitioner is entitled to undergo a cartilage transplant procedure if the Visco supplementation injections failed to relieve his symptoms. Dr. Forsythe's opposition to the total knee replacement loses credibility in light of his simultaneous opposition to the cartilage transplant procedure which has already been found by Arbitrator Erbacci to be reasonable and necessary.

6. Dr. Anthony Levenda has taken over Petitioner's care upon Dr. Thoma's retirement. He has found Petitioner to be a candidate for either a cartilage transplant or a total knee replacement. (PX 2)

7. Dr. Forsythe contends that Petitioner will not benefit from additional surgery. (RX 1, p. 39) Dr. Thoma contends that a total knee replacement for Petitioner would have an 85% chance of lasting 20 years. (PX 1, p. 51) The Arbitrator believes that the decision on whether to proceed with knee replacement surgery should rest with Petitioner and his treating doctor and not foisted upon them.

Based on the foregoing, the Arbitrator finds that Petitioner is entitled to undergo total knee replacement surgery with Dr. Anthony Levenda, and that Respondent shall be liable for the cost of this procedure and all ancillary treatment pursuant to Sections 8(a) and 8.2 of the Act.

In support of the Arbitrator's decision on the period of temporary total disability ("L"), the Arbitrator concludes as follows:

Neither Dr. Thoma nor Dr. Forsythe has released Petitioner to return to work as a truck driver. Their only disagreement is on whether Petitioner is a candidate for left knee surgery. In light of the Arbitrator's determination that Petitioner is a candidate for additional surgery, the Arbitrator further concludes that Petitioner remains temporarily totally disabled for the 79 1/7 week period from July 27, 2018 (the date following the last arbitration hearing) through January 31, 2020 (the date of the current arbitration hearing.)

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC019273
Case Name	BARNARD, JAMES v. GLOBAL BRASS
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0227
Number of Pages of Decision	20
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	David Galanti
Respondent Attorney	Michael Keefe

DATE FILED: 5/7/2021

DISSENT

/s/Maria Portela, Commissioner

Signature

21IWCC0227

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Barnard,

Petitioner,

vs. NO: 17 WC 19273

Global Brass,

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 and nature and extent, reverses the Decision of the Arbitrator and denies Petitioner's claim for compensation, for the reasons stated below.

Findings of Fact

Petitioner alleged a date of injury of 2/7/17[1]. He testified that he had been employed by Respondent for 21 years, 20 years of which he had worked as an operator A. (T.9-10). He noted that there are two different job titles within the classification of operator A – an operator A and a utility. (T.13). He indicated that when he's working as an operator A "[w]e set up and maintain transfer and progressive presses. We do stamping of lead frames like for the automotive division and then a lot of commercial stuff for like Delta Faucet was one of our biggest customers." (T.13-14). He stated that during the three years leading up to 2017 he spent 60 to 70 percent of his time as an operator A and 30 to 40 percent as a utility worker. (T.14). He noted that in setting up presses and the like he used "[h]and tools and some pneumatic and electric." (T.14). He estimated that he would use pneumatic tools a couple hours a day as an operator A, and that the hand tools included "[r]atchets, wrenches, pliers, screwdrivers, hammers, pry bars." (T.15). He agreed that he is

[1] The Arbitrator found the date of accident to be 2/27/17 (Arb.Dec., p.2), while the Application for Adjustment of Claim (Arb.Ex.2) and Request for Hearing form (Arb.Ex.1) both allege a date of accident of 2/7/17.

applying force when he uses these tools, and that the amount of force "[d]epends on what it takes to get it done… Quite a bit." (T.15). He likewise agreed that he uses these tools in awkward positions or confined areas, specifically when he is "[w]orking near the top or the bottom of the machine." (T.15-16). He agreed that he also flexes and extends his arm past 90 degrees when he's using those tools, and that he also flexes and extends his wrists. (T.16). He testified that the utility job involves primarily hand packing. (T.16).

A four-page "Physical Demand Documentation" dated 5/28/13 for the job of "Fabricating Utility" was admitted at PX7. The physical demand level for the job was noted to be "Heavy Work", that the shift was consisted of "8 hr/day, 5 days/week", and that overtime was mandatory. (PX7). The general purpose of the job was as follows: "[f]abricate, assemble, install, and repair sheet metal products and equipment. Work may involve any of the following: setting up and operating fabricating machines to cut, bend, straighten, inspecting, and assembling sheet metal." (PX7). Under "Essential Functions" the following was listed:

- Determine project requirements, including scope, assembly sequences, and required methods and materials, according to blue prints, drawings, and written or verbal instructions.
- Maneuver completed units into position for installation, and anchor the units.
- Install assemblies with dyes depending on product specifications.
- Select gauges and types of sheet metal, according to product specifications.
- Fabricate or alter parts at construction sites, using shears, hammers, punches, and drills;
- Trim or file, using hand tolls and portable power tools.
- Maintain equipment, making repairs and modifications when necessary.
- Inspect individual parts, assemblies, and installations for conformance to specifications and building codes. (PX7).

Under "Marginal Functions" it was noted:

- Perform duties of Fabricating Utility. (PX7).

Under "Equipment/Tools Used (examples, not a complete list)" it was noted:

- Hand tools
- Bucket
- Forklift
- Air gun
- Pallet jack
- Pry bar
- Mallet (PX7).

Video purportedly depicting the activities associated with Petitioner's job as a fabricating operator A was admitted at RX1. Petitioner agreed the video did a respectable job of showing the hand packing work activities but "[n]ot so much on the operator A video." (T.21).

Petitioner indicated that he reviewed both the job description and a videotape that was provided to Dr. Omotola. (T.16). He agreed that the job description was roughly accurate in terms of what he does. (T.16). He noted that the most hand intensive aspect of the utility person job is the hand packing. (T.16-17). He agreed that the second videotape shows the hand packing. (T.17). When asked to describe the hand packing, he responded: "[i]t's sort of like an assembly line

process. I used to explain it like Laverne and Shirley but there's stacks of 50 lead frames which are like the inside of a fuse box where it's flat before it's formed. They're stacked 50 high and they come out down the belt and you have to pick them up and straighten them up and inspect them and then they get packed into a tote, 450, I believe, into a tote, this is just what's on the video, and then you wrap it up with bubble wrap and pack everything and then you move it over onto a skid." (T.17-18).

When asked if he inspects all 50, Petitioner stated: "[y]ou don't fan through it like cards but we have what's called a light table so you get them all stacked as straight as you can and then you do a visual inspection with a light that's supposed to case – you know, bring out imperfections like if there's scratch marks or any distortion in the part and then you can pull it apart and take the bad ones and replace it." (T.18). He noted that when he's grasping these 50 parts he rotates them. (T.18). When asked how much these parts weigh, he stated: "[t]hat depends on the job. We have some that are close to a pound apiece and others that are maybe four or five ounces. They're small." (T.18). He described the pace at which he works as a hand-packer as "[c]onsistent. It's non-stop" and that he's grasping with both the right and left hands when the part comes to him. (T.19).

He noted that there are various hand packing stations and "… different jobs. I mean, some of them come off of a belt, some are parts that are like cup shaped, like a fuse cap that will come down a belt rolling and you have to pick it up and then turn it upright or upsidedown [sic] so it will – won't fall over going through the parts washer to clean it." (T.19). He agreed that the inspecting of parts require flexion and extension of the wrists. (T.19-20).

Petitioner indicated that during the three years leading up to the injury, probably 30 to 40 percent of his day was spent hand packing rather than working as an operator A. (T.20). He also agreed that the videotape that shows the hand packing was accurate, including the pace. (T.20).

He agreed the heaviest lead frame is about a pound. (T.21). When asked if these positions rotate amongst his coworkers in the department, Petitioner stated: "[s]ometimes. Depends on manning and scheduling." (T.22). He agreed that the tools he spoke of were for purposes of setting up the press or unjamming the press, things of that nature. (T.22). He noted "… we have to work on them constantly pretty much every day, it's not we just get it set up and then put our tools away because it has – you know, accidents happen and you have wrecks and then you have to fine tune things. It can be a pain." (T.22-23). He agreed that it was fair to say that he would use various tools for a few minutes and then maybe have to do it again later the next hour "[i]f it's running", but noted that "… if we're doing a setup it can last for two weeks… For like a week or two, two weeks of just wrenching on it." (T.23). He indicated that it can take two weeks to set up the press on certain jobs. (T.23).

Petitioner stated that he is right-handed. (T.10). He denied being a diabetic, having a thyroid disorder or having gout. (T.10). He noted that in 2017 he was having pain, numbness and tingling in his left hand and left arm "[l]ike it was asleep." (T.10). When asked which digits he was having the numbness and tingling in, he replied: "[m]ainly the middle, ring and pinky finger. (T.10-11). He estimated that he had had this problem for several years and that it started to get worse. (T.11).

Petitioner noted that in March of 2017 his family physician, Dr. Green ordered an EMG or nerve conduction velocity test and referred him to Dr. Omotola. (T.11). He agreed that Dr. Omotola eventually performed surgery on the left elbow and hand on 8/3/17, and that he missed work from 8/3/17 through 10/5/17. (T.12).

In an office note dated 2/6/17, Dr. Christopher Green recorded that the patient had "[i]ntermittent dysesthesias, numbness in the hypothenar eminence in the fourth and fifth fingers of the left hand on the palmar aspect. States years ago he was told that he had cubital tunnel syndrome." (PX1). Upon examination it was noted that "[t]here is sensory disturbance to the light touch over the thenar eminence in the fourth and fifth fingers of the right hand on the palmar aspects. There is no tenderness over the ulnar groove or the wrist." (PX1). The impression was ulnar neuropathy on the right. (PX1). Dr. Green recommended an "EMG/NCV left upper extremity. Further evaluation and treatment pending. Consider referral to Plastics, as he states he has had this on and off progressively over the last eight years." (PX1).

An EMG/NCV performed on 3/7/17 was interpreted as abnormal, suggesting 1) mild left median sensory entrapment neuropathy at the flexor retinaculum, for example carpal tunnel syndrome; 2) very mild left ulnar sensory neuropathy, the site of lesion is undetermined, the needle EMG study did not show any ongoing denervation, clinical correlation is recommended. (PX2).

In a report dated 6/9/17, Dr. Aaron Omotola recorded the following history: "Patient complains of Left wrist and hand pain. This is evaluated as a personal injury. The onset of the pain was sudden, not related to any specific activity[.] The pain is described as aching. The pain occurs continuously. The patient is [sic] had night time symptoms. Restricted activities include: repetitive use pattern. The patient has had Physical Therapy for these symptoms. The pain is relieved by nothing[.] EMG studies were positive for carpal tunnel and ulnar nerve. Patient's work is repetitive and he has not missed work." (PX3). Dr. Omotola's assessment was 1) cubital tunnel syndrome, left; 2) carpal tunnel syndrome, left; and 3) ulnar nerve entrapment, left. (PX3). He concluded that the "[p]atient has tried conservative management for left ulnar nerve entrapment at wrist and elbow, carpal tunnel syndrome including night splinting, injection, and therapy and failed. We discussed carpal tunnel release, ulnar nerve release and elbow and wrist… The patient will follow up for surgery." (PX3).

On 8/3/17, Petitioner underwent surgery in the form of left open ulnar nerve release at the elbow, open ulnar nerve release at the wrist and open carpal tunnel release at the wrist. (PX4). The diagnosis was left carpal tunnel syndrome and ulnar nerve entrapment at the wrist and elbow. (PX4).

In an office note dated 9/18/17, Dr. Omotola and/or his staff recorded that "[p]eri-incisional pain in the left palm prevents Mr. Barnard from returning to work. He continues to have residual numbness in the ring and small fingers which is unchanged. Previous numbness in the dorsum of his left hand involving the thumb and index fingers has resolved." (PX3). The patient was encouraged to use the left upper extremity for all activities as tolerated and to use [P]lay Doh for grip strengthening. We discussed scar massage and offered a referral to physical therapy which was declined. Jim will return to the office for reexamination in 1 month and will remain off work during the interim unless he feels he is able to resume his work duties without restrictions." (PX3).

In an office note dated 10/12/17, Dr. Omotola and/or his staff recorded that "[p]eri-incisional pain in the left palm prevents Mr. Barnard from returning to work. He continues to have residual numbness in the ring and small fingers which is unchanged. Previous numbness in the dorsum of his left hand involving the thumb and index fingers has resolved." (PX3). The plan was for Petitioner to "… return to work effective 10/05/2017 without restrictions. He will follow up with Dr. Omotola at the next available appointment." (PX3).

In an office note dated 11/13/17, Dr. Omotola recorded that the patient "… has had persistent numbness in his left ring and pinky finger and states some lack of strength with gripping. He notes his symptoms form [sic] his carpal tunnel release have resolved since surgery. He is back to work without restrictions. He is a mechanic/machinst [sic]. Pt notes he sees a chiropractor for upper thoracic adjustments. This also did not change his symptoms." (PX3). The assessment was 1) ulnar nerve entrapment at elbow, left; and 2) cervicalgia. (PX3). Dr. Omotola's plan was to "[r]efer patient to Christian Northeast spine to evaluate for possible disc[.] [H]is ulnar nerve symptoms continue[.] [A]fter release he will follow up [with] me on a p.r.n. basis[.] [P]lan on MRI of his cervical spine and refer him over." (PX3).

Petitioner agreed that he last saw Dr. Omotola on 11/13/17 at which time he complained of persistent numbness in his left, ring and pinky finger and some lack of strength with gripping. (T.12). He indicated that he is still currently having this problem with his left hand and arm. (T.12). He noted the numbness is constant and "… outside of the middle finger, then the ring and the pinky." (PX12-13). He indicated that he does not have that same complaint of numbness in the index finger or thumb. (T.13). He stated that his current grip strength is less than it was before the accident. (T.13). When asked if he followed up with any of the neck or spine doctors recommended by Dr. Omotola at his last exam, Petitioner responded: "I had an MRI at Alton Memorial and I didn't pursue it after that." (T.21). He indicated that he is not scheduled to see anyone for his neck or anything. (T.21).

At the request of Petitioner, Dr. Aaron Omotola testified by way of evidence deposition on 8/9/19. He stated that he is a board-certified orthopedic surgeon and that he is also fellowship trained in sports medicine. (PX6, pp.3-4). He indicated that about 15% of his practice (20% if you include the elbow) deals with disorders of the hand or upper extremity with the remainder of his practiced devoted to the elbow, shoulder, knee, hip and ankle. (PX6, p.4). He noted that he does probably 150, 200 hand cases a year. (PX6, p.4).

Dr. Omotola testified that he first saw Petitioner on 6/9/17 with complaints of left wrist and hand pain. (PX6, p.5). He agreed that the intake sheet showed that his work was repetitious and that he had not missed work yet. (PX6, p.6). He reviewed an EMG/nerve conduction velocity test and diagnosed Petitioner with ulnar nerve entrapment of his left upper extremity and median nerve entrapment of his left upper extremity. (PX6, pp.6-7). He indicated that he discussed surgery at that time. (PX6, p.7). He noted that he was not aware of Petitioner having any systemic disease processes that would cause or contribute to the development of either carpal or cubital tunnel syndrome by way of history. (PX6, p.7).

Dr. Omotola agreed that he eventually performed surgery on Petitioner on 8/13/17 and he began holding him off work on that date. (PX6, pp.7-8). He noted that his pre and post-operative

diagnoses correlated. (PX6, p.8). When asked when Petitioner was released to return to work, Dr. Omotola stated: "[s]o I saw on Don's note here he reported Jim will return to work effective the 5th without restrictions." (PX6, p.9).

He indicated that he saw Petitioner again on 11/13/17 at which time he recorded that Mr. Barnard "… stated he had some persistent numbness in his left ring and pinky finger and stated some lack of strength with gripping. He notes his symptoms for carpal tunnel release have resolved since surgery. He's back to work without restrictions. He's a mechanic and machinist. He notes that he sees a chiropractor for upper thoracic adjustments and… the adjustments did not change his symptoms." (PX6, pp.9-10). Dr. Omotola testified that at that time he referred Petitioner to a spine specialist to look at his neck and discharged Ms. Barnard from his care. (PX6, p.10).

Dr. Omotola was given a hypothetical in which he was asked to assume, among other things, that Petitioner's "… job as a machine operator involved installing and repairing dies, retrieving tools, operating controls, packing products in boxes, and that some frequent firm and power grasping was done at a medium pace, and that he also used his hands in a pushing motion involving taking samples, scraps, pallet jacking, tooling, wrenching, crowbar, and opening and closing doors and pushing buttons through the workday, as well as using a pulling motion involving pry bars, hoods, drapes, rolling slides, guards, and doors, and he would use hand tools, buckets, forklifts, air[-]guns, pallet jacks, and pry bars and a mallet to do his job duties… [and] that's what he did throughout his workday…" (PX6, p.11). When asked his opinion as to causation, Dr. Omotola stated that "… his work description could relate directly to his cubital and carpal tunnel syndrome." (PX6, pp.11-12).

Dr. Omotola indicated that it was fair to say that Petitioner was at MMI as of the last time he saw him "[b]ased on the treatment I provided for him." (PX6, p.12). He stated that he did not know if Petitioner pursued further treatment that he recommended that day. (PX6, p.12). Counsel for Petitioner then stipulated that that treatment is not related to his work. (PX6, p.12).

On cross examination, Dr. Omotola agreed that he did an open carpal tunnel release, noting that a reference to an endoscopic scar in his first postoperative note was an "epic" error. (PX6, pp.12-14). He agreed that there was a chance that Petitioner's residual symptoms in his fourth and fifth fingers were coming from the neck. (PX6, p.14).

Dr. Omotola indicated that he did not cover any of the work activities with Petitioner that were addressed in the previous hypothetical question. (PX6, p.14). Thus, he acknowledged that he would have no notion as to how frequently Petitioner would use crowbars, tools or any of the other items. (PX6, pp.14-15). He likewise did not know whether Petitioner would rotate job activities with co-workers with respect to the activities outlined in the hypothetical. (PX6, p.15). He indicated it was not unusual for Petitioner's conditions to be just in the left hand. (PX6, p.15).

On re-direct examination, Dr. Omotola indicated that he does not always release the ulnar nerve at the Guyon's canal, nor does he always do that when he does a cubital tunnel release. (PX6, p.15). He noted that he did so in this case because "[c]linically [Petitioner's] symptoms were at his wrist." (PX6, p.15). He agreed that in clinical exam he can differentiate between ulnar symptoms at the level of the wrist versus the elbow. (PX6, pp.15-16).

At the request of Respondent, Dr. Mitchell Rotman testified by way of evidence deposition on 9/10/10. He stated that he is a board-certified orthopedic surgeon, with a subspecialty in surgery of the arm, and that 100 percent of his practice is devoted to the care and treatment of the upper extremities, including carpal and cubital tunnel. (RX2, pp.6-7). He agreed he performed a medical legal examination of Petitioner and his report is dated 6/3/19. (RX2, p.7). He agreed this was his second IME of Petitioner, and that the first was conducted back in 2011. (RX2, p.8). Dr. Rotman agreed that the current examination had nothing to do with those old complaints. (RX2, p.8).

Dr. Rotman agreed that his 6/3/19 examination involved a workers' compensation claim involving a diagnosis of left carpal tunnel and left cubital tunnel syndromes. (RX2, p.8). He was aware by that time that Petitioner had been examined and treated for his left upper extremity by Dr. Omotola. (RX2, p.8). He agreed that prior to his evaluation he was provided with various medical records by defense counsel, including job descriptions and a job video. (RX2, pp.8-9). He agreed that he reviewed those materials prior to meeting with Petitioner, and that he relied on those materials, at least in part, in forming his opinions as set forth in his report. (RX2, p.9).

Dr. Rotman agreed that at the time of his exam, Petitioner reported still having some degree of symptoms in his left upper extremity. (RX2, p.9). He agreed that as far as he was concerned Petitioner could work for Respondent without restrictions and that he was not recommending any specific treatment for his left hand or left elbow. (RX2, p.9).

With respect to causation, Dr. Rotman opined that Petitioner's "… work activities at Global Brass would not have been an aggravating factor for his carpal tunnel condition." (RX2, p.10). When asked what type of movements or activities he looks for when evaluating a job for carpal tunnel syndrome, he replied: "I look for a job that involves repetitive high forces to the hand. It's just not repetition, alone. It has to be high forces with heavy gripping for a prolonged period of time with or without awkward positions, such as hyperflexion or extension, with or without vibration." (RX2, p.10). He agreed that he spoke to Petitioner about his job activities and that he would have interwoven those discussions with his review of the videos and other materials in forming his opinion. (RX2, pp.10-11).

With respect to the cubital tunnel syndrome condition, Dr. Rotman opined that Petitioner's "… work at Global Brass would not have been an aggravating factor for cubital tunnel syndrome." (RX2, p.11). When evaluating a job for this condition, he noted that he "… look[s] for a job that involves repetitive elbow flexion or prolonged elbow flexion past 90 degrees, or prolonged pressure on the inner elbow, such as sitting on the inner elbows." (RX2, p.11). He indicated that he did not find any of those markers when he reviewed the video and discussed the work activities with Petitioner. (RX2, p.12).

On cross examination, Dr. Rotman agreed that he is an examining physician in this case, not a treating physician, and that his exam was done at the behest of Respondent. (RX2, pp.12-13). He agreed that he's done examinations for Global Brass as well as Olin in the past, and he has had such a relationship for about 20 years. (RX2, p.13). He agreed that the vast majority of those cases are for either hand, elbow or shoulder disorders, with about 75 percent of those cases involving the hand and/or elbow, and that close to 100 percent of the claims he sees are for some

sort of repetitive trauma disorder as opposed to an acute injury. (RX2, p.13). He noted that "… I have treated several patients, as well, from those companies over the years, that have had acute injuries. But when doing the independent medical exams, it's generally from repetitive trauma, close to 80 to 90 percent of those cases." (RX2, p.14). He agreed it's either carpal tunnel in the hands or cubital tunnel in the elbow. (RX2, p.14).

Dr. Rotman agreed that he is fairly familiar with a lot of the jobs out there (presumably with Respondent), since he's had a 20-year relationship with them (i.e. Global Brass). (RX2, p.14). He acknowledged that Petitioner is not the first operator he's seen claiming repetitive trauma injuries to his elbow or hand, although he did not have any kind of recollection of seeing any other operators out there. (RX2, pp.14-15).

He agreed that there are a number of systemic disease processes that can cause or contribute to CTS and cubital tunnel syndrome, and that Petitioner did not have any of those. (RX2, p.15). He agreed that the occupational risk factors for cubital tunnel syndrome are less well studied than for CTS. (RX2, p.15).

Dr. Rotman indicated that he felt Petitioner would benefit from surgery "[m]ore for the carpal tunnel than the cubital tunnel." (RX2, p.15). Thus, he agreed that he felt Petitioner should have the carpal tunnel release, regardless of his opinion as to causation. (RX2, pp.15-16). With respect to treatment for the cubital tunnel syndrome, he noted that he "… was looking for [a] trial of conservative care. It would have been nice to see positive nerve studies for the condition, although that's not generally necessary when treating it. But when you have normal nerve studies for cubital tunnel, it's generally a well-accepted practice to try conservative care for the condition in light of normal nerve studies." (RX2, p.16). He agreed he's operated before on people with cubital tunnel syndrome who have had negative EMG nerve conduction velocity tests at that level. (RX2, p.16). He likewise agreed that it was fair to say that testing at the level of the elbow is not as good or accurate as at the level of the wrist. (RX2, p.16).

He agreed he reviewed Petitioner's post-surgery records as well as Dr. Omotola's operative note dated 8/3/17. (RX2, p.17). He noted Petitioner improved from the CTS surgery but "[b]ut not so much from the cubital tunnel." (RX2, p.17). He agreed Dr. Omotola also released the ulnar nerve at the level of the wrist or Guyon's canal. (RX2, p.17). He noted that "I don't really see ulnar nerve at the wrist very often. I don't find it necessary." (RX2, p.17). He agreed that the practice varies between surgeons, although he noted "[s]ome surgeons always seem to routinely release that canal, even though the nerve studies are normal there." (RX2, pp.17-18). He indicated that "… when you release the carpal tunnel, the pressures on Guyon's canal are also released. So that's why I release the Guyon's canal maybe once or twice every five years." (RX2, p.18). He stated that "… there are some surgeons that still practice releasing Guyon's canal for whatever personal reasons they may have. It's just not based on scientific approach to surgery." (RX2, p.18). However, he wouldn't say that there's a large number of physicians who do that, categorizing the number as "… only a handful." (RX2, pp.18-19).

Dr. Rotman agreed that someone's work activities can cause or aggravate both carpal tunnel and cubital tunnel syndromes. (RX2, p.19). When asked what the risk factors are for the development of cubital tunnel syndrome in the workplace, he stated that "[i]f they're not leaning on their elbows, there was no trauma, as you say, a direct blow to the elbow, or even a fracture to

the elbow, then the risk factor would be hyperflexion of the elbow. Hyperflexion of the elbow causes stretching of the ulnar nerve at the level of the cubital tunnel and that … will aggravate it." (RX2, p.19). He agreed that it would have to be a number of hyper-flexions past 90 degrees at the elbow throughout the workday. (RX2, p.20). He indicated that it has not been studied how many times it has to be done during an eight-hour period, noting "I don't think there's anybody that's come up with a number. I would just say in a repetitive fashion." (RX2, pp.20-21).

Dr. Rotman agreed that his understanding of the job is based upon his discussions with Petitioner as well as his review of the videotape. (RX2, p.21). He also agreed that if the videotape or his understanding of the job was in error, his opinions as to causation might change. (RX2, p.21). He indicated that the amount of force that someone is applying during the workday with the elbow past 90 degrees would not have an impact on the development of cubital tunnel syndrome. (RX2, p.21). He agreed that he's basically just talking repetition past 90 degrees throughout the workday, and that there is no exact number that he can pin it on. (RX2, p.21). He likewise agreed that different individuals have different predispositions for the development of both CTS and cubital tunnel syndrome. (RX2, pp.21-22). He also suspected that it would be possible that an individual can work a job for his entire career, hyper-flexing his arm past 90 degrees through his workday, and may not ever develop that condition, and that other individuals might be very susceptible to that condition once their elbow is flexed past 90 degrees due to their anatomy. (RX2, p.22).

Conclusions of Law

An employee seeking benefits for gradual injury due to repetitive trauma must meet the same standard of proof as a petitioner alleging a single, definable accident. *Three "D" Discount Store v. Industrial Commission*, 144 Ill.Dec. 794, 797, 556 N.E.2d 261, 264 (Ill.App. 4 Dist. 1989); citing *Nunn v. Industrial Commission*, 157 Ill.App.3d 470, 109 Ill.Dec. 634, 510 N.E.2d 502 (1987). The Petitioner must prove a precise, identifiable date when the accidental injury manifested itself. "Manifested itself" means the date on which both the fact of the injury and the causal relationship of the injury to the petitioner's employment would have become plainly apparent to a reasonable person. *Three "D" Discount Store*, 556 N.E.2d at 264; citing *Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill.2d 524, 106 Ill.Dec. 235, 505 N.E.2d 1026 (1987). The test of when an injury manifests itself is an objective one, determined from the facts and circumstances of each case. Id., at 264; citing *Luttrell v. Industrial Commission*, 154 Ill.App.3d 943, 107 Ill.Dec. 620, 507 N.E.2d 533 (1987).

Further, the burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Hansel & Gretel Day Care v. Industrial Commission*, 158 Ill.Dec. 851, 858, 574 N.E.2d 1244, 1251 (Ill.App. 3 Dist. 1991); citing *Board of Education v. Industrial Commission*, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969).

Based on the above, and the record taken as a whole, the Commission reverses the decision of the Arbitrator and finds that Petitioner failed to prove by a preponderance of the credible evidence that he suffered accidental injuries arising out of and in the course of his employment on or about 2/7/17, and likewise failed to prove that his current conditions of ill-being relative to his

left upper extremity are causally related to his employment. More to the point, the Commission is not convinced that Petitioner's job duties were sufficiently repetitive or performed in such a manner as to cause and/or aggravate his carpal tunnel and cubital tunnel conditions in his left upper extremity. In support of this determination, the Commission relies on the opinion of §12 examining physician Dr. Rotman who appears to have a better understanding as to the nature of Petitioner's job duties compared to treating orthopedic surgeon Dr. Omotola, whose opinion was based on an incomplete hypothetical and without the benefit of reviewing either the job description (PX7) or the job video (RX1). Indeed, Dr. Omotola acknowledged that he did not cover any of the work activities that were addressed in the hypothetical with Petitioner personally and would have no notion as to how frequently Mr. Barnard would use crowbars, tools or any of the other items mentioned. (PX6, pp.14-15). He likewise did not know whether Petitioner would rotate job activities with co-workers with respect to the activities outlined in the hypothetical. (PX6, p.15).

Furthermore, the Commission notes that there is no basis in the record for the date of accident alleged by Petitioner (2/7/17), or the 2/27/21 date noted by the Arbitrator (which would appear to be a scrivener's error). Indeed, the only record close to that date was an office note dated 2/6/17 wherein Dr. Green ordered an EMG/NCV of the left upper extremity, and it was not until that diagnostic study was performed on 3/7/17 that Petitioner was actually diagnosed with left carpal tunnel and left cubital tunnel syndrome. (PX1).

Therefore, the Commission finds that Petitioner failed to prove by a preponderance of the credible evidence that he suffered accidental injuries arising out of and in the course of his employment on or about 2/7/17, and likewise failed to prove that his current conditions of ill-being relative to his left upper extremity are causally related to his employment.

Accordingly, the Arbitrator's decision is hereby reversed and Petitioner's claim for compensation is denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's award dated 12/18/19 is vacated and Petitioner's claim for compensation is hereby denied.

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

MAY 7, 2021

o: 3/9/21
TJT/pmo
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/s/ *Maria E. Portela*

/s/ *Kathryn A. Doerries*

DISSENT

I dissent. I believe the evidence supports the Arbitrator's finding that Petitioner suffered repetitive trauma-type injuries to his left upper extremity as a result of his job activities for Respondent over the course of 20 years. And while there is a suggestion in the record that Petitioner may have been diagnosed with cubital tunnel syndrome years earlier, the evidence shows that he continued to work in a demonstrably repetitive job until he began experiencing symptoms in his left hand and arm in early 2017 and underwent surgery on 8/3/17. Furthermore, there is absolutely no evidence that Petitioner suffered from any systemic disease process, such as diabetes and the like, that would have caused and/or aggravated his conditions.

Thus, absent any other explanation, and given what I would consider the repetitive nature of his job, based on both the job description and the video, I would modify the decision to show a date of accident of 3/7/17, the date of the EMG/NCV, and otherwise affirm and adopt the Arbitrator's well-reasoned and thorough decision.

/s/ *Thomas J. Tyrrell*

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0227
NOTICE OF ARBITRATOR DECISION

BARNARD, JAMES Case# **17WC019273**
Employee/Petitioner

GLOBAL BRASS
Employer/Respondent

On 12/18/2019, 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 1.55% 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:

4463 GALANTI LAW OFFICE
DAVID M GALANTI
PO BOX 99
E ALTON, IL 62024

0299 KEEFE & DePAULI PC
MIKE KEEFE
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

James Barnard
Employee/Petitioner

v.

Global Brass
Employer/Respondent

Case # **17** WC **19273**

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 **Michael Nowak**, Arbitrator of the Commission, in the city of **Collinsville**, on **10/30/19**. 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 **2/27/17**, 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 $**70,622.08**; the average weekly wage was $**1,290.72**.

On the date of accident, Petitioner was **42** years of age, ***single*** with **1** dependent child.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**4,937.55** for other benefits, for a total credit of $**4,937.55**.

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

ORDER

Respondent shall pay reasonable and necessary medical services of $748.00 to Dr. Green, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall pay Petitioner temporary total disability benefits of $860.48/week for 9 1/7 weeks, commencing 8/3/17 through 10/5/17, as provided in Section 8(b) of the Act.

Based on the factors enumerated in §8.1b of the Act, which the Arbitrator addressed in the attached findings of fact and conclusions of law, and the record taken as a whole, Respondent shall pay Petitioner the sum of $**774.43**/week for **77.45** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **10% loss of the left hand (19 weeks) at the 190 week level for the carpal tunnel syndrome, 10% loss of the left hand (20.5 weeks) at the 205 week level for the guyon canal, and 15% loss of the left arm (37.95 weeks) for the Cubital tunnel syndrome.**

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.

Michael K. Nowak, Arbitrator

12/10/19
Date

ICArbDec p. 2

DEC 18 2019

JOINT STIPULATION

Both Parties stipulated that Respondent would receive a credit for nonoccupational disability payments but did not have the exact amount of Respondent's 8(j) credit at the time of trial. The Parties have subsequently stipulated that the Respondent shall receive an 8(j) credit of $4,937.55.

FINDINGS OF FACT

Petitioner, James Barnard, was employed by Global Brass and Copper on February 7, 2017. On that date, Petitioner had been employed there for approximately 20 years as an Operator A. Petitioner is not diabetic, does not have a thyroid disorder, or any history of gout.

In 2017, Petitioner complained of pain, tingling, and numbness into his left hand and arm. Petitioner is right-handed. Petitioner was mainly having problems on the third, fourth, and fifth fingers of his left hand. Petitioner had been having these problems for several years and these symptoms were worsening.

Petitioner's sought medical attention for this condition from his PCP, Dr. Green. (PX 1 at 1). Following a clinical examination, Dr. Green diagnosed the Petitioner with ulnar neuropathy and recommended an EMG Nerve Conduction Velocity Test. (PX 1at 6).

An EMG was performed on March 7, 2017 at Alton Memorial Hospital. This test was abnormal and indicated Petitioner had left carpal tunnel syndrome, as well as left ulnar neuropathy. (PX 2 at 2).

Petitioner sought additional medical care from Dr. Omotola on referral from Dr. Green. (PX 3 at 22). Dr. Omotola is a Board-Certified and Fellowship trained Orthopedic Surgeon (PX 6 at 3, 4). Following a clinical examination on review of the EMG/NCV, Dr. Omotola diagnosed the Petitioner with cubital tunnel syndrome on the left, carpal tunnel syndrome on the left, as well as ulnar nerve entrapment at the level of the wrist. (PX 3 at 24). To correct this condition, Dr. Omotola performed surgery on August 3, 2017. (PX 4). This operation consisted of a cubital tunnel release, an open ulnar nerve release at the level of the wrist, and an open carpal tunnel release. (Id.)

The Parties stipulated that the Petitioner missed work from August 3, 2017 through October 5, 2017, a period of 9 and 1/7 weeks. Petitioner was paid nonoccupational benefits in the amount of $4,937.55.

Petitioner was last seen by Dr. Omotola on November 13, 2017. On that date, Dr. Omotola noted that Petitioner had persistent numbness in his left ring and a pinky finger and some lack of strength with gripping. (PX 3 at 1). Dr. Omotola further noted that the Petitioner's symptoms from his carpal tunnel release have resolved. (Id.). Petitioner went back to work without restrictions as a mechanic/machinist. (Id.) Petitioner testified at trial that he was still having the same problems that were documented in Dr. Omotola's final office notes. Specifically, Petitioner testified that he was still having numbness on the outside of his middle finger, in the ring finger, and the pinky finger, and that those complaints were constant. Petitioner did not complain of numbness into the index finger or thumb. Petitioner also complained of lesser grip strength than he had prior to developing this condition.

Petitioner described the Operator A position as having two primary jobs within that job classification. There is the Operator A job and a Utility Worker job. When Petitioner was working as an Operator A, he would

set up and maintain transfer and progressive presses, as well as doing stamping. He estimated that he spent approximately 60% to 70% in the three years prior to the date of injury working as an Operator A. 30% to 40% of his time was spent in the second job classification as a utility worker. While he was a utility worker, Petitioner would be setting up presses and using hand tools which were both pneumatic and electric. Petitioner estimated his use of pneumatic tools as a couple hours a day. Petitioner described the hand tools that he used as ratchets, wrenches, plyers, screwdrivers, hammers, and prybars. Petitioner described using force with these hand tools, as well as using them in all grip positions while working on the machines. While using these tools, Petitioner frequently flexed and extended his arm past 90 degrees, as well as flexing and extending his wrist off of neutral. Petitioner felt that his most hand intensive work was that of hand packing which he did as an Operator A. Petitioner described this process as an assembly line process which was like "Laverne and Shirley" assembly work. He would stack lead frames which were placed inside a fuse box and then he would inspect them. Petitioner would rotate approximately 50 parts over a light table to make sure there were no imperfections or distortions. He estimated the 50 frames would weight anywhere between 5 ounces if they were small pieces up to 1 pound a piece. Petitioner described the pace in doing this job as consistent and nonstop. Packing these parts required both flexion and extension of the wrist. Petitioner testified at trial that the videotape depicting the hand packing job was accurate. Additionally, the Petitioner also reviewed the job description and stated that while not very detailed, it was roughly accurate as to his job duties. The job description and videotaped were admitted as Petitioner's Exhibit #7 and Respondent's Exhibit #1 respectfully.

Petitioner was examined at the behest of the Respondent by Dr. Rotman on June 3, 2019. Dr. Rotman is a Board-Certified and Fellowship Trained Orthopedic Surgeon. (RX 1 at 2). After reviewing the job description and videotape, Dr. Rotman opined that Petitioner's work was not a causative factor of his carpal tunnel syndrome and cubital tunnel syndrome. (RX 2 at 10). However, Dr. Rotman did opine that Petitioner needed surgery for the carpal tunnel syndrome, and potentially the cubital tunnel syndrome to relieve his symptoms. (Id. at 15). Dr. Rotman further admitted that he has had a 20-year relationship with the Respondent as an examiner. (Id. at 14). The Petitioner was not the first Operator A that was claiming repetitive trauma injuries to his elbows and hands who Dr. Rotman examined. (Id. at 14). 80% to 90% of the cases he sees from Global Brass and Copper are related to repetitive trauma hand and elbow injuries. (Id. at 14). Dr. Rotman also admitted that the Petitioner had no systemic diseases which would cause or contribute to either is carpal or cubital tunnel syndromes. (Id. at 15). Dr. Rotman felt the primary cause of repetitive trauma elbow injuries was hyper flexion of the elbow past 90 degrees. (Id. at 19) Further, that if the videotape or job description were inaccurate his opinion on causation might change. (Id. at 21). Finally, Dr. Rotman opined that the Petitioner suffered a 2% permanent partial impairment based on the AMA guidelines 6th edition of the left upper extremity. (RX 2 Depo Ex 2).

Dr. Omotola felt that if Petitioner did not have any systemic diseases which would cause or contribute to developing carpal or cubital tunnel syndrome and that if the Petitioner was involved in installing and repairing dies, retrieving tools, operating controls, packing products in boxes, and using frequent firm and power grasping at a medium pace, as well as using hand tools, that he would feel that his work would relate directly to his cubital and carpal tunnel syndrome. (PX 6 at 11-12)

The following medical bills were admitted into evidence:

APG Dr. Green: $748.00

CONCLUSIONS

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

The Arbitrator finds that the Petitioner sustained a repetitive trauma accident while working for the Respondent. The Arbitrator the testimony and opinions of Dr. Omotola more persuasive than those of Dr. Rotman. Dr. Omotola is Petitioner's treating physician and Dr. Rotman has had a long-term relationship with the Respondent where he has done numerous exams for repetitive trauma injuries. Further, both the videotape and job description, as well as Petitioner's testimony on his job duties lead the Arbitrator to conclude that his job is repetitive.

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

The Arbitrator finds that the Petitioner's cubital, carpal tunnel, as well as Guyon's canal on the left side all are causally related to Petitioner's work, the Arbitrator relies on the opinions of Dr. Omotola more so than Dr, Rotman for reasons listed above.

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?

Petitioner admitted the bill of APG Dr. Green in the amount of $748.00 into evidence. The Arbitrator finds that these services were both reasonable and necessary for Petitioner's medical care and treatment. These are ordered to be paid by the Respondent pursuant to the fee schedule.

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

The Arbitrator finds the Petitioner was temporary and totally disabled from August 3, 2017 through October 5, 2017, a period of 9 and 1/7 weeks. The Respondent is entitled to a credit in the amount of $4,937.55 pursuant to Section 8(j) of the Act.

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of §8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 2% of the upper extremity as determined by Dr. Rotman, pursuant to the most current edition of the American Medication Association's Guides to the Evaluation of Permanent Impairment. 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 Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as an Operator A at the time of the accident and that he was able to return to work in his prior capacity. The work is still hand and upper extremity intensive. The Arbitrator therefore gives *some* 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 his injuries. Petitioner has diminished healing capacity and a low threshold for future injury as a result thereof. Furthermore, Petitioner has hand and arm intensive employment as an Operator A for Respondent. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes there is no direct evidence of reduced earning capacity contained in the record. 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 Petitioner was a credible witness. Dr. Omotola specifically noted that the Petitioner had a decrease in grip strength, as well as numbness into his third, fourth and fifth fingers. Because of Dr. Omotola's findings, as well as Petitioner's testimony at trial indicating that he is still having these problems and they have not improved, 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 10% loss of the left hand (19 weeks) at the 190 week level for the carpal tunnel syndrome, 10% loss of the left hand (20.5 weeks) at the 205 week level for the guyon canal, and 15% loss of the left arm (37.95 weeks) for the cubital tunnel syndrome pursuant to §8(e) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC038303
Case Name	REID, BOBBIE G v. ED LEWIS TRUCKING INC
Consolidated Cases	
Proceeding Type	Remanded Arb – Petition Under 19b
Decision Type	Commission Decision
Commission Decision Number	21IWCC0228
Number of Pages of Decision	31
Decision Issued By	Thomas Tyrrell, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Colin Mills

DATE FILED: 5/7/2021

/s/ Thomas Tyrrell, 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

Bobbie G. Reid,

Petitioner,

vs. NO: 15 WC 38303

Ed Lewis Trucking, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, temporary total disability, medical expenses and prospective medical treatment, affirms the Decision of the Arbitrator, as modified herein, said decision being attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission modifies the Decision of the Arbitrator to show that Petitioner failed to prove that the MRI spectroscopy recommended by Dr. Gornet is both reasonable and necessary under the circumstances. More to the point, the Commission questions the medical efficacy and reliability of such a study and is reluctant to countenance same. Thus, while the Commission affirms the Arbitrator's prospective medical treatment award with respect to the remainder of Dr. Gornet's recommendations, the Arbitrator's award with respect to the MRI spectroscopy is hereby vacated.

Furthermore, the Commission corrects a clerical error in the Arbitrator's decision to show that Petitioner was temporarily totally disabled from 5/15/15 through 10/24/19, for a period of 231-6/7 weeks (not 231-3/7 weeks).

All else is otherwise affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed 12/11/19, is hereby affirmed and adopted with changes as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $666.67 per week for a period of 231-6/7 weeks, from 5/15/15 through 10/24/19, 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 $193,669.48 for reasonable and necessary medical expenses under §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall authorize and pay for the prospective medical treatment prescribed by Dr. Gornet, with the exception of the MRI spectroscopy, 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 of the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 7, 2021

/s/ *Thomas J. Tyrrell*

TJT: pmo
o 2/9/21
51

/s/ *Kathryn A. Doerries*

DISSENT

The fact that Petitioner sustained an accident on May 13, 2015, is undisputed. What is disputed is the extent of injury to Petitioner's cervical, thoracic and lumbar spine stemming from this accident on May 13, 2015. I disagree with the majority's opinion finding that Petitioner is entitled to "recover for the expenses contained in the record." (ArbDec.17) I further disagree with the conclusion that "[a]t no point has Petitioner reached maximum medical improvement since the injury, and she has not exhausted all reasonable treatment options." *Id.* The majority concluded that the Petitioner "suffered injury to her neck, thoracic spine, and lumbar spine as a result of the motor vehicle accident." (ArbDec. 15) I would add that Petitioner suffered injury to her left knee as a result of the work accident. While I disagree with the award of "the expenses contained in the record," I take no issue with the award of medical expenses related to the Petitioner's left knee condition for treatment with Dr. Lehman which I believe is causally related to the work accident. I would also find that Petitioner reached maximum medical improvement (MMI) for her left knee injury on July 31, 2017, the date of Dr. Nikhil Verma's §12 evaluation. Dr. Verma examined Petitioner's left knee, and testified that she needed no further treatment at that time based upon the time frame after surgery, given the procedure performed and her clinical objective examination which was consistent with the time frame after surgery. Dr. Verma testified that there was no need for further medical management at that time and that she could return to work full-duty with no restrictions with respect to her left knee. (RX3, pp. 13-15, 25-26)

On July 31, 2017, Dr. Verma was of the opinion that Petitioner would have reached maximum medical improvement (MMI) six to eight weeks following the surgery by Dr. Lehman on January 4, 2017. (RX3, pp.14-15) Dr. Verma also did not believe Petitioner required further formalized treatment for her left knee and found no objective basis to suggest ongoing work restrictions despite her ongoing subjective complaints. (RX3, pp.13-14) While Dr. Lehman, the surgeon, did not reference the fact that Petitioner had reached MMI until his office note dated December 16, 2018, the record clearly shows that Petitioner's treatment leading up to that date was focused primarily on her ongoing hip and spinal issues, as evidenced by multiple referrals by Dr. Lehman to various specialists. (PX13)

I would also find that Petitioner reached MMI from her cervical and lumbar spine sprain/strains by November 12, 2015, the date of Dr. Frank Petkovich's opinion report and from her thoracic spine sprain/strain six weeks thereafter, on December 23, 2015. Therefore, I respectfully dissent from the majority opinion regarding the award of medical treatment after December 23, 2015, and any and all treatment by Dr. Matthew Gornet to Petitioner's cervical and lumbar spine. I further dissent from the award of prospective cervical and lumbar medical treatment recommended by Dr. Gornet for the following reasons.

A CT of the head/cervical performed at Eliza Coffee Memorial Hospital on May 13, 2015, revealed 1) probable cerebral contusion in the left temporal lobe; 2) no evidence of cervical spine or calvarial fracture; 3) degenerative changes at C1-2, C5-6 and C6-7. (PX3)

A CT of the lumbar spine performed at the same facility on May 13, 2015, identified no abnormality. (PX3)

A CT of the chest/abdomen/pelvis performed at the same facility on May 13, 2015, identified 1) hiatal hernia with prominent of fluid in the esophagus; 2) inflammatory appearing lymph nodes in the AP window and mediastinum; 3) distended gallbladder without evidence of stone, obstruction or disruption; 4) distended urinary bladder; 5) postoperative changes in the pelvis; 6) degenerative changes spine without evidence of fracture. (PX3)

The May 27, 2015, thoracic MRI reviewed and documented by Dr. Kovalsky on June 3, 2015, showed minor degenerative changes with no disc herniations or fractures and that her rib articulations were normal, all of which is compelling and persuasive evidence that the Petitioner had no objective evidence of trauma within days or weeks of the accident. (PX6)

On August 12, 2015, Dr. Kovalsky recorded that "[s]he's not had any significant head or neck pain. She continues to have right thoracolumbar pain which is improving with therapy. (PX6)

On September 8, 2015, Dr. Kovalsky notes that the patient reported her neck is feeling better. (PX6) Dr. Kovalsky also noted that there were no tension signs in her legs, no evidence of myelopathy or spinal cord compression. He noted "She's neurologically intact in the L3 to S1 dermatomes." (PX6)

On September 24, 2015, Dr. Angela Freehill recorded that Petitioner presented for consultation at the request of "Dr. Kovalsky and workman's comp" for evaluation of her left knee noting that "… during the injection, patient had pain out of proportion to what is typical for an injection response. She was tearful and crying and yelling throughout the injection of the knee. This is highly atypical." (PX6) Therefore, it is inferred that any exacerbated cervical or lumbar pain would have been noted within the first year, or certainly within two or three years, of the accident.

On October 9, 2015, Dr. Kovalsky found negative Spurling's and Lhermitte's signs and no evidence of cervical radiculopathy. Dr. Kovalsky documents that she "has a lumbosacral strain which is more of a muscular injury." (PX6)

Dr. Petkovich examined Petitioner and issued a report on November 12, 2015. In his report, Dr. Petkovich noted a diagnosis of cervical strain, now resolved; 2) right shoulder strain; now resolved; 3) thoracic strain, resolving; 4) lumbar strain, now resolved; 5) left knee ligament strain with persistent discomfort. At the time, Dr. Petkovich opined the Petitioner reached MMI

regarding her cervical strain, lumbar strain and right shoulder strain as a result of the May 13, 2015 incident. He did not believe that "…any further diagnostic evaluation or treatment is indicated" with respect to the thoracic spine, and that while "…she may have some residual discomfort in her thoracic area for approximately the next six weeks, …this should resolve on its own. (RX8) Six weeks after Dr. Petkovich's November 12, 2015 examination is December 23, 2015; thus, I find Petitioner reached MMI regarding Petitioner's thoracic spine on December 23, 2015.

Dr. Petkovich's opinion and Dr. Kovalsky's diagnoses and opinions were bolstered shortly thereafter by the December 15, 2015, lower extremity EMG/NCV test that was a normal study. When Petitioner presented to Dr. Coleman of Millennium Pain Management on January 4, 2016, the physical examination demonstrated only evidence of spondylosis of the thoracic region. (PX12)

The Petitioner commenced treating with Dr. Lehman for her left knee. In a letter dated January 21, 2016, Dr. Lehman noted that "[i]t is my opinion …She does have radicular back pain which she states is new with pain going down her leg and thoracic spine pain." (PX13) Dr. Lehman also indicated that "[i]t is my opinion that these problems should be addressed by a spine surgeon and causality should be addressed by a spine surgeon although by her history she did not have the problems prior… I would [refer] care and treatment for her lumbar spine to a spine surgeon, referring her to Dr. Kevin Rutz for evaluation or Dr. Petkovich but at this juncture she clearly has symptoms and these symptoms, in my opinion, appear to be spine related and I believe the spine surgeon is substantially more qualified than I to proceed." (PX13)

Ironically, Dr. Petkovich had already rendered his opinion that Petitioner had a lumbar strain/sprain that should have been resolved. In Dr. Petkovich's opinion, only Petitioner's left knee pain was unresolved. However, Petitioner began treating with Dr. Kevin Rutz. On January 26, 2016, Dr. Rutz recorded that Petitioner presented with a chief complaint of thoracic back pain which developed secondary to an MVA in May of 2015. (PX14) Petitioner reported that she had no neck pain to Dr. Rutz. (PX14) Following his examination, Dr. Rutz's assessment was low back pain, specifically thoracolumbar back pain "… possibly secondary to an injury at T11-12 disc space and possible left side radiculopathy." (PX14) Dr. Rutz recommended "… a new MRI of the lumbar spine going all the way up to T10." (PX14)

A February 22, 2016, lumbar spine MRI was interpreted as revealing 1) kyphotic curvature with anterior end plate on end plate articulation at L11-12 level; 2) facet arthropathy L4-5 and L5-S1 with minimal annular disc bulge at L5-S1; 3) mild right greater than left foraminal stenosis are present at this level. There is no central canal stenosis. (PX13)

On March 8, 2016, Dr. Rutz documented that the MRI performed on February 22, 2016, "… demonstrated no signs of significant pathology in the lumbar spine. The fac[e]t [sic] joints look good. She has very mild lateral recessed stenosis at L4-5 with good hydration of her disc and no signs of injury. Her primary pathology is at T11-12 and this demonstrated moderate to severe degeneration of the disc with modic changes and a foraminal disc herniation on the right filling

more than half of the neuroforamen." (PX14) His assessment was 1) herniated nucleus pulposus, thoracic; 2) left foot drop; 3) lumbar radiculopathy; 4) radiculopathy, thoracic region. (PX14) Dr. Rutz concluded that "[a]t this point, I do not see any pathology in her lumbar spine that can account for the pain in her buttock. I suspect that this is residual from the contusion that she had in the buttock." (PX14)

Dr. Rutz, recommended a foraminal discectomy and fusion at T11-12. (PX14)

Dr. Petkovich's opinion that Petitioner suffered a sprain/strain to her cervical, thoracic and lumbar spine was then bolstered by Dr. Kern Singh's opinions. Dr. Singh authored a §12 opinion report dated July 13, 2016. (RX1, DepX2) Dr. Singh testified via evidence deposition regarding his practice advising that he sees approximately 10,000 patients per year for spinal disorders and performs about 400 to 500 surgeries per year of the neck, upper back and lower back. Dr. Singh testified that thoracic surgery is reserved primarily for fractures or tumors and is extremely rare. (RX1, 6-7) Dr. Gornet later agreed, testifying, "[In] [t]he thoracic spine I believe she has some disc pathology, aggravation of some preexisting disc degeneration at L11-T12. I don't believe that all of the findings present there are due to trauma, so I believe she may have a problem that was aggravated there." (PX28, p.19). This is evidence of the divergent opinions of the orthopedic community.

A July 11, 2017 lower extremity EMG/NCV test confirmed that all nerve conduction studies were within normal limits and all examined muscles showed no evidence of electrical instability. (PX13)

Dr. Singh testified that on July 31, 2017, a physical exam revealed that, "[s]he had full range of motion of her thoracic and lumbar spine. Monofilament testing, which is a soft brush, and it's more accurate than light touch, was normal in both of her legs. There was no sensory loss. She had normal strength in her arms as well as her legs. She had no evidence of spinal cord compression on her exam and she had no Waddell findings on her examination." (RX2, p.10) He noted there were no abnormal findings on examination, and that his diagnosis was cervical and lumbar muscular strain. (RX2, p.10)

Yet another MRI of the lumbar spine performed on October 26, 2017, was interpreted as normal. (PX13)

On July 5, 2018, Petitioner underwent an NM whole body bone scan. The Impression result was normal bone scan. (PX19)

On January 17, 2019, Petitioner consulted Dr. Gornet at the referral of Dr. Bradley. (PX23) She reported increasing pain in her neck, shoulder and arm after attempting to return to work light duty. Physical exam was positive for pain in both trapezii, particularly the right trapezius and right arm, decreased range of motion to the right and decreased flexion/extension. Based on his review of the accident and Petitioner's symptoms, Dr. Gornet documented that, "[w]ith a severe trauma

such as this, her symptoms may manifest overtime and it appears the most part they have focused on her thoracic spine is the main etiology. I have discussed with her that a cervical spine problem can also refer pain between the shoulder blades or base of her neck. At this point, I have recommended she obtain a new MRI under whiplash protocol and a motion analysis. (PX23)

Petitioner obtained a new MRI of her cervical spine on March 4, 2019, which showed: 1) a central annular tear and protrusion at C6-7 with a small caudally extruded disc fragment in the midline and severe bilateral foraminal stenosis; 2) A C5-6 circumferential disc bulge with a small caudally extruded disc fragment in the midline and bilateral foraminal protrusions resulting in severe bilateral foraminal stenoses, ventral cord flattening, and central canal stenosis; and 3) a C3-4 central broad-based protrusion that extends into both foramina resulting in moderate to severe right greater than left foraminal stenosis. (PX24, 3/4/19) Dr. Gornet recommended an injection of Petitioner's neck at C6-7 and C5-6, and potentially disc replacement if Petitioner failed conservative care. *Id.* After reviewing the results of the cervical spine MRI, Dr. Gornet reviewed an old lumbar spine MRI which he noted showed some central protrusion at L5-S1 and degeneration at T11-12. *Id.*

On May 9, 2019, after receiving the recommended injections at C6-7 and C5-6 the Petitioner reported only temporary relief from the injections. Dr. Gornet documented that based on the failure of conservative care to resolve Petitioner's complaints, her best option was surgery. (PX23, 5/19/19)

Dr. Gornet did not testify to any other study outside of his own to bolster his opinion that cervical disc replacement is superior to spinal fusion at multiple levels, however, more importantly, he opined that Petitioner's degenerative cervical and lumbar conditions, which were never before noted to be aggravated by any physician in the previous 3-1/2+ years following the accident, were causally related to the accident.

Dr. Singh further rendered opinions in a report dated May 3, 2019, to which he testified to on July 17, 2019, noting that while additional treatment to the cervical spine recommended by Dr. Gornet may be reasonable, it is not causally related to the work accident. (RX15, DepX1, p. 22) Dr. Singh testified that as far as Petitioner's cervical systems, her neck pain was not consistent through the medical records nor was her arm pain consistent throughout the medical records. He testified, "I do believe that if she had failed conservative treatment for her cervical spine, disc replacement would be appropriate and reasonable, but I did not believe that it would be causally connected." (RX15, pp.21-22)

Dr. Gornet's causal opinion regarding the cervical spine is based upon a "referred pain" theory. (PX28, pp14-15) He testified, "… the thoracic spine or pain between the shoulder blades is an overlapping area. For motor vehicle accidents, we see this almost in 100 percent of people who have cervical disc injuries. The most common cause really is a cervical disc injury, but it's important to potentially evaluate the midback. But for the most part, there's not a lot you can do with thoracic disc issues anyway. So we tell the patients that the pain between the shoulder blades

is probably referred pain. When we treat the cervical spine it usually goes away." (PX28, pp.14-15)

Petitioner's complaints were primarily and generally associated with mid-back pain and almost four years after the accident, Dr. Gornet prescribed surgeries for progressive cervical degenerative disease in a 25 year pack per day smoker and causally related the need for disk replacements, at two or three levels, to the work accident. Dr. Gornet testified, "I believe that smoking does play a factor or a role in disc degeneration. So I think that that's been clearly stated in the medical literature." (PX28, p.34) Therefore, Dr. Gornet's opinion regarding causation is not credible; until Petitioner saw him no physician causally related her degenerative cervical spine condition to the work accident and Dr. Gornet conceded that smoking could have accelerated Petitioner's condition. He also testified that Petitioner would have to cut down to a half a pack or less a day in smoking to even do the surgery. "If she's smoking a pack a day, she doesn't get surgery." (PX28, p. 34) There is also no evidence that Petitioner has ceased her smoking habit and Dr. Gornet provided no opinion as to how he would be sure that her smoking habit had been "cut down to a half a pack a day." Dr. Gornet also did not define how long Petitioner would be required to reduce her smoking habit prior to the surgery. These practicalities should give the majority pause as to the award of cervical spine surgery with so many unknown factors. Dr. Gornet also does not address the risk associated with disk replacement surgery or the chances of success if Petitioner is not candid about her smoking habit and he proceeds with the surgery.

Dr. Gornet's opinion regarding the lumbar spine is equally speculative allegedly based upon a test result that was "suggestive of a tear in the disc." He testified, "…The lumbar MRI was consistent with a central disc protrusion at L5-S1. There was suggestion of a tear in the disc centrally there. Further workup with a higher resolution MRI is going to be required. " (PX28, pp.18-19) He noted that his diagnosis was "… disc injury C5-6, C6-7, and C3-4 … In her lumbar spine our working diagnosis there is disc injury L5-S1…" (PX28, p.19)

Dr. Gornet also testified that Petitioner's lumbar spine, "for the most part, looks fairly good." (PX28, p. 25) He also acknowledged that the findings he made in Petitioner could be found in someone's Ms. Reid's age range who was not involved in an MVA, noting that "[p]eople can have disc injuries without a motor vehicle accident." (PX28, p. 31)

I am not persuaded that there is any new evidence that comports with the need for lumbar surgery and indeed, not as a result of the May 13, 2015, work accident. Instead, the majority is prematurely awarding a surgery that may not even be necessary, much less causally related. As late as July 2017 a lower extremity EMG/NCV performed by Dr. Margarita was normal with no evidence of electrical instability. An October 2017 lumbar spine MRI was normal and a whole body bone scan performed on July 5, 2018 was normal. Assuming arguendo, after the higher resolution MRI is obtained, Dr. Gornet opines the Petitioner needs surgery, then there remains the issue of reasonableness and necessity of surgery, not just causation. At most the majority award should be the higher resolution MRI, so that Respondent would be able to obtain a medical opinion regarding the reasonableness and necessity of a lumbar surgery. The majority award of prospective

surgery precludes the Respondent from then obtaining a medical opinion regarding reasonableness and necessity of a surgery when the higher resolution MRI is completed. This is true even after Dr. Gornet testified that Petitioner's lumbar spine "for the most part, looks fairly good." (PX28, p. 25)

Dr. Gornet testified that he told the Petitioner the disc injuries, "not only are they evident on MRI scan, but they are also evident on quantitative motion analysis. And those MRI findings fit with her neurologic examination. They fit with her subjective complaints." (PX28, p.22) The evidence, however, as shown, does not causally relate the disc injuries Dr. Gornet references on the March 4, 2019 MRI, to the work accident.

I further find Petitioner's pain complaints are also not entirely credible. While she suffered a serious accident, on occasion there was also evidence in the record that Petitioner was exaggerating her pain symptoms. Weeks after the accident, on June 3, 2015, Petitioner first consulted Dr. Don Kovalsky, of the Orthopaedic Center of Southern Illinois. (PX6) Dr. Kovalsky noted, "[p]atient ambulates in a slow rigid fashion without an antalgic gait or a limp. She holds her hand on her lower back as she ambulates which is sort of a red flag. Her cervical motion was normal. Upper extremity neurological exam was normal. However, although she was tender at the thoracolumbar junction from about T-10 to L1, and she had the pain which radiates around the right side stopping at the mid-thoracic line, it did not radiate to her anterior chest wall or abdomen." (PX6) Dr. Kovalsky's clinical impression was "… lumbosacral sprain, Grade 2 sprain, lateral collateral ligament left knee, and she probably has meralgia paresthetica of her right anterior thigh probably due to blunt trauma."(PX6)

Dr. Singh testified that his examination of Petitioner on July 31, 2017, was normal, while Dr. Gornet's (examination) implied that there may be some involvement of the C6 nerve root. (RX15, p.18-19) Dr. Gornet saw Petitioner 1-1/2 years after the Dr. Singh's examination and her condition had changed, however, as Dr. Singh opined, that condition is not causally related.

Finally, Dr. Rutz also testified via evidence deposition. When asked if the accident aggravated any preexisting conditions in her lumbar spine, Dr. Rutz stated: "[s]he had no preexisting condition in her lumbar spine. And as far as any symptoms in her low lumbar spine, I don't have a true diagnosis." (PX27, p.25) When asked his opinion regarding the annular disc bulge in both foramina at L5-S1 noted by the radiologist in the February 22, 2016, MRI report, Dr. Rutz testified: "… I generally don't like the term disc bulge that much, just because it's ambiguous, … I put that in the category of a mild degenerative change. It can be traumatic, but if it's somewhat diffuse, it's more consistent with mild age-appropriate degenerative changes." (PX27, pp.25-26) This treating orthopedic opinion regarding Petitioner's lumbar spine comports with Dr. Petkovich, Dr. Kovalsky and Dr. Singh 's opinions but is contrary only to Dr. Gornet.

The referenced records, diagnostics and opinions except Dr. Gornet's, are compelling evidence that there is no cervical or lumbar condition that requires surgery as a result of the work accident. Therefore, I take issue with the majority's causation award as it relates to Petitioner's

current condition of ill-being relative to her cervical and lumbar spine given the vastly different opinions offered by the medical experts in this case -- namely, Drs. Rutz, Gornet and Singh and particularly as it concerns the proper diagnosis and appropriate treatment of Petitioner's spinal conditions. I disagree with the majority's conclusion that the Petitioner's conditions in her cervical and lumbar spine, and the prospective treatment recommended by Dr. Gornet, are related to the work accident.

Dr. Gornet's opinion regarding the Petitioner's cervical and lumbar spine is not supported by the opinions of Dr. Petkovich, Dr. Kovalsky, Dr. Singh, Dr. Margherita, Dr. Bradley, Dr. Ungacta or Dr. Rutz or by the Petitioner's other treating records and is, therefore, of little persuasive value. I find Petitioner failed to prove a causal relationship between her accident of May 13, 2015, and her condition of ill-being as it relates to the need for cervical or lumbar surgery. I find Petitioner reached MMI from her cervical and lumbar strains/sprains by November 12, 2015, and reached MMI from her thoracic spine strain/sprain by December 23, 2015, based upon Dr. Frank Petkovich's §12 opinion report. (RX8)

In *Prairie Farms Dairy*, the Court held that the Commission is not precluded from adopting the opinion of an examining physician:

> Our research has not revealed any case where this court, or the Illinois Supreme [***9] Court, has said that, as a matter of law, the Commission *must* give more weight to a treating physician's testimony than to that of an examining physician. Certainly *Edgcomb* does not state that. In *Edgcomb,* we simply found that a balance of all the evidence, including that of Dr. Holden, which the Commission disregarded, supported a finding of causal connection. Although we have said numerous times that the Commission *may* give more weight to a treating physician's opinion, we
> have never stated that it is obligated [*551] to.

Prairie Farms Dairy v. Industrial Comm'n (Kossman), 279 Ill. App. 3d 546, 550-551, 664 N.E.2d 1150, 1153, 1996 Ill. App. LEXIS 321, *8-9, 216 Ill. Dec. 222, 225.

Therefore, I would vacate benefits awarded for cervical and lumbar back treatment after November 12, 2015, and deny prospective medical treatment for surgeries to the cervical and lumbar back recommended by Dr. Gornet.

For the above-stated reasons, I respectfully dissent.

/s/ *Kathryn A. Doerries*

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

21IWCC0228

REID, BOBBIE G
Employee/Petitioner

Case# **15WC038303**

ED LEWIS TRUCKING INC
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:

0996 RICH RICH COOKSEY & CHAPPELL
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0000 INMAN & FITZGIBBONS LTD
COLIN M MILLS
301 N NEIL ST SUITE 350
CHAMPAIGN, IL 61820

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Bobbie G. Reid
Employee/Petitioner

v.

Ed Lewis Trucking, Inc.
Employer/Respondent

Case # **15** WC **38303**

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 **Michael Nowak**, Arbitrator of the Commission, in the city of **Collinsville**, on **10/24/19**. 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **5/13/15**, 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 $**52,000.00**; the average weekly wage was $**1,000.00**.

On the date of accident, Petitioner was **45** 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 $**89,998.98** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**89,998.98**.

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

ORDER

Respondent shall pay outstanding reasonable and necessary medical services of $193,669.48, as set forth in Petitioner's exhibit 1, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall authorize and pay for prospective medical care as recommended by Dr. Gornet, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $666.67/week for 231 3/7 weeks, commencing 5/15/15 through 10/24/19, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $89,998.98 for temporary total disability benefits that have been paid.

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

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

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

Michael K. Nowak, Arbitrator

12/2/19
Date

ICArbDec19(b)

DEC 11 2019

FINDINGS OF FACT

Petitioner is a truck driver for Respondent, Ed Lewis Trucking, and does transports with her husband. (T.8-9) The parties stipulated that she sustained accidental injuries that arose out of and in the course of her employment with Respondent, when on May 13, 2015, she was involved in a severe motor vehicle accident as a passenger in the truck being operated by her husband. (T.9) Petitioner described the accident as follows:

> We was driving down the road, a car come out behind a tree line, ran a stop sign and hit us in the front tire, broke our steering, went down a 20-foot embankment and rolled into swamp waters down in Alabama. (T.9)

Pictures of the crash, which show a demolished cabin and a truck cab suspended in a muddy swamp bank, along with corroborating accident, witness, and news reports were entered into evidence as Petitioner's Exhibits 29 through 32. (PX29; PX30; PX31; PX32) Petitioner testified that she injured her neck, mid back, low hip, and left knee, and described herself as "bruised from head to toe." (T.9-10) While her bruises, cuts, and left knee injury resolved, Petitioner continued to have problems with her neck and back. (T.10) She suffered no injuries to her neck or back and required no diagnostic studies for same prior to this accident. (T.9-10)

Petitioner was treated extensively for her condition over the next four-and-a-half years, and Respondent continued to pay benefits until it ceased paying temporary total disability (TTD) benefits on October 28, 2018. (T.12-13) Petitioner also seeks benefits for prospective care as outlined by her treating physician. (T.14)

Petitioner was taken via ambulance and treated immediately following the crash at Eliza Coffee Memorial Hospital. (PX3) There, it was documented that Petitioner's truck "rolled over in pond," and although Petitioner was restrained inside, "PT was found outside of vehicle face down in mud." *Id.* Petitioner suffered severe neck and back pain for which she was given Dilaudid and was also diagnosed with a subconjunctival hemorrhage in her right eye. *Id.* A CT of Petitioner's head and cervical spine showed a probable cerebral contusion in the left temporal lobe along with degenerative changes. *Id.* A CT of the chest and pelvis showed a hiatal hernia with fluid in the esophagus, inflammatory appearing lymph nodes in the AP window and mediastinum, a distended urinary bladder, and degenerative changes. *Id.* She was discharged with prescriptions for Motrin and Norflex. *Id.*

Petitioner was seen again in the emergency room of St. Mary's Hospital on May 16, 2015, where it was noted, "Has multiple abrasions and basically hurts all over." (PX5, 5/16/15) Petitioner's pain had been constant since the crash despite use of pain medication. *Id.* Repeat CT scans of the abdomen and pelvis were consistent with the prior scans, and x-rays of Petitioner's left knee were normal. *Id.* The attending physician discussed the possibility of an occult rib fracture. *Id.* Petitioner was scheduled for an MRI and instructed to follow up with her primary care physician. *Id.* Petitioner followed up with her family healthcare provider, Dr. McMurphy-Quick, on May 19, 2015, who noted Petitioner's complaint of pain in her back, right hip, and left knee rated 8 out of 10 relieved only by her lying flat on her back with her knees elevated. (PX4, 5/19/15) She also reported chest pain and lack of bowel since the collision despite use of stool softeners and laxatives. *Id.* Examination again demonstrated multiple bruises, contusions, and abrasions to Petitioner's trunk and all four (4) extremities with healing bruises noted to her face. *Id.* She was given Prednisone for pain and instructed to return in two weeks. *Id.*

Petitioner's MRI was completed on May 27, 2015, and was mostly unremarkable; however, the radiologist noted, "MRI of the thoracic spine is somewhat compromised by patient motion and respiratory artifact." (PX5, 5/27/15) Petitioner returned to Dr. McMurphy the next day still in marked pain and reported that she felt like she was not healing. (PX5, 5/28/15) Dr. McMurphy reviewed the MRI and decided to refer Petitioner to an orthopedic physician to be sure of the findings. *Id.*

Petitioner came under the care of Dr. Don Kovalsky on June 3, 2015. (PX6, 6/3/15) He took a brief history of the injury and the diagnostic studies obtained thus far and performed a physical examination, after which he diagnosed Petitioner with a lumbosacral strain, Grade 2 sprain of the lateral collateral ligament of the left knee, and probable meralgia paresthetica of the right anterior thigh secondary to blunt trauma. *Id.* Petitioner was kept off work and referred for physical therapy. *Id.* He also placed Petitioner on a Prednisone taper followed by Mobic, Tramadol, and Acetaminophen. *Id.* If Petitioner continued to have anterior thigh numbness, he suggested an EMG nerve conduction study. *Id.* Petitioner participated in physical therapy until the end of June at St. Mary's Hospital and returned to Dr. Kovalsky on July 8, 2015, with continued pain in her left knee, pain in her thoracolumbar region, and numbness and tingling in her anterior thigh. (PX5, 6/11-30/15; PX6, 7/8/15) The venous Doppler sonogram of Petitioner's right lower extremity was negative, but Petitioner exhibited significant muscle spasm in her thoracolumbar area on examination, and Dr. Kovalsky prescribed more tramadol and outpatient therapy. (PX7, 6/25/15; PX6, 7/8/15) When this failed to improve her symptoms and she presented to Dr. Kovalsky with a limp on August 12, 2015, he recommended an MRI of her left knee, a left knee trigger point injection, and cessation of therapy on her knee. (PX6, 7/8/15) He believed, however, that Petitioner's back would continue to benefit from therapy. *Id.*

Petitioner presented for the trigger point injection on August 25, 2015, but the procedure was aborted due to severe hypersensitivity to touch resembling allodynia during the examination prior to the procedure. (PX6, 8/25/15) She also reported that although Dr. Kovalsky seemed to be focusing on her low back, her pain was in the upper mid back. *Id.* The MRI taken of Petitioner's knee the same day showed moderate edema about the ACL, suggestive of a sprain or partial tear without a full-thickness rent, findings suggestive of a sprain of the PCL and LCL, and chondromalacia of the medial and patellofemoral compartments with small joint effusion. *Id.* Dr. Kovalsky reviewed the MRI results and recommended that Petitioner see Dr. Houle within a week or two for treatment since Petitioner's Orthopedist, Dr. Lehman, had no upcoming appointments availability. (PX6, 9/8/15) He also noted that the thoracic trigger point injection was cancelled due to concern for pneumothorax. *Id.* Petitioner reported that although her neck was feeling better, she was getting stiffness and headaches. *Id.* She also reported exquisite pain in the right posterior thoracic region around T8 and right buttock pain. *Id.* Examination of the buttocks showed a dimple with the appearance of fat necrosis from blunt trauma. *Id.* He believed Petitioner would benefit further from therapy but stated that her left knee injury needed to be addressed first. *Id.* He referred Petitioner to Dr. Anthony Anderson, a pain management specialist, to again attempt a trigger point injection. *Id.*

On September 24, 2015, Petitioner saw Dr. Angela Freehill, who noted that she was "still having trouble walking" and noted associated swelling, popping, grinding, weakness, locking, catching and giving way aggravated by standing, walking, lifting, exercise, squatting, kneeling and/or stair use. (PX6, 9/24/15) Dr. Freehill noted that Petitioner had a near full-thickness ACL tear with edema according to the MRI. *Id.* She stated that although there were some remaining fibers, she did not believe that the ACL was intact or functioning well. *Id.* She recommended and administered a lidocaine injection and more physical therapy and kept Petitioner off work. *Id.* On September 29, 2015, Petitioner underwent a trigger point injection to her right

paraspinals at T9. (PX6, 9/29/15) Petitioner reported no improvement in pain following the procedure. *Id.* On October 9, 2015, Petitioner was referred for additional therapy for her lumbar spine and SI joint. (PX6, 10/9/15)

Petitioner was able to finally see her orthopedist, Dr. Richard Lehman, on October 27, 2015. (PX13, 10/27/15) After taking a history of the injury, noting positive findings during physical examination, and summarizing her medical records, he ordered an MRI Arthrogram of the left knee given the level of concern over the increased laxity found on examination. *Id.* On November 12, 2015, Petitioner underwent the MRI of her left knee, which showed a popliteal cyst without intra-articular loose bodies. (PX11) Dr. Lehman reviewed the MRI and recommended re-evaluation. When he saw Petitioner again on November 25, 2015, he noted she remained markedly symptomatic in her back and knee. (PX13, 11/17/15, 11/25/15) His assessment was thoracic spine dysfunction, herniated lumbar disc without myelopathy, and chondromalacia patellae of the left knee. (PX13, 11/25/15) Dr. Lehman recommended an EMG nerve conduction study, which was done on December 15, 2015, and was normal. (PX13, 11/25/15; PX10) As Petitioner continued to have pain in her back, Dr. Lehman recommended a bone scan and facet injection. (PX13, 12/15/15) He also administered another injection into her left knee. *Id.* The bone scan completed on December 21, 2015, showed degenerative uptake at her acromioclavicular joints. (PX11)

Petitioner presented to Dr. Coleman of Millennium Pain Management on January 4, 2016, with a chief complaint of back pain. (PX12) Petitioner's depression screening was mildly positive, and physical examination demonstrated evidence of spondylosis of the thoracic region. *Id.* He administered a bilateral thoracic facet injection at T4-5. *Id.* Petitioner returned to Dr. Lehman on January 21, 2016 and reported that although her left knee was getting stronger, she was still in significant pain and unable to walk up or down stairs. (PX13, 1/21/16) She also continued to complain of tenderness in her thoracic and lower spine. *Id.* Dr. Lehman recommended evaluation by a spine physician, Dr. Rutz, and potentially another PRP injection. *Id.*

Petitioner saw Dr. Kevin Rutz on January 26, 2016, who noted that Petitioner was not even able to sit comfortably for an hour. (PX14, 1/26/16) He noted Petitioner suffered mid back pain radiating towards the right side and to her right flank and right upper quadrant, as well as back pain radiating to her left posterior thigh and lateral calf. *Id.* Petitioner also suffered atrophy throughout her left lower extremity since the accident. *Id.* He reviewed the films taken of her spine thus far and noted the lack of any prior history of back problems prior to the motor vehicle accident. *Id.* He believed Petitioner needed a new MRI of her spine going all the way up to T10, given the unusual mechanism of injury, which he felt "could clearly cause significant forces on her spine." *Id.* He stated, "I think the primary challenge is diagnosing it." *Id.* He further stated, "In addition, I suspect that she will have a relatively difficult time with her condition performing activities as a truck driver, as often people with disc level injuries have significant discomfort with prolonged positioning, which is required for long term driving. I would give her a 20 pound restriction at this point and being allowed to change positions as needed to control her discomfort. In addition, she is currently taking narcotics for pain control, which would preclude her from driving a commercial driving [sic]." *Id.*

The new MRI completed on February 22, 2016, showed kyphotic curvature with anterior end plate on end plate articulation at T11-12, facet arthropathy L4-5 and L5-S1 with some annular disc bulge at L5-S1, and right greater than left foraminal stenoses. (PX15) Petitioner called Dr. Rutz's office with the results of same and was instructed to return for surgical consultation. (PX14, 1/26/16) Petitioner returned on March 8, 2016, at which time Dr. Rutz linked Petitioner's problem to her thoracic spine and discussed foraminal discectomy and fusion at T11-12. (PX14, 3/8/16) However, he first recommended a T11-12 transforaminal epidural steroid

injection to see if Petitioner would respond to non-operative measures. *Id.* Petitioner saw Dr. Lehman on March 10th and continued to have problems with her knee and back. (PX13, 3/10/16) He recommended continued physical therapy. *Id.* Petitioner presented to Excel Imaging on March 15, 2016 and underwent the recommended transforaminal ESI at T11-12. (PX18, 3/15/16)

On May 13, 2016, Dr. Rutz authored a letter addressing Petitioner's current condition in her spine. (PX14, 5/13/16) He again noted the lack of any previous spinal problems, noted objective findings of severe degeneration of Petitioner's disc at T11-12 with a right sided foraminal disc herniation, and her persistent complaints. *Id.* He stated that her spinal condition was causally related to her motor vehicle accident on May 13, 2015, including her radicular complaints. *Id.* He noted that although Petitioner had some pre-existing degeneration, this was aggravated and accelerated by her work accident. *Id.* Petitioner saw Dr. Rutz again on June 2, 2016, to discuss surgical intervention for the MRI findings of a right T11 foraminal disc herniation impinging her nerve root. (PX14, 6/2/16) Dr. Rutz recommended decompression and removal of the disc herniation and a fusion of the disc space. *Id.*

Petitioner underwent yet another injection at T11-12 for persistent pain. (PX18, 8/2/16) On August 11, 2016, Petitioner returned to Dr. Rutz's office and again reported significant pain into her right buttock and hip. (PX14, 8/11/16) Petitioner saw Dr. Lehman on August 25, 2016, and advised that she was not able to sit straight due to sharp, severe back pain. (PX13, 8/25/16) Petitioner was instructed to return for a PRP injection in four (4) weeks. *Id.*

Petitioner returned to Dr. Lehman on November 1, 2016, at which time he noted Petitioner's persistent findings on examination of pain with overpressure, grinding in the knee, and soreness in the knee. (PX13, 11/1/16) He recommended diagnostic arthroscopy, given the length of time Petitioner remained markedly symptomatic. *Id.* Petitioner returned to Dr. Lehman on January 3, 2017, and again reported severe and intense left leg pain and radicular pain across her low back from her left hip. (PX13, 1/3/17) This pain had worsened with time, at times bringing her to tears, and interfered with her sleep. *Id.* Petitioner was unable to differentiate between her knee and thigh pain and exhibited a knot in her left hip. *Id.* He recommended a left hip PRP injection and additional therapy. *Id.*

On January 4, 2017, Petitioner underwent a left knee arthroscopy, anterior and extra-articular anterior cruciate ligament reconstruction, and debridement of the lateral tibial plateau and lateral meniscus. (PX16, 1/4/17) On follow-up, Petitioner was much improved and was referred for therapy. (PX13, 1/18/17) Though her left knee pain improved, Petitioner continued to have back pain and hip pain and presented to Dr. Steven Stahle on February 21, 2017, for a PRP injection in her right hip. (PX13, 2/21/17) Examination showed tenderness in the right sacroiliac region, and Petitioner reported intense pain with twisting and lifting and spasm with extended ambulation. *Id.* On March 30, 2017, Petitioner returned to Dr. Lehman for follow up of her left knee surgery. (PX13, 3/30/17) Petitioner was making progress, but still had pain, superior lateral tenderness, tenderness over the lateral portal, and bursa inflammation over her sutures. *Id.* He administered a steroid injection. *Id.*

Dr. Stahle administered another PRP injection in Petitioner's SI joint for hip complaints on April 25, 2017. (PX13, 4/25/17) Petitioner also presented to Dr. Lehman with continued back complaints, particularly when driving, despite physical therapy. *Id.* On May 23, 2017, Petitioner reported no improvement following the injection. (PX13, 5/23/17) She continued to have radicular back pain with intermittent paresthesias despite

therapy and continued to report difficulty sleeping due to same. *Id.* Petitioner attempted to fully participate in strengthening exercise but was limited due to ongoing hip and lower back pain. *Id.* Dr. Lehman concluded that further therapy would only be beneficial after the cause of Petitioner's hip pain was discovered and referred her to Dr. Margherita for evaluation of same. *Id.*

Petitioner presented to Dr. Margherita at the West County Spine & Sports Medicine Center on June 14, 2017, with complaints of neck and back pain with bilateral leg weakness, and left leg pain and paresthesias. (PX17, 6/14/17) Dr. Margherita noted Petitioner had tried therapy, medication, and injection with no improvement in her symptoms. *Id.* After his physical examination demonstrated excessive anterior pelvic tilt, abnormal crest motion, and pain and tenderness with motion and palpation, Dr. Margherita's assessment was segmental and somatic dysfunction of the sacral region. *Id.* He scheduled Petitioner for a diagnostic right SI joint injection with ultrasound guidance. *Id.* Petitioner returned to Dr. Margherita for the procedure on June 21, 2017, at which time he again noted abnormal crest motion and painful medial rotation with a sacral sulcus tender to palpation. (PX17, 6/21/17) He administered the injection, but when Petitioner returned on July 5, 2017, she reported no improvement in her symptoms. (PX17, 7/5/17) Physical examination findings remained positive, so he recommended evaluation with an EMG study to assess Petitioner's nerve roots and better localize any pathology. *Id.*

Petitioner completed the EMG studies on July 11, 2017, which were normal, and followed up with Dr. Margherita on July 17, 2017. (PX17, 7/11/17; PX17, 7/17/17) Dr. Margherita noted that Petitioner's current pain was emanating from her ischial tuberosity. (PX17, 7/17/17) Since there was no guarantee injection would benefit Petitioner, Dr. Margherita released Petitioner from his care. *Id.*

Petitioner returned to Dr. Lehman on August 24, 2017 and reported an injury during the IME examination in Chicago. (PX13, 8/24/17) Petitioner reported that the physician "overworked her knee" and caused a pulling sensation, and she reported significant swelling and soreness three days after the incident and has since had radiating pain throughout her lower leg. *Id.* Petitioner's pain in her spine remained severe and interfered with the rehabilitation of her knee. *Id.* Dr. Lehman refilled Petitioner's Percocet and referred her to a spinal orthopedist at Washington University. *Id.*

On October 23, 2017, Petitioner returned to the Orthopedic Specialists, saw NP Vangergriff with persistent complaints of back pain, and was referred for a new MRI. (PX14, 10/23/17) The MRI completed October 26, 2017, at Excel Imaging was normal. (PX18, 10/26/17) On January 1, 2018, Dr. Lehman noted that although Petitioner's knee pain was improved, she still suffered from weakness and was unable to stand or walk for more than 20 minutes. (PX13, 1/16/18) Petitioner also continued to exhibit tenderness in her right buttock on examination of the SI joint. *Id.* Dr. Lehman stated that though Petitioner was making progress with her left knee, her tibial screw would remain sore for a while. *Id.* He reiterated that her back required treatment. *Id.* Dr. Lehman noted that Petitioner had a palpable bulging knot on her right lower back and that her symptoms would not abate with any conservative treatment. (PX13, 3/8/18) He recommended an isolated CT scan of her inferior pubis region with an accompanying bone scan. *Id.* In the meantime, he refilled her Percocet and prescribed a Lidoderm patch for her right hip pain. (PX13, 4/12/18)

Petitioner presented to St. Mary's Hospital for the prescribed bone and CT scan. (PX19, 7/5/18) The bone scan was normal, and the CT scan showed a subcutaneous area of encased fatty signal surrounded by a low signal rim of fibrous tissue or calcification believed to represent traumatic injury with fatty necrosis and

calcification or incomplete granuloma formation. *Id.* On July 10th, Dr. Lehman stated, "Patient cannot sit or stand without pain and this is very concerning to me. The patient has extreme difficulty with performing age-appropriate activities of daily living such as ambulation of stairs and walking. . . I believe she will require an obturator nerve decompression procedure to be done by Dr. Hagan. . ." (PX13, 7/10/18)

On August 3, 2018, Petitioner presented to Dr. Matthew Bradley of Midwest Bone and Joint in follow-up of the June 7th IME appointment with complaints of right neck pain, right hip pain, and low back pain. (PX20, 8/3/18) He noted that Petitioner had not received the ischial bursa injection he recommended, and continued to have pain to palpation and when sitting on her right ischial tuberosity. *Id.* He again recommended the ischial bursa injection and advised Petitioner to continue treating with her physician for her neck complaints. *Id.*

On August 21, 2018, Petitioner presented to St. Anthony's Memorial Hospital for the right hip ischium injection. (PX21, 8/21/18) Petitioner returned to Dr. Bradley in follow up on August 30th, and reported resolution of her pain to palpation over the ischial tuberosity. (PX20, 8/30/18) She continued to have pain, however, along her SI joint with sitting. *Id.* Dr. Bradley noted that Petitioner suffered no intervening trauma. *Id.* He agreed that consultation with a nerve specialist was necessary and instructed Petitioner to return following her consultation with Dr. Hagan. *Id.*

Dr. Hagan saw Petitioner on October 1, 2018, took the history of the injury and her care and treatment for her symptoms and complaints thus far, and noted increased swelling with marked tenderness at the sacral sulcus and sacroiliac joint along her piriformis muscle and sciatic nerve with notable cavity. (PX22, 10/1/18) His impression was right posterior thigh/gluteal pain; right piriformis syndrome and known lumbar spine pathology. *Id.* He explained to Petitioner that she appeared to have irritation of her piriformis related to her sciatic nerve and posterior gluteal nerve which he believed was a direct result from her original injury in 2015. *Id.* He recommended that Petitioner move forward with the surgical intervention recommended by Dr. Rutz and then treat her symptoms related to her piriformis afterward with a diagnostic and therapeutic injection of her piriformis insertion. *Id.* He noted that if Petitioner responded well to the injection, she would be a candidate for surgical decompression of her piriformis and sciatic nerve. *Id.* He indicated he would hold treatment "until her lower back has been cleared." *Id.*

On October 9, 2018, Dr. Rutz evaluated Petitioner and remained of the opinion that her thoracic pathology at T11-12 correlated with her radicular complaints into her flank area, but he did not believe there was any evidence of nerve impingement in her lumbar spine based on his review of her previous MRIs. (PX14, 10/9/18) Petitioner then returned to Dr. Bradley on October 23, 2018, with continued complaints of right hip pain. (PX20, 10/23/18) She advised him that the SI joint injections helped for a few hours and brought a note from Dr. Hagan indicating that she would benefit from psoas injection but needed to have complete work-up for her spine completed first. *Id.* Dr. Bradley sought to review all of Petitioner's recent treatment records prior to recommending further care. *Id.*

On October 30th, Petitioner saw Dr. Felix Ungacta in Dr. Bradley's office and noted Petitioner continued to have pain, currently rated 8 out of 10, in her mid-back and neck. (PX20, 10/30/18) Physical examination demonstrated tenderness to palpation in the right trapezial, right latissimus dorsi areas. *Id.* She requested additional medication and was given a prescription for Tizanidine and was given a work slip. *Id.* Petitioner returned yet again on November 8, 2018, with persistent pain rated 6 on a scale of 10 in her neck, low back, and

right buttock. (PX20, 11/8/18) Petitioner reported that her neck pain radiated down her spine, and that this pain had been present since the May 13, 2018 accident. *Id.* Dr. Hagan wanted to proceed with surgery; but he wanted Petitioner's spinal problems addressed first, and Dr. Rutz had nothing further to offer Petitioner. *Id.* Petitioner requested referral to another spine specialist. *Id.*

Dr. Lehman saw Petitioner again on December 6, 2018, with complaints of right hip pain, and he noted that Dr. Hagan believed Petitioner's back required treatment prior to her hip. (PX13, 12/6/18) Petitioner continued to have significant symptoms in her back and hip. *Id.* He noted that while Petitioner was at maximum medical improvement with respect to her knee, he did not provide a release date for her hip. *Id.* He stated that Petitioner's release date for light duty work and full duty work were "TBD" with respect to her hip. *Id.* The accompanying work slip noted that Petitioner was to remain off work. *Id.*

Petitioner came under the care of Dr. Matthew Gornet on January 17, 2019, at the referral of Dr. Bradley. (PX23, 1/17/19) He took the history of Petitioner's injury and complaints and noted that she was having increasing pain in her neck, shoulder, and arm after she attempted to return to work light duty. *Id.* His physical examination was positive for pain in both trapezii, particularly the right trapezius and right arm, and decreased range of motion to the right, and decreased flexion/extension. *Id.* Deep tendon reflexes were trace and the motor examination revealed decreased biceps on the right and left at 4/5 and decreased wrist dorsiflexion and volar flexion on the on the left side at 4/5. *Id.* Based on his review of the photographs of the accident and Petitioner's progressive symptoms, he stated:

> Based on the notes provided, I do believe her current symptoms are causally connected to her work related motor vehicle accident. With a severe trauma such as this, her symptoms may manifest over time and it appears for the most part they have focused on her thoracic spine as the main etiology. I have discussed with her that a cervical spine problem can also refer pain between the shoulder blades or base of her neck. At this point, I have recommended a new MRI under whiplash protocol and a motion analysis. I will see her back and try to obtain all of the previous studies including the previous MRI from Excel Imaging. I do not have Dr. Bradley's notes. We will try to obtain previous studies from Imaging Partners. We have dispensed today Meloxicam 7.5 mg p.o. b.i.d. X 60 days and Cyclobenzaprine 10 mg p.o. q.h.s. X 60 days. I have kept her off work completely for right now until I can further understand her problem. Again, I do believe her current symptoms and requirement for treatment are causally connected to her injury as described. *Id.*

Petitioner obtained an MRI of her cervical spine on March 4, 2019, which showed: 1) a central annular tear and protrusion at C6-7 with a small caudally extruded disc fragment in the midline and severe bilateral foraminal stenoses; 2) a C5-6 circumferential disc bulge with a small caudally extruded disc fragment in the midline and bilateral foraminal protrusions resulting in severe bilateral foraminal stenoses, ventral cord flattening, and central canal stenosis; and 3) a C3-4 central broad-based protrusion that extends into both foramina resulting in moderate to severe right greater than left foraminal stenosis. (PX24, 3/4/19) Petitioner presented to Dr. Gornet afterwards, and he noted that Petitioner's examination was unchanged from her last visit. (PX23, 3/4/19) After reviewing the results of the cervical spine MRI, Dr. Gornet also reviewed an old MRI of Petitioner's lumbar spine from Imaging Partners of Missouri, which he noted showed some central protrusion at L5-S1 and degeneration at T11-12. *Id.* He recommended an injection of Petitioner's neck at C6-7 and C5-6, and potentially disc replacement if Petitioner failed conservative care. *Id.*

Petitioner underwent the recommended injections at C6-7 and C5-6 respectively on March 26th and April 9th of 2019 and returned to Dr. Gornet on May 9, 2019 for follow-up. (PX25, 3/26/19, 4/9/19; PX26; PX23, 5/9/19) Dr. Gornet noted that Petitioner obtained only temporary relief rather than sustained relief from the injections. (PX23, 5/9/19) He also reviewed the IME report Petitioner brought her authored by Dr. Singh and disagreed with his opinion that Petitioner's condition consisted of resolved strains. *Id.* He noted that his opinion did not comport with the timeline of events, Petitioner's clinical course, and the objective findings on MRI. *Id.* He stated that based on the failure of conservative care to resolve Petitioner's complaints, her best option was surgery. *Id.* On August 15, 2019, Dr. Gornet saw Petitioner and reiterated his recommendation for surgery. (PX23, 8/15/19)

Petitioner testified that she hurts constantly, particularly with increased activity. (T.18) She also stated she is unable to sit or stand for prolonged periods of time without an increase in her pain level. (T.18) She cannot currently use her CDL, because she cannot pass the physical. (T.19) Respondent had Petitioner examined on several occasions in Chicago. (T.14) Expenses for the trips were submitted as Petitioner's Exhibit 33 (PX33). (T.16-17)

Respondent obtained a records review for an opinion with respect to Petitioner's spinal condition from Dr. Kern Singh on July 13, 2016, and he was deposed by Respondent on November 30, 2016. (RX1, p.9) Based upon his review of Petitioner's records, he did not agree with Dr. Rutz's interpretation of Petitioner's February 22, 2016 MRI as demonstrating a foraminal disc herniation at T11-12. *Id.* at 13. He stated there was no spinal cord compression from a disc herniation, but a less smooth disc at T11-12 representing age-related change. *Id.* at 13. He also believed that any herniation at that level would not correlate with Petitioner's symptoms. *Id.* at 13-14. He stated that the area that Dr. Rutz circled on Petitioner's MRI was not a herniation, but the T12 exiting nerve root at that level, and he stated that there was no pathology that would indicate a need for surgery. *Id.* at 14-15. He believed Petitioner suffered only a muscular strain and did not require fusion of her disc space at T11-12. *Id.* at 17. He also believed that fusion of that level was a high-risk surgery not routinely done in the community. *Id.* at 17.

On cross-examination, Dr. Singh testified that "medicolegal work" was the largest portion of his practice. *Id.* at 22. He testified that all of his medical legal work was focused on workers' compensation, and that the vast majority of his IMEs were done on behalf of Respondents. *Id.* at 22-23. He acknowledged that he did not meet or examine Petitioner, and that he did not review or possess all of Petitioner's medical records. *Id.* at 23-24. He also did not see the photographs of the accident. *Id.* at 23. He admitted that Petitioner's complaints of thoracic pain radiating around the right chest wall would be in fact consistent with a potential herniated disc in the thoracic spine. *Id.* at 25. He did not possess the March 8, 2016, note of Dr. Rutz describing wraparound pain towards Petitioner's belly button. *Id.* at 26. Though he felt that Petitioner's off-work period was prolonged, he admitted that his opinion was limited to the spine and that Petitioner had other injuries which made her condition "less amenable to returning to work." *Id.* at 27.

Dr. Singh testified that he did believe that Petitioner's thoracic and lumbar strains were caused by the motor vehicle accident, and further acknowledged that "it's hard to differentiate the thoracic and lumbar region..." *Id.* at 28. He did not believe, however, that the accident aggravated Petitioner's thoracic disc degeneration. *Id.* at 29. He stated he believed so, because "the thoracic discs don't move. They're not meant to move. So unless it was accompanied by a fracture that extended into the disc space, then I would say that there was no aggravation of that disc space." *Id.* at 29. He subsequently admitted that it was "theoretically possible"

but he did not believe it to be so in this case absent fracture. *Id.* at 29. Although he earlier stated that the thoracic discs don't move, he testified:

> Q. Okay. So do you always link a fracture to aggravation of preexisting disc disease?
>
> A. No. In the cervical and thoracic spine, which are mobile segments, it can happen not uncommonly. The thoracic spine is very unique in that it's protected space and that's why pathology and injuries of the thoracic spine are very rare. *Id.* at 29.

He admitted that Petitioner had no thoracic or lumbar complaints prior to the May 13, 2015, work injury. *Id.* at 29-30. However, Dr. Singh also stated in his report that "any activity would have rendered the T11-12 disc space to be symptomatic," which he explained in his testimony to mean that if Petitioner's disc space was unstable, then any activity at all would have rendered it symptomatic. *Id.* at 30. He then stated that he believed that disc space was neither symptomatic before the accident nor after, even though Petitioner complained of symptoms which he admittedly testified were consistent with a potential disc herniation at that level. *Id.* at 30:11-24. He again confirmed that he saw no photos of the accident, but stated that these would not have changed his opinion. *Id.* at 36.

Dr. Singh testified by way of deposition again on June 27, 2018, following an independent medical examination he conducted on July 31, 2017. (RX2, p.7) He testified that Petitioner reported substantial pain in her neck and upper back rated 7-8 out of 10 with burning, throbbing, numbness, and tingling into both of her legs. *Id.* at 9. He testified that he found no abnormal findings during his examination, and his assessment was cervical and lumbar muscle strain. *Id.* at 10. He believed these to be related to her motor vehicle accident on May 13, 2015, but concluded that Petitioner had reached maximum medical improvement "approximately four to six weeks from the date of injury consistent with soft tissue strain." *Id.* at 11. He did not believe she required any further treatment with regard to her cervical or lumbar spine. *Id.* at 11-12.

On cross-examination, Dr. Singh testified that he still had not been provided with any photographs of the motor vehicle collision. *Id.* at 16. When asked whether he would characterize Petitioner's collision as a severe accident, he declined and stated, "I would say it's a high energy collision." *Id.* at 16. He acknowledged that the photos would perhaps help him "understand the mechanism," but did not believe they would ultimately change his opinion. *Id.* at 16. He agreed that a high energy collision or incident could cause a disc herniation to any part of the spine – cervical, thoracic, or lumbar. *Id.* at 16. He also acknowledged it could aggravate a preexisting condition and provoke symptoms. *Id.* at 17. He also admitted that he reviewed no records indicating that Petitioner had any problems or symptoms in any part of her spine prior to this accident. *Id.* at 17-18. He acknowledged that Petitioner has had persistent complaints since the accident. *Id.* at 20-21. He only had one additional note from Dr. Rutz's office for review at the time he authored his second report. *Id.* at 18-19. He also testified that he did not see Dr. Lehman's record of November 25, 2015, diagnosing Petitioner with thoracic spine dysfunction and herniated discs, but stated that this would not be significant to him. *Id.* at 21-22. He also believed that Petitioner had reached maximum medical improvement prior to the point that Dr. Lehman diagnosed her with a disc injury and recommended further treatment. *Id.* at 22-23. He acknowledged that he did not identify any Waddell signs during his examination. *Id.* at 23.

Dr. Singh did not believe it possible for a disc injury to present but not manifest on an MRI study. *Id.* at 25. He acknowledged, however, that pathology could be present and be asymptomatic, and that a patient can suffer from structural back or neck pain without having any neurologic findings. *Id.* at 29. Even though

Petitioner continued to have symptoms 3 years out from her accident, he did not believe that her condition was inconsistent with a sprain/strain. *Id.* at 27. He stated, "Ms. Reid can have complaints of anything she wants subjectively. I would state that objectively her strain had resolved, and her pain complaints are not objectifiable [sic]. *Id.* at 27. He stated that he could not answer the question of whether a patient could have an increase in his or her symptoms without an appearance of change on the MRI. *Id.* at 28. He reiterated his opinion that Petitioner's current complaints had nothing to do with the motor vehicle accident. *Id.* at 29.

Dr. Singh testified by way of deposition for a third and final time on July 17, 2019, regarding the contents of an addendum report authored on May 3, 2019, following an additional records review that Respondent requested for an opinion regarding Petitioner's cervical spine. (RX15, p.5-6) His diagnosis regarding Petitioner's cervical spine was degenerative disc disease at C5-6 and C6-7 with bilateral foraminal stenosis and cervical muscular strain. *Id.* at 6. He reached said conclusion based on his findings of loss of disc height on the MRI and Petitioner's contemporary complaints of neck pain at the time of the injury. *Id.* at 6. He testified that he believed the most injury Petitioner sustained was a soft tissue strain, and he did not feel that her disc degeneration was aggravated, exacerbated, or accelerated by the motor vehicle accident. *Id.* at 7. When asked the basis of this opinion, he stated that Petitioner would have developed associated radiculopathy had an aggravation occurred, and he did not observe any upper extremity complaints in the records he reviewed or note any at the time of his examination two years later. *Id.* at 7. He did not believe she needed any restrictions with respect to her cervical spine, and he continued to believe Petitioner was at maximum medical improvement. *Id.* at 8.

On cross-examination, Dr. Singh acknowledged that he did not examine Petitioner's cervical spine. *Id.* at 12. He also testified that disc replacement was effective in treating patients suffering from stenosis and radiculopathy. *Id.* at 13-14. He acknowledged that Petitioner's neck symptoms were consistent with the MRI findings. *Id.* at 14-15. He also admitted that it was possible for the C6-7 pathology to cause pain in the upper back. *Id.* at 15. He acknowledged that it was very difficult to date MRI findings, and that Petitioner had no prior record of cervical spine complaints prior to the accident. *Id.* at 16. He acknowledged that a patient can suffer structural injury to the spine without necessarily having nerve root impingement. *Id.* at 18. Although he did not note the same findings of decreased biceps strength and reduced wrist dorsiflexion and volar flexion, he acknowledged that said findings noted by Dr. Gornet would indicate involvement of the C6 nerve root. *Id.* at 19. He acknowledged that Petitioner was persistently symptomatic in the records he reviewed, and that he had no disagreement with Petitioner's course of treatment, including the injections administered and the disc replacement proposed. *Id.* at 20. However, he remained of the opinion that Petitioner suffered only a sprain/strain of the cervical spine from the accident. *Id.* at 21.

Respondent requested a records review from Dr. Nikhil Verma with respect to Petitioner's left knee condition, and he authored a report containing his opinion on September 4, 2016. (RX3, p.8) He did not examine Petitioner, but reviewed her records and concluded his assessment with a diagnosis of suspected internal derangement. *Id.* at 9. He recommended examination under anesthesia, diagnostic arthroscopy, and possible ligament reconstruction. *Id.* at 10. Following his initial report, he had the opportunity to examine Petitioner and generated a supplemental report dated July 31, 2017. *Id.* at 10. In said report, he noted tenderness over the tibial screw, complaints of back pain during standing, and complaints of hip pain during ambulation. *Id.* at 12. His assessment was subjective complaints with hardware pain and limitations in strength. *Id.* at 13. He did not believe that Petitioner required any further formal treatment at that time based on the time that had elapsed following her surgery, and he recommended over-the-counter medication for her remaining complaints.

Id. at 13-14. He testified that Petitioner reached maximum medical improvement approximately six (6) to eight (8) months following her surgery in January of 2017, which was approximately the time of his IME evaluation. *Id.* at 14-15.

On cross-examination, Dr. Verma testified that he performs approximately five (5) to seven (7) IMEs per week, 80% of which are on behalf of defense parties. *Id.* at 16. He also never saw any photographs of the accident and did not solicit her account of the accident when he examined her in July of 2017. *Id.* at 17-18. He agreed that Petitioner suffered a severe, high-energy collision and causally related Petitioner's knee condition to same in his initial report. *Id.* at 18-19. He also acknowledged that there was no evidence that Petitioner was symptomatic prior to the accident, and that she complained of pain over her hardware site at the time of his examination. *Id.* at 19. He differentiated these complaints, however, from "mechanical symptoms." *Id.* at 19. He acknowledged that in his initial report, he stated that Petitioner may require ACL reconstruction if her knee was unstable during the diagnostic arthroscopy he recommended. *Id.* at 20.

Dr. Verma admitted that hardware pain was a post-surgical complaint associated with the reconstruction procedure. *Id.* at 21. He did not believe there were any treatment options for that complaint. *Id.* at 21. He also believed that quadriceps atrophy was a typical finding after ACL reconstruction. *Id.* at 22-23. He did not believe that Petitioner's back or hip condition hindered her progress following knee surgery, but stated: "Now, that's not to say that she may not have limitations in functional capacity based on other joints; but from a knee standpoint alone, she was recovering as one would expect." *Id.* at 23-24. He had no opinion with regard to Petitioner's hip or back conditions but agreed that all of Petitioner's care and treatment rendered to her knee was reasonable, necessary, and causally related to the 2015 motor vehicle injury. *Id.* at 24.

Petitioner took the deposition of Dr. Kevin Rutz on September 30, 2016. (PX27) He testified that Petitioner was referred to him by Dr. Lehman when she failed conservative management of her lumbar and thoracic complaints. *Id.* at 8-9. He testified that his differential diagnosis at the time he initially evaluated Petitioner and reviewed the imaging studies she had to date was low back pain, thoracolumbar pain, possibly secondary to an injury at T11-12, and possible left-sided radiculopathy. *Id.* at 11. He testified that Petitioner had no prior history of back pain. *Id.* at 11-12. After the new thoracic MRI he recommended was obtained and demonstrated a disc herniation in her foramen at T11-12, he recommended transforaminal epidural steroid injection at that level. *Id.* at 14-15. This was not noted on the radiologist's report, so he took a copy of the MRI marked as an exhibit and indicated the injury with a red circle. *Id.* at 16-17. Dr. Rutz also noted degenerative changes at that level. *Id.* at 18-19.

Dr. Rutz was unable to form a diagnosis with respect to Petitioner's lumbar radiculopathy but testified that the herniated nucleus pulposus thoracic was commensurate with a disc herniation and consistent with Petitioner's other symptoms. *Id.* at 19, 22, 25. He testified that he could not tell if they performed the injection in the exact manner than he recommended, but ultimately Petitioner failed to improve with injection. *Id.* at 21-22. He testified that Petitioner remained unable to work up to the time he recommended surgery by way of T11-12 decompression with removal of the disc herniation and fusion with instrumentation, and that her status remained the same at the time of his deposition. *Id.* at 21-24. He testified that Petitioner's trucking accident caused the foraminal disc herniation at T11-12, aggravated her preexisting degeneration and made it symptomatic, and caused her need for the recommended thoracic surgery. *Id.* at 24-25.

On cross-examination, Dr. Rutz testified that he recommended the surgery whether or not Petitioner underwent the transforaminal injection in the manner specified, he "[didn't] think it will long-term fix the problem." *Id.* at 29. When asked whether he thought it would offer Petitioner some benefit, he testified that it would provide short-term relief but would not be "curative." *Id.* at 29-30. When asked about his diagnosis of a thoracic herniation and the lack of notation thereof by the radiologist, Dr. Rutz testified that he reviewed the actual films and characterized them as a "tricky read." *Id.* at 32. He stated:

> But I think it's a tricky read, because I personally missed it the first time when I looked at it. And then when getting the second MRI, which was a better MRI, I could see it. And then when I went back today and compared the two, it was interesting that there were certain sequences that they didn't run off the first MRI that were run on the new MRI, which made it a lot easier for me to see the pathology. So at 20/20 hindsight, then I look back, and on certain sequences I can see it, but it's much more evident on the new MRI. *Id.* at 32.

Dr. Rutz characterized Petitioner's thoracic degeneration as moderate and agreed that it existed before the accident but testified that he did not believe the herniation was present beforehand. *Id.* at 34-35.

Dr. Matthew Gornet testified by way of deposition on September 9, 2019. (PX26) Dr. Gornet testified that he actively participates in FDA IDE clinical trials, has written numerous publications, and lectures worldwide on spine care. *Id.* at 6-8. He testified that he specializes in disc replacement surgery and treating patients, but occasionally performs independent medical evaluations at the request of plaintiff or defense parties once or twice a month. *Id.* at 9. Dr. Gornet testified that in addition to performing his own evaluation and generating treatment records, he reviewed the records of Dr. Rutz, Dr. Kovalsky, Dr. Lehman, and the photographs of the motor vehicle accident. *Id.* at 10. He testified that from his review of records, Petitioner's symptoms she complained of when she presented to him were consistent with the symptoms she reported to all other physicians following the collision. *Id.* at 12. He also noted no evidence of prior symptoms or treatment for Petitioner's neck or low back. *Id.* at 12.

Dr. Gornet testified that his examination of Petitioner revealed that she suffers from weakness and irritation of the C5, 6, and C7 nerve roots. *Id.* at 13. He stated that the accident Petitioner was in could have easily caused injuries in the spine, and that the pain between her shoulder blades was most likely referred pain. *Id.* at 14-15. He also indicated that her degeneration in her spine was age appropriate, but made her more susceptible to disc injury. *Id.* at 15-16. He thus recommended an MRI of Petitioner's cervical spine under a whiplash protocol and recommended a motion analysis. *Id.* at 16-17. The MRI showed structural injury of the spine at C3-4, C5-6, C6-7, and potentially at C4-5. *Id.* at 18, 19. He testified that Petitioner's lumbar spine MRI also showed central disc protrusion at L5-S1, and disc degeneration at T11-12, which he believed was aggravated as a result of the injury. *Id.* at 18-20. He testified that since Petitioner had no problems prior to the accident, was working full duty, suffered a severe injury, had unabating symptoms since then, and the lack of any intervening accidents or injuries led him to believe conclusively that her symptoms and condition were still related to the motor vehicle accident of May 13, 2015. *Id.* at 17-18.

Dr. Gornet testified that since Petitioner failed to improve with conservative care, the only real option for Petitioner to improve at this point is surgical intervention. *Id.* at 21. Dr. Gornet recommended disc replacement at C3-4, C5-6, and C6-7. *Id.* at 23. Although there was strong suggestion of disc injury at C4-5 based on quantitative motion analysis, Dr. Gornet testified that he would recommend a new MRI scan to see if

Petitioner's pathology was increasing prior to determining whether to incorporate that level in the procedure. *Id.* at 23. He remained hopeful that Petitioner would be able to return to work full duty following her treatment, but also stated:

> We know that the longer this drags out the more difficult it is to return someone back to full duty. But my recollection of this patient is she was fairly motivated and wants to go back. I think if we can provide her with this type of benefit, there's a strong chance we could get back to work full duty, at least as an over-the-road truck driver, on touch freight, something like that. *Id.* at 25-26.

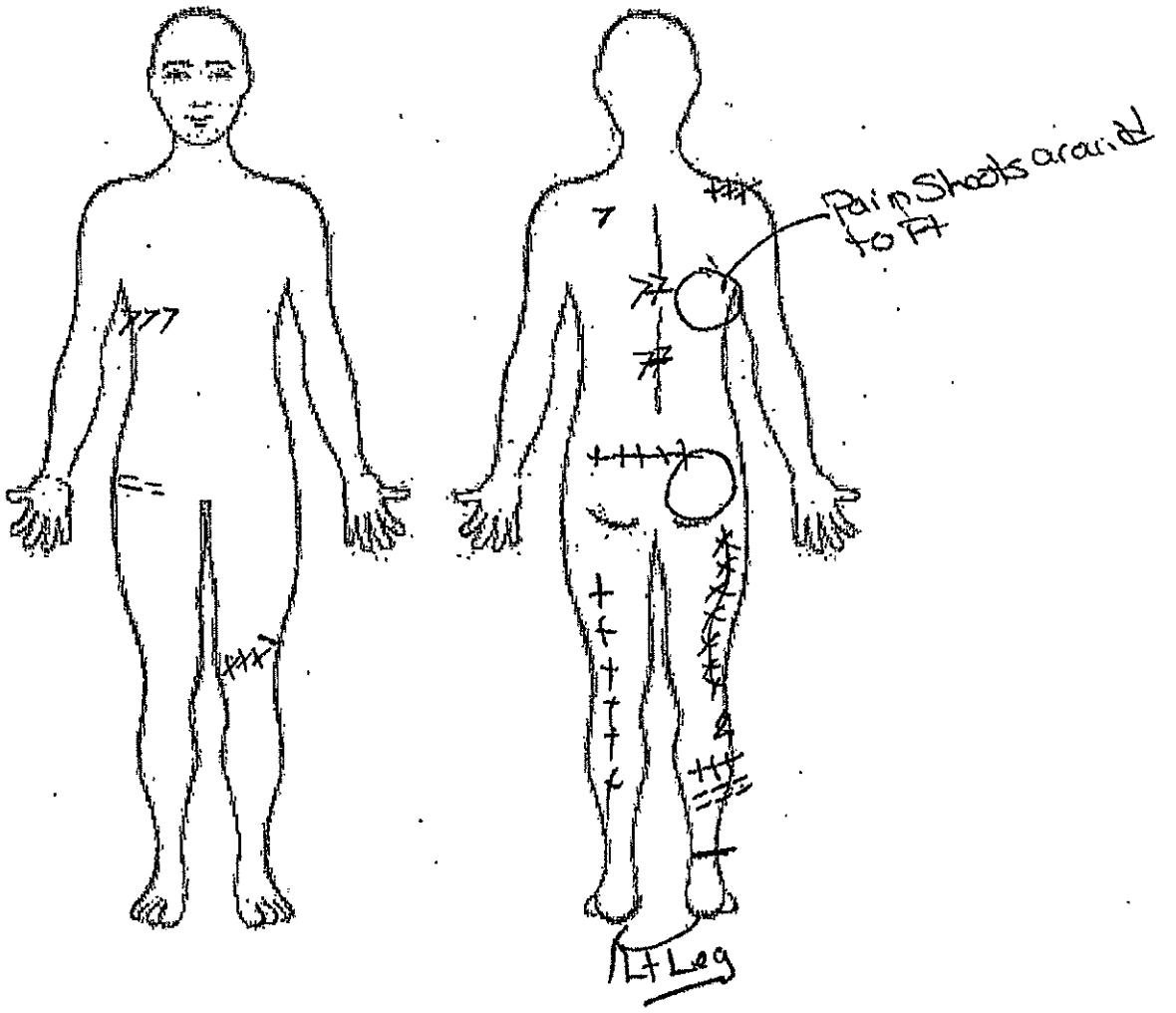
With respect to her lumbar spine, Dr. Gornet testified that his plan was to obtain a high resolution MRI, given that the machine that performed her previous scan was only 1.5 Tesla in strength, more than 20 years old, and was currently being replaced. *Id.* at 26-27. He recommended MRI spectroscopy and a CT discogram to see if she would be indicated for L5-S1 disc replacement. *Id.* at 26. On cross-examination, he testified that he placed Petitioner off work rather than restrict her to sedentary duty, "Because sedentary duty in this situation oftentimes aggravates people. . . Prolonged fixed head positions tend to really aggravate these people. There's not a lot they can do." *Id.* at 34. He further stated, "I would think it would be difficult for her to maintain gainful employment right now." *Id.* at 35-36.

CONCLUSIONS

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). The law also holds that accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (2003). If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967); see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 362 N.E.2d 339 (Ill. 1977).

The Arbitrator finds, based on the evidence in the record, that Petitioner suffered a severe motor vehicle collision that resulted in her current condition of ill-being. While it is unfortunate that it has been difficult to ascertain the exact cause of Petitioner's condition of ill-being, with sufficient time and adequate referrals, Petitioner's physicians have objectively demonstrated through imaging studies that she suffered injury to her neck, thoracic spine, and lumbar spine as a result of the motor vehicle collision. (PX13; PX14; PX15; PX23; PX24) The Arbitrator also notes that Petitioner has consistently complained of symptoms that correlated with injury to the cervical spine, (radicular shoulder complaints), thoracic spine, and lumbar spine, and her complaints are corroborated by the medical records submitted into evidence. *See below pain diagram from the records of Dr. Rutz dated January 26, 2016, contained in Petitioner's Exhibit 14.*



(PX14, 1/26/16).

In accordance with Petitioner's credible and persistent complaints and the objective medical evidence, the Arbitrator places significant weight on the opinions of Dr. Gornet and Dr. Rutz with respect to Petitioner's spine, as both of these physicians identified objective evidence through MRIs that correlated with Petitioner's symptoms. Dr. Gornet and Dr. Rutz believed that Petitioner suffered new injury and an aggravation of her preexisting asymptomatic conditions. The Arbitrator is unpersuaded by the opinion of Dr. Singh, who believed that Petitioner suffered only a strain that has since resolved, when Petitioner, who was asymptomatic prior to the collision, has at no point returned to baseline following the accident. Dr. Verma, on the other hand, agreed that Petitioner's knee condition was causally related to the injury. Consequently, the Arbitrator finds that Petitioner met her burden of proof on the issue of causal connection.

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

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

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

Based upon the above findings as to causal connection, the Arbitrator finds Petitioner entitled to recovery for the expenses contained in the record. At no point has Petitioner reached maximum medical improvement since the injury, and she has not exhausted all reasonable treatment options. Even Dr. Singh, who disagreed with respect to causation, testified he agreed that Petitioner's past and proposed course of care was reasonable for her condition. (RX15, p.20)

Respondent shall pay outstanding reasonable and necessary medical services of $193,669.48, as set forth in Petitioner's exhibit 1, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall further authorize and pay for prospective medical care as recommended by Dr. Gornet, as provided in Sections 8(a) and 8.2 of the Act.

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

The law in Illinois holds that "[a]n employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit." *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 561 N.E.2d 623 (Ill. 1990). The ability to do light or restricted work does not preclude a finding of temporary total disability. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 561 N.E.2d 623 (Ill., 1990) citing *Ford Motor Co. v. Industrial Comm'n*, 126 Ill.App.3d 739, 743, 467 N.E.2d 1018, 81 Ill.Dec. 896 (1984). Since neither Dr. Rutz nor Dr. Gornet have concluded Petitioner's care or placed her at maximum medical improvement, Petitioner has clearly not reached maximum medical improvement and remains entitled to temporary total disability benefits.

Respondent shall pay Petitioner temporary total disability benefits of $666.67/week for 231 3/7 weeks, commencing 5/15/15 through 10/24/19, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $89,998.98 for temporary total disability benefits that have been paid.

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Bobbie G. Reid,
Petitioner,

vs.

Ed Lewis Trucking, Inc.,
Respondent.

No. 15 WC 38303
21 IWCC 0228

ORDER

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

The Commission finds that said Decision should be recalled for the correction of a clerical/computational error.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Commission Decision dated May 7, 2021, is hereby recalled pursuant to Section 19(f) of the Act. The parties should return their original decisions to Commissioner Thomas J. Tyrrell.

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

MAY 11, 2021

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

TJT/pmo
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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

Bobbie G. Reid,

Petitioner,

vs.

NO: 15 WC 38303
21 IWCC 0228

Ed Lewis Trucking, Inc.,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, temporary total disability, medical expenses and prospective medical treatment, affirms the Decision of the Arbitrator, as modified herein, said decision being attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission modifies the Decision of the Arbitrator to show that Petitioner failed to prove that the MRI spectroscopy recommended by Dr. Gornet is both reasonable and necessary under the circumstances. More to the point, the Commission questions the medical efficacy and reliability of such a study and is reluctant to countenance same. Thus, while the Commission affirms the Arbitrator's prospective medical treatment award with respect to the remainder of Dr. Gornet's recommendations, the Arbitrator's award with respect to the MRI spectroscopy is hereby vacated.

Furthermore, the Commission corrects a clerical error in the Arbitrator's decision to show that Petitioner was temporarily totally disabled from 5/15/15 through 10/24/19, for a period of 231-6/7 weeks (not 231-3/7 weeks).

All else is otherwise affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed 12/11/19, is hereby affirmed and adopted with changes as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $666.67 per week for a period of 231-6/7 weeks, from 5/15/15 through 10/24/19, 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 $193,669.48 for reasonable and necessary medical expenses under §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall authorize and pay for the prospective medical treatment prescribed by Dr. Gornet, with the exception of the MRI spectroscopy, 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 of the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 11, 2021

/s/ *Thomas J. Tyrrell*

TJT: pmo
o 2/9/21
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/s/ *Maria E. Portela*

DISSENT

The fact that Petitioner sustained an accident on May 13, 2015, is undisputed. What is disputed is the extent of injury to Petitioner's cervical, thoracic and lumbar spine stemming from this accident on May 13, 2015. I disagree with the majority's opinion finding that Petitioner is entitled to "recover for the expenses contained in the record." (ArbDec.17) I further disagree with the conclusion that "[a]t no point has Petitioner reached maximum medical improvement since the injury, and she has not exhausted all reasonable treatment options." *Id.* The majority concluded that the Petitioner "suffered injury to her neck, thoracic spine, and lumbar spine as a result of the motor vehicle accident." (ArbDec. 15) I would add that Petitioner suffered injury to her left knee as a result of the work accident. While I disagree with the award of "the expenses contained in the record," I take no issue with the award of medical expenses related to the Petitioner's left knee condition for treatment with Dr. Lehman which I believe is causally related to the work accident. I would also find that Petitioner reached maximum medical improvement (MMI) for her left knee injury on July 31, 2017, the date of Dr. Nikhil Verma's §12 evaluation. Dr. Verma examined Petitioner's left knee, and testified that she needed no further treatment at that time based upon the time frame after surgery, given the procedure performed and her clinical objective examination which was consistent with the time frame after surgery. Dr. Verma testified that there was no need for further medical management at that time and that she could return to work full-duty with no restrictions with respect to her left knee. (RX3, pp. 13-15, 25-26)

On July 31, 2017, Dr. Verma was of the opinion that Petitioner would have reached maximum medical improvement (MMI) six to eight weeks following the surgery by Dr. Lehman on January 4, 2017. (RX3, pp.14-15) Dr. Verma also did not believe Petitioner required further formalized treatment for her left knee and found no objective basis to suggest ongoing work restrictions despite her ongoing subjective complaints. (RX3, pp.13-14) While Dr. Lehman, the surgeon, did not reference the fact that Petitioner had reached MMI until his office note dated December 16, 2018, the record clearly shows that Petitioner's treatment leading up to that date was focused primarily on her ongoing hip and spinal issues, as evidenced by multiple referrals by Dr. Lehman to various specialists. (PX13)

I would also find that Petitioner reached MMI from her cervical and lumbar spine sprain/strains by November 12, 2015, the date of Dr. Frank Petkovich's opinion report and from her thoracic spine sprain/strain six weeks thereafter, on December 23, 2015. Therefore, I respectfully dissent from the majority opinion regarding the award of medical treatment after December 23, 2015, and any and all treatment by Dr. Matthew Gornet to Petitioner's cervical and lumbar spine. I further dissent from the award of prospective cervical and lumbar medical treatment recommended by Dr. Gornet for the following reasons.

A CT of the head/cervical performed at Eliza Coffee Memorial Hospital on May 13, 2015, revealed 1) probable cerebral contusion in the left temporal lobe; 2) no evidence of cervical spine or calvarial fracture; 3) degenerative changes at C1-2, C5-6 and C6-7. (PX3)

A CT of the lumbar spine performed at the same facility on May 13, 2015, identified no abnormality. (PX3)

A CT of the chest/abdomen/pelvis performed at the same facility on May 13, 2015, identified 1) hiatal hernia with prominent of fluid in the esophagus; 2) inflammatory appearing lymph nodes in the AP window and mediastinum; 3) distended gallbladder without evidence of stone, obstruction or disruption; 4) distended urinary bladder; 5) postoperative changes in the pelvis; 6) degenerative changes spine without evidence of fracture. (PX3)

The May 27, 2015, thoracic MRI reviewed and documented by Dr. Kovalsky on June 3, 2015, showed minor degenerative changes with no disc herniations or fractures and that her rib articulations were normal, all of which is compelling and persuasive evidence that the Petitioner had no objective evidence of trauma within days or weeks of the accident. (PX6)

On August 12, 2015, Dr. Kovalsky recorded that "[s]he's not had any significant head or neck pain. She continues to have right thoracolumbar pain which is improving with therapy. (PX6)

On September 8, 2015, Dr. Kovalsky notes that the patient reported her neck is feeling better. (PX6) Dr. Kovalsky also noted that there were no tension signs in her legs, no evidence of myelopathy or spinal cord compression. He noted "She's neurologically intact in the L3 to S1 dermatomes." (PX6)

On September 24, 2015, Dr. Angela Freehill recorded that Petitioner presented for consultation at the request of "Dr. Kovalsky and workman's comp" for evaluation of her left knee noting that "… during the injection, patient had pain out of proportion to what is typical for an injection response. She was tearful and crying and yelling throughout the injection of the knee. This is highly atypical." (PX6) Therefore, it is inferred that any exacerbated cervical or lumbar pain would have been noted within the first year, or certainly within two or three years, of the accident.

On October 9, 2015, Dr. Kovalsky found negative Spurling's and Lhermitte's signs and no evidence of cervical radiculopathy. Dr. Kovalsky documents that she "has a lumbosacral strain which is more of a muscular injury." (PX6)

Dr. Petkovich examined Petitioner and issued a report on November 12, 2015. In his report, Dr. Petkovich noted a diagnosis of cervical strain, now resolved; 2) right shoulder strain; now resolved; 3) thoracic strain, resolving; 4) lumbar strain, now resolved; 5) left knee ligament strain with persistent discomfort. At the time, Dr. Petkovich opined the Petitioner reached MMI

regarding her cervical strain, lumbar strain and right shoulder strain as a result of the May 13, 2015 incident. He did not believe that "…any further diagnostic evaluation or treatment is indicated" with respect to the thoracic spine, and that while "…she may have some residual discomfort in her thoracic area for approximately the next six weeks, …this should resolve on its own. (RX8) Six weeks after Dr. Petkovich's November 12, 2015 examination is December 23, 2015; thus, I find Petitioner reached MMI regarding Petitioner's thoracic spine on December 23, 2015.

Dr. Petkovich's opinion and Dr. Kovalsky's diagnoses and opinions were bolstered shortly thereafter by the December 15, 2015, lower extremity EMG/NCV test that was a normal study. When Petitioner presented to Dr. Coleman of Millennium Pain Management on January 4, 2016, the physical examination demonstrated only evidence of spondylosis of the thoracic region. (PX12)

The Petitioner commenced treating with Dr. Lehman for her left knee. In a letter dated January 21, 2016, Dr. Lehman noted that "[i]t is my opinion …She does have radicular back pain which she states is new with pain going down her leg and thoracic spine pain." (PX13) Dr. Lehman also indicated that "[i]t is my opinion that these problems should be addressed by a spine surgeon and causality should be addressed by a spine surgeon although by her history she did not have the problems prior… I would [refer] care and treatment for her lumbar spine to a spine surgeon, referring her to Dr. Kevin Rutz for evaluation or Dr. Petkovich but at this juncture she clearly has symptoms and these symptoms, in my opinion, appear to be spine related and I believe the spine surgeon is substantially more qualified than I to proceed." (PX13)

Ironically, Dr. Petkovich had already rendered his opinion that Petitioner had a lumbar strain/sprain that should have been resolved. In Dr. Petkovich's opinion, only Petitioner's left knee pain was unresolved. However, Petitioner began treating with Dr. Kevin Rutz. On January 26, 2016, Dr. Rutz recorded that Petitioner presented with a chief complaint of thoracic back pain which developed secondary to an MVA in May of 2015. (PX14) Petitioner reported that she had no neck pain to Dr. Rutz. (PX14) Following his examination, Dr. Rutz's assessment was low back pain, specifically thoracolumbar back pain "… possibly secondary to an injury at T11-12 disc space and possible left side radiculopathy." (PX14) Dr. Rutz recommended "… a new MRI of the lumbar spine going all the way up to T10." (PX14)

A February 22, 2016, lumbar spine MRI was interpreted as revealing 1) kyphotic curvature with anterior end plate on end plate articulation at L11-12 level; 2) facet arthropathy L4-5 and L5-S1 with minimal annular disc bulge at L5-S1; 3) mild right greater than left foraminal stenosis are present at this level. There is no central canal stenosis. (PX13)

On March 8, 2016, Dr. Rutz documented that the MRI performed on February 22, 2016, "… demonstrated no signs of significant pathology in the lumbar spine. The fac[e]t [sic] joints look good. She has very mild lateral recessed stenosis at L4-5 with good hydration of her disc and no signs of injury. Her primary pathology is at T11-12 and this demonstrated moderate to severe degeneration of the disc with modic changes and a foraminal disc herniation on the right filling

more than half of the neuroforamen." (PX14) His assessment was 1) herniated nucleus pulposus, thoracic; 2) left foot drop; 3) lumbar radiculopathy; 4) radiculopathy, thoracic region. (PX14) Dr. Rutz concluded that "[a]t this point, I do not see any pathology in her lumbar spine that can account for the pain in her buttock. I suspect that this is residual from the contusion that she had in the buttock." (PX14)

Dr. Rutz, recommended a foraminal discectomy and fusion at T11-12. (PX14)

Dr. Petkovich's opinion that Petitioner suffered a sprain/strain to her cervical, thoracic and lumbar spine was then bolstered by Dr. Kern Singh's opinions. Dr. Singh authored a §12 opinion report dated July 13, 2016. (RX1, DepX2) Dr. Singh testified via evidence deposition regarding his practice advising that he sees approximately 10,000 patients per year for spinal disorders and performs about 400 to 500 surgeries per year of the neck, upper back and lower back. Dr. Singh testified that thoracic surgery is reserved primarily for fractures or tumors and is extremely rare. (RX1, 6-7) Dr. Gornet later agreed, testifying, "[In] [t]he thoracic spine I believe she has some disc pathology, aggravation of some preexisting disc degeneration at L11-T12. I don't believe that all of the findings present there are due to trauma, so I believe she may have a problem that was aggravated there." (PX28, p.19). This is evidence of the divergent opinions of the orthopedic community.

A July 11, 2017 lower extremity EMG/NCV test confirmed that all nerve conduction studies were within normal limits and all examined muscles showed no evidence of electrical instability. (PX13)

Dr. Singh testified that on July 31, 2017, a physical exam revealed that, "[s]he had full range of motion of her thoracic and lumbar spine. Monofilament testing, which is a soft brush, and it's more accurate than light touch, was normal in both of her legs. There was no sensory loss. She had normal strength in her arms as well as her legs. She had no evidence of spinal cord compression on her exam and she had no Waddell findings on her examination." (RX2, p.10) He noted there were no abnormal findings on examination, and that his diagnosis was cervical and lumbar muscular strain. (RX2, p.10)

Yet another MRI of the lumbar spine performed on October 26, 2017, was interpreted as normal. (PX13)

On July 5, 2018, Petitioner underwent an NM whole body bone scan. The Impression result was normal bone scan. (PX19)

On January 17, 2019, Petitioner consulted Dr. Gornet at the referral of Dr. Bradley. (PX23) She reported increasing pain in her neck, shoulder and arm after attempting to return to work light duty. Physical exam was positive for pain in both trapezii, particularly the right trapezius and right arm, decreased range of motion to the right and decreased flexion/extension. Based on his review of the accident and Petitioner's symptoms, Dr. Gornet documented that, "[w]ith a severe trauma

such as this, her symptoms may manifest overtime and it appears the most part they have focused on her thoracic spine is the main etiology. I have discussed with her that a cervical spine problem can also refer pain between the shoulder blades or base of her neck. At this point, I have recommended she obtain a new MRI under whiplash protocol and a motion analysis. (PX23)

Petitioner obtained a new MRI of her cervical spine on March 4, 2019, which showed: 1) a central annular tear and protrusion at C6-7 with a small caudally extruded disc fragment in the midline and severe bilateral foraminal stenosis; 2) A C5-6 circumferential disc bulge with a small caudally extruded disc fragment in the midline and bilateral foraminal protrusions resulting in severe bilateral foraminal stenoses, ventral cord flattening, and central canal stenosis; and 3) a C3-4 central broad-based protrusion that extends into both foramina resulting in moderate to severe right greater than left foraminal stenosis. (PX24, 3/4/19) Dr. Gornet recommended an injection of Petitioner's neck at C6-7 and C5-6, and potentially disc replacement if Petitioner failed conservative care. *Id.* After reviewing the results of the cervical spine MRI, Dr. Gornet reviewed an old lumbar spine MRI which he noted showed some central protrusion at L5-S1 and degeneration at T11-12. *Id.*

On May 9, 2019, after receiving the recommended injections at C6-7 and C5-6 the Petitioner reported only temporary relief from the injections. Dr. Gornet documented that based on the failure of conservative care to resolve Petitioner's complaints, her best option was surgery. (PX23, 5/19/19)

Dr. Gornet did not testify to any other study outside of his own to bolster his opinion that cervical disc replacement is superior to spinal fusion at multiple levels, however, more importantly, he opined that Petitioner's degenerative cervical and lumbar conditions, which were never before noted to be aggravated by any physician in the previous 3-1/2+ years following the accident, were causally related to the accident.

Dr. Singh further rendered opinions in a report dated May 3, 2019, to which he testified to on July 17, 2019, noting that while additional treatment to the cervical spine recommended by Dr. Gornet may be reasonable, it is not causally related to the work accident. (RX15, DepX1, p. 22) Dr. Singh testified that as far as Petitioner's cervical systems, her neck pain was not consistent through the medical records nor was her arm pain consistent throughout the medical records. He testified, "I do believe that if she had failed conservative treatment for her cervical spine, disc replacement would be appropriate and reasonable, but I did not believe that it would be causally connected." (RX15, pp.21-22)

Dr. Gornet's causal opinion regarding the cervical spine is based upon a "referred pain" theory. (PX28, pp14-15) He testified, "… the thoracic spine or pain between the shoulder blades is an overlapping area. For motor vehicle accidents, we see this almost in 100 percent of people who have cervical disc injuries. The most common cause really is a cervical disc injury, but it's important to potentially evaluate the midback. But for the most part, there's not a lot you can do with thoracic disc issues anyway. So we tell the patients that the pain between the shoulder blades

is probably referred pain. When we treat the cervical spine it usually goes away." (PX28, pp.14-15)

Petitioner's complaints were primarily and generally associated with mid-back pain and almost four years after the accident, Dr. Gornet prescribed surgeries for progressive cervical degenerative disease in a 25 year pack per day smoker and causally related the need for disk replacements, at two or three levels, to the work accident. Dr. Gornet testified, "I believe that smoking does play a factor or a role in disc degeneration. So I think that that's been clearly stated in the medical literature." (PX28, p.34) Therefore, Dr. Gornet's opinion regarding causation is not credible; until Petitioner saw him no physician causally related her degenerative cervical spine condition to the work accident and Dr. Gornet conceded that smoking could have accelerated Petitioner's condition. He also testified that Petitioner would have to cut down to a half a pack or less a day in smoking to even do the surgery. "If she's smoking a pack a day, she doesn't get surgery." (PX28, p. 34) There is also no evidence that Petitioner has ceased her smoking habit and Dr. Gornet provided no opinion as to how he would be sure that her smoking habit had been "cut down to a half a pack a day." Dr. Gornet also did not define how long Petitioner would be required to reduce her smoking habit prior to the surgery. These practicalities should give the majority pause as to the award of cervical spine surgery with so many unknown factors. Dr. Gornet also does not address the risk associated with disk replacement surgery or the chances of success if Petitioner is not candid about her smoking habit and he proceeds with the surgery.

Dr. Gornet's opinion regarding the lumbar spine is equally speculative allegedly based upon a test result that was "suggestive of a tear in the disc." He testified, "…The lumbar MRI was consistent with a central disc protrusion at L5-S1. There was suggestion of a tear in the disc centrally there. Further workup with a higher resolution MRI is going to be required." (PX28, pp.18-19) He noted that his diagnosis was "… disc injury C5-6, C6-7, and C3-4 … In her lumbar spine our working diagnosis there is disc injury L5-S1…" (PX28, p.19)

Dr. Gornet also testified that Petitioner's lumbar spine, "for the most part, looks fairly good." (PX28, p. 25) He also acknowledged that the findings he made in Petitioner could be found in someone's Ms. Reid's age range who was not involved in an MVA, noting that "[p]eople can have disc injuries without a motor vehicle accident." (PX28, p. 31)

I am not persuaded that there is any new evidence that comports with the need for lumbar surgery and indeed, not as a result of the May 13, 2015, work accident. Instead, the majority is prematurely awarding a surgery that may not even be necessary, much less causally related. As late as July 2017 a lower extremity EMG/NCV performed by Dr. Margarita was normal with no evidence of electrical instability. An October 2017 lumbar spine MRI was normal and a whole body bone scan performed on July 5, 2018 was normal. Assuming arguendo, after the higher resolution MRI is obtained, Dr. Gornet opines the Petitioner needs surgery, then there remains the issue of reasonableness and necessity of surgery, not just causation. At most the majority award should be the higher resolution MRI, so that Respondent would be able to obtain a medical opinion regarding the reasonableness and necessity of a lumbar surgery. The majority award of prospective

surgery precludes the Respondent from then obtaining a medical opinion regarding reasonableness and necessity of a surgery when the higher resolution MRI is completed. This is true even after Dr. Gornet testified that Petitioner's lumbar spine "for the most part, looks fairly good." (PX28, p. 25)

Dr. Gornet testified that he told the Petitioner the disc injuries, "not only are they evident on MRI scan, but they are also evident on quantitative motion analysis. And those MRI findings fit with her neurologic examination. They fit with her subjective complaints." (PX28, p.22) The evidence, however, as shown, does not causally relate the disc injuries Dr. Gornet references on the March 4, 2019 MRI, to the work accident.

I further find Petitioner's pain complaints are also not entirely credible. While she suffered a serious accident, on occasion there was also evidence in the record that Petitioner was exaggerating her pain symptoms. Weeks after the accident, on June 3, 2015, Petitioner first consulted Dr. Don Kovalsky, of the Orthopaedic Center of Southern Illinois. (PX6) Dr. Kovalsky noted, "[p]atient ambulates in a slow rigid fashion without an antalgic gait or a limp. She holds her hand on her lower back as she ambulates which is sort of a red flag. Her cervical motion was normal. Upper extremity neurological exam was normal. However, although she was tender at the thoracolumbar junction from about T-10 to L1, and she had the pain which radiates around the right side stopping at the mid-thoracic line, it did not radiate to her anterior chest wall or abdomen." (PX6) Dr. Kovalsky's clinical impression was "… lumbosacral sprain, Grade 2 sprain, lateral collateral ligament left knee, and she probably has meralgia paresthetica of her right anterior thigh probably due to blunt trauma."(PX6)

Dr. Singh testified that his examination of Petitioner on July 31, 2017, was normal, while Dr. Gornet's (examination) implied that there may be some involvement of the C6 nerve root. (RX15, p.18-19) Dr. Gornet saw Petitioner 1-1/2 years after the Dr. Singh's examination and her condition had changed, however, as Dr. Singh opined, that condition is not causally related.

Finally, Dr. Rutz also testified via evidence deposition. When asked if the accident aggravated any preexisting conditions in her lumbar spine, Dr. Rutz stated: "[s]he had no preexisting condition in her lumbar spine. And as far as any symptoms in her low lumbar spine, I don't have a true diagnosis." (PX27, p.25) When asked his opinion regarding the annular disc bulge in both foramina at L5-S1 noted by the radiologist in the February 22, 2016, MRI report, Dr. Rutz testified: "… I generally don't like the term disc bulge that much, just because it's ambiguous, … I put that in the category of a mild degenerative change. It can be traumatic, but if it's somewhat diffuse, it's more consistent with mild age-appropriate degenerative changes." (PX27, pp.25-26) This treating orthopedic opinion regarding Petitioner's lumbar spine comports with Dr. Petkovich, Dr. Kovalsky and Dr. Singh 's opinions but is contrary only to Dr. Gornet.

The referenced records, diagnostics and opinions except Dr. Gornet's, are compelling evidence that there is no cervical or lumbar condition that requires surgery as a result of the work accident. Therefore, I take issue with the majority's causation award as it relates to Petitioner's

current condition of ill-being relative to her cervical and lumbar spine given the vastly different opinions offered by the medical experts in this case -- namely, Drs. Rutz, Gornet and Singh and particularly as it concerns the proper diagnosis and appropriate treatment of Petitioner's spinal conditions. I disagree with the majority's conclusion that the Petitioner's conditions in her cervical and lumbar spine, and the prospective treatment recommended by Dr. Gornet, are related to the work accident.

Dr. Gornet's opinion regarding the Petitioner's cervical and lumbar spine is not supported by the opinions of Dr. Petkovich, Dr. Kovalsky, Dr. Singh, Dr. Margherita, Dr. Bradley, Dr. Ungacta or Dr. Rutz or by the Petitioner's other treating records and is, therefore, of little persuasive value. I find Petitioner failed to prove a causal relationship between her accident of May 13, 2015, and her condition of ill-being as it relates to the need for cervical or lumbar surgery. I find Petitioner reached MMI from her cervical and lumbar strains/sprains by November 12, 2015, and reached MMI from her thoracic spine strain/sprain by December 23, 2015, based upon Dr. Frank Petkovich's §12 opinion report. (RX8)

In *Prairie Farms Dairy*, the Court held that the Commission is not precluded from adopting the opinion of an examining physician:

> Our research has not revealed any case where this court, or the Illinois Supreme [***9] Court, has said that, as a matter of law, the Commission *must* give more weight to a treating physician's testimony than to that of an examining physician. Certainly *Edgcomb* does not state that. In *Edgcomb*, we simply found that a balance of all the evidence, including that of Dr. Holden, which the Commission disregarded, supported a finding of causal connection. Although we have said numerous times that the Commission *may* give more weight to a treating physician's opinion, we
> have never stated that it is obligated [*551] to.

Prairie Farms Dairy v. Industrial Comm'n (Kossman), 279 Ill. App. 3d 546, 550-551, 664 N.E.2d 1150, 1153, 1996 Ill. App. LEXIS 321, *8-9, 216 Ill. Dec. 222, 225.

Therefore, I would vacate benefits awarded for cervical and lumbar back treatment after November 12, 2015, and deny prospective medical treatment for surgeries to the cervical and lumbar back recommended by Dr. Gornet.

For the above-stated reasons, I respectfully dissent.

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0228
NOTICE OF 19(b) ARBITRATOR DECISION

REID, BOBBIE G
Employee/Petitioner

Case# **15WC038303**

ED LEWIS TRUCKING INC
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:

0996 RICH RICH COOKSEY & CHAPPELL
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0000 INMAN & FITZGIBBONS LTD
COLIN M MILLS
301 N NEIL ST SUITE 350
CHAMPAIGN, IL 61820

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Bobbie G. Reid
Employee/Petitioner

v.

Ed Lewis Trucking, Inc.
Employer/Respondent

Case # **15** WC **38303**

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 **Michael Nowak**, Arbitrator of the Commission, in the city of **Collinsville**, on **10/24/19**. 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **5/13/15**, 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 $**52,000.00**; the average weekly wage was $**1,000.00**.

On the date of accident, Petitioner was **45** 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 $**89,998.98** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**89,998.98**.

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

ORDER

Respondent shall pay outstanding reasonable and necessary medical services of $193,669.48, as set forth in Petitioner's exhibit 1, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall authorize and pay for prospective medical care as recommended by Dr. Gornet, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $666.67/week for 231 3/7 weeks, commencing 5/15/15 through 10/24/19, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $89,998.98 for temporary total disability benefits that have been paid.

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

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

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

Michael K. Nowak, Arbitrator

12/2/19
Date

ICArbDec19(b)

FINDINGS OF FACT

Petitioner is a truck driver for Respondent, Ed Lewis Trucking, and does transports with her husband. (T.8-9) The parties stipulated that she sustained accidental injuries that arose out of and in the course of her employment with Respondent, when on May 13, 2015, she was involved in a severe motor vehicle accident as a passenger in the truck being operated by her husband. (T.9) Petitioner described the accident as follows:

> We was driving down the road, a car come out behind a tree line, ran a stop sign and hit us in the front tire, broke our steering, went down a 20-foot embankment and rolled into swamp waters down in Alabama. (T.9)

Pictures of the crash, which show a demolished cabin and a truck cab suspended in a muddy swamp bank, along with corroborating accident, witness, and news reports were entered into evidence as Petitioner's Exhibits 29 through 32. (PX29; PX30; PX31; PX32) Petitioner testified that she injured her neck, mid back, low hip, and left knee, and described herself as "bruised from head to toe." (T.9-10) While her bruises, cuts, and left knee injury resolved, Petitioner continued to have problems with her neck and back. (T.10) She suffered no injuries to her neck or back and required no diagnostic studies for same prior to this accident. (T.9-10)

Petitioner was treated extensively for her condition over the next four-and-a-half years, and Respondent continued to pay benefits until it ceased paying temporary total disability (TTD) benefits on October 28, 2018. (T.12-13) Petitioner also seeks benefits for prospective care as outlined by her treating physician. (T.14)

Petitioner was taken via ambulance and treated immediately following the crash at Eliza Coffee Memorial Hospital. (PX3) There, it was documented that Petitioner's truck "rolled over in pond," and although Petitioner was restrained inside, "PT was found outside of vehicle face down in mud." *Id.* Petitioner suffered severe neck and back pain for which she was given Dilaudid and was also diagnosed with a subconjunctival hemorrhage in her right eye. *Id.* A CT of Petitioner's head and cervical spine showed a probable cerebral contusion in the left temporal lobe along with degenerative changes. *Id.* A CT of the chest and pelvis showed a hiatal hernia with fluid in the esophagus, inflammatory appearing lymph nodes in the AP window and mediastinum, a distended urinary bladder, and degenerative changes. *Id.* She was discharged with prescriptions for Motrin and Norflex. *Id.*

Petitioner was seen again in the emergency room of St. Mary's Hospital on May 16, 2015, where it was noted, "Has multiple abrasions and basically hurts all over." (PX5, 5/16/15) Petitioner's pain had been constant since the crash despite use of pain medication. *Id.* Repeat CT scans of the abdomen and pelvis were consistent with the prior scans, and x-rays of Petitioner's left knee were normal. *Id.* The attending physician discussed the possibility of an occult rib fracture. *Id.* Petitioner was scheduled for an MRI and instructed to follow up with her primary care physician. *Id.* Petitioner followed up with her family healthcare provider, Dr. McMurphy-Quick, on May 19, 2015, who noted Petitioner's complaint of pain in her back, right hip, and left knee rated 8 out of 10 relieved only by her lying flat on her back with her knees elevated. (PX4, 5/19/15) She also reported chest pain and lack of bowel since the collision despite use of stool softeners and laxatives. *Id.* Examination again demonstrated multiple bruises, contusions, and abrasions to Petitioner's trunk and all four (4) extremities with healing bruises noted to her face. *Id.* She was given Prednisone for pain and instructed to return in two weeks. *Id.*

Petitioner's MRI was completed on May 27, 2015, and was mostly unremarkable; however, the radiologist noted, "MRI of the thoracic spine is somewhat compromised by patient motion and respiratory artifact." (PX5, 5/27/15) Petitioner returned to Dr. McMurphy the next day still in marked pain and reported that she felt like she was not healing. (PX5, 5/28/15) Dr. McMurphy reviewed the MRI and decided to refer Petitioner to an orthopedic physician to be sure of the findings. *Id.*

Petitioner came under the care of Dr. Don Kovalsky on June 3, 2015. (PX6, 6/3/15) He took a brief history of the injury and the diagnostic studies obtained thus far and performed a physical examination, after which he diagnosed Petitioner with a lumbosacral strain, Grade 2 sprain of the lateral collateral ligament of the left knee, and probable meralgia paresthetica of the right anterior thigh secondary to blunt trauma. *Id.* Petitioner was kept off work and referred for physical therapy. *Id.* He also placed Petitioner on a Prednisone taper followed by Mobic, Tramadol, and Acetaminophen. *Id.* If Petitioner continued to have anterior thigh numbness, he suggested an EMG nerve conduction study. *Id.* Petitioner participated in physical therapy until the end of June at St. Mary's Hospital and returned to Dr. Kovalsky on July 8, 2015, with continued pain in her left knee, pain in her thoracolumbar region, and numbness and tingling in her anterior thigh. (PX5, 6/11-30/15; PX6, 7/8/15) The venous Doppler sonogram of Petitioner's right lower extremity was negative, but Petitioner exhibited significant muscle spasm in her thoracolumbar area on examination, and Dr. Kovalsky prescribed more tramadol and outpatient therapy. (PX7, 6/25/15; PX6, 7/8/15) When this failed to improve her symptoms and she presented to Dr. Kovalsky with a limp on August 12, 2015, he recommended an MRI of her left knee, a left knee trigger point injection, and cessation of therapy on her knee. (PX6, 7/8/15) He believed, however, that Petitioner's back would continue to benefit from therapy. *Id.*

Petitioner presented for the trigger point injection on August 25, 2015, but the procedure was aborted due to severe hypersensitivity to touch resembling allodynia during the examination prior to the procedure. (PX6, 8/25/15) She also reported that although Dr. Kovalsky seemed to be focusing on her low back, her pain was in the upper mid back. *Id.* The MRI taken of Petitioner's knee the same day showed moderate edema about the ACL, suggestive of a sprain or partial tear without a full-thickness rent, findings suggestive of a sprain of the PCL and LCL, and chondromalacia of the medial and patellofemoral compartments with small joint effusion. *Id.* Dr. Kovalsky reviewed the MRI results and recommended that Petitioner see Dr. Houle within a week or two for treatment since Petitioner's Orthopedist, Dr. Lehman, had no upcoming appointments availability. (PX6, 9/8/15) He also noted that the thoracic trigger point injection was cancelled due to concern for pneumothorax. *Id.* Petitioner reported that although her neck was feeling better, she was getting stiffness and headaches. *Id.* She also reported exquisite pain in the right posterior thoracic region around T8 and right buttock pain. *Id.* Examination of the buttocks showed a dimple with the appearance of fat necrosis from blunt trauma. *Id.* He believed Petitioner would benefit further from therapy but stated that her left knee injury needed to be addressed first. *Id.* He referred Petitioner to Dr. Anthony Anderson, a pain management specialist, to again attempt a trigger point injection. *Id.*

On September 24, 2015, Petitioner saw Dr. Angela Freehill, who noted that she was "still having trouble walking" and noted associated swelling, popping, grinding, weakness, locking, catching and giving way aggravated by standing, walking, lifting, exercise, squatting, kneeling and/or stair use. (PX6, 9/24/15) Dr. Freehill noted that Petitioner had a near full-thickness ACL tear with edema according to the MRI. *Id.* She stated that although there were some remaining fibers, she did not believe that the ACL was intact or functioning well. *Id.* She recommended and administered a lidocaine injection and more physical therapy and kept Petitioner off work. *Id.* On September 29, 2015, Petitioner underwent a trigger point injection to her right

paraspinals at T9. (PX6, 9/29/15) Petitioner reported no improvement in pain following the procedure. *Id.* On October 9, 2015, Petitioner was referred for additional therapy for her lumbar spine and SI joint. (PX6, 10/9/15)

Petitioner was able to finally see her orthopedist, Dr. Richard Lehman, on October 27, 2015. (PX13, 10/27/15) After taking a history of the injury, noting positive findings during physical examination, and summarizing her medical records, he ordered an MRI Arthrogram of the left knee given the level of concern over the increased laxity found on examination. *Id.* On November 12, 2015, Petitioner underwent the MRI of her left knee, which showed a popliteal cyst without intra-articular loose bodies. (PX11) Dr. Lehman reviewed the MRI and recommended re-evaluation. When he saw Petitioner again on November 25, 2015, he noted she remained markedly symptomatic in her back and knee. (PX13, 11/17/15, 11/25/15) His assessment was thoracic spine dysfunction, herniated lumbar disc without myelopathy, and chondromalacia patellae of the left knee. (PX13, 11/25/15) Dr. Lehman recommended an EMG nerve conduction study, which was done on December 15, 2015, and was normal. (PX13, 11/25/15; PX10) As Petitioner continued to have pain in her back, Dr. Lehman recommended a bone scan and facet injection. (PX13, 12/15/15) He also administered another injection into her left knee. *Id.* The bone scan completed on December 21, 2015, showed degenerative uptake at her acromioclavicular joints. (PX11)

Petitioner presented to Dr. Coleman of Millennium Pain Management on January 4, 2016, with a chief complaint of back pain. (PX12) Petitioner's depression screening was mildly positive, and physical examination demonstrated evidence of spondylosis of the thoracic region. *Id.* He administered a bilateral thoracic facet injection at T4-5. *Id.* Petitioner returned to Dr. Lehman on January 21, 2016 and reported that although her left knee was getting stronger, she was still in significant pain and unable to walk up or down stairs. (PX13, 1/21/16) She also continued to complain of tenderness in her thoracic and lower spine. *Id.* Dr. Lehman recommended evaluation by a spine physician, Dr. Rutz, and potentially another PRP injection. *Id.*

Petitioner saw Dr. Kevin Rutz on January 26, 2016, who noted that Petitioner was not even able to sit comfortably for an hour. (PX14, 1/26/16) He noted Petitioner suffered mid back pain radiating towards the right side and to her right flank and right upper quadrant, as well as back pain radiating to her left posterior thigh and lateral calf. *Id.* Petitioner also suffered atrophy throughout her left lower extremity since the accident. *Id.* He reviewed the films taken of her spine thus far and noted the lack of any prior history of back problems prior to the motor vehicle accident. *Id.* He believed Petitioner needed a new MRI of her spine going all the way up to T10, given the unusual mechanism of injury, which he felt "could clearly cause significant forces on her spine." *Id.* He stated, "I think the primary challenge is diagnosing it." *Id.* He further stated, "In addition, I suspect that she will have a relatively difficult time with her condition performing activities as a truck driver, as often people with disc level injuries have significant discomfort with prolonged positioning, which is required for long term driving. I would give her a 20 pound restriction at this point and being allowed to change positions as needed to control her discomfort. In addition, she is currently taking narcotics for pain control, which would preclude her from driving a commercial driving [sic]." *Id.*

The new MRI completed on February 22, 2016, showed kyphotic curvature with anterior end plate on end plate articulation at T11-12, facet arthropathy L4-5 and L5-S1 with some annular disc bulge at L5-S1, and right greater than left foraminal stenoses. (PX15) Petitioner called Dr. Rutz's office with the results of same and was instructed to return for surgical consultation. (PX14, 1/26/16) Petitioner returned on March 8, 2016, at which time Dr. Rutz linked Petitioner's problem to her thoracic spine and discussed foraminal discectomy and fusion at T11-12. (PX14, 3/8/16) However, he first recommended a T11-12 transforaminal epidural steroid

injection to see if Petitioner would respond to non-operative measures. *Id.* Petitioner saw Dr. Lehman on March 10th and continued to have problems with her knee and back. (PX13, 3/10/16) He recommended continued physical therapy. *Id.* Petitioner presented to Excel Imaging on March 15, 2016 and underwent the recommended transforaminal ESI at T11-12. (PX18, 3/15/16)

On May 13, 2016, Dr. Rutz authored a letter addressing Petitioner's current condition in her spine. (PX14, 5/13/16) He again noted the lack of any previous spinal problems, noted objective findings of severe degeneration of Petitioner's disc at T11-12 with a right sided foraminal disc herniation, and her persistent complaints. *Id.* He stated that her spinal condition was causally related to her motor vehicle accident on May 13, 2015, including her radicular complaints. *Id.* He noted that although Petitioner had some pre-existing degeneration, this was aggravated and accelerated by her work accident. *Id.* Petitioner saw Dr. Rutz again on June 2, 2016, to discuss surgical intervention for the MRI findings of a right T11 foraminal disc herniation impinging her nerve root. (PX14, 6/2/16) Dr. Rutz recommended decompression and removal of the disc herniation and a fusion of the disc space. *Id.*

Petitioner underwent yet another injection at T11-12 for persistent pain. (PX18, 8/2/16) On August 11, 2016, Petitioner returned to Dr. Rutz's office and again reported significant pain into her right buttock and hip. (PX14, 8/11/16) Petitioner saw Dr. Lehman on August 25, 2016, and advised that she was not able to sit straight due to sharp, severe back pain. (PX13, 8/25/16) Petitioner was instructed to return for a PRP injection in four (4) weeks. *Id.*

Petitioner returned to Dr. Lehman on November 1, 2016, at which time he noted Petitioner's persistent findings on examination of pain with overpressure, grinding in the knee, and soreness in the knee. (PX13, 11/1/16) He recommended diagnostic arthroscopy, given the length of time Petitioner remained markedly symptomatic. *Id.* Petitioner returned to Dr. Lehman on January 3, 2017, and again reported severe and intense left leg pain and radicular pain across her low back from her left hip. (PX13, 1/3/17) This pain had worsened with time, at times bringing her to tears, and interfered with her sleep. *Id.* Petitioner was unable to differentiate between her knee and thigh pain and exhibited a knot in her left hip. *Id.* He recommended a left hip PRP injection and additional therapy. *Id.*

On January 4, 2017, Petitioner underwent a left knee arthroscopy, anterior and extra-articular anterior cruciate ligament reconstruction, and debridement of the lateral tibial plateau and lateral meniscus. (PX16, 1/4/17) On follow-up, Petitioner was much improved and was referred for therapy. (PX13, 1/18/17) Though her left knee pain improved, Petitioner continued to have back pain and hip pain and presented to Dr. Steven Stahle on February 21, 2017, for a PRP injection in her right hip. (PX13, 2/21/17) Examination showed tenderness in the right sacroiliac region, and Petitioner reported intense pain with twisting and lifting and spasm with extended ambulation. *Id.* On March 30, 2017, Petitioner returned to Dr. Lehman for follow up of her left knee surgery. (PX13, 3/30/17) Petitioner was making progress, but still had pain, superior lateral tenderness, tenderness over the lateral portal, and bursa inflammation over her sutures. *Id.* He administered a steroid injection. *Id.*

Dr. Stahle administered another PRP injection in Petitioner's SI joint for hip complaints on April 25, 2017. (PX13, 4/25/17) Petitioner also presented to Dr. Lehman with continued back complaints, particularly when driving, despite physical therapy. *Id.* On May 23, 2017, Petitioner reported no improvement following the injection. (PX13, 5/23/17) She continued to have radicular back pain with intermittent paresthesias despite

therapy and continued to report difficulty sleeping due to same. *Id.* Petitioner attempted to fully participate in strengthening exercise but was limited due to ongoing hip and lower back pain. *Id.* Dr. Lehman concluded that further therapy would only be beneficial after the cause of Petitioner's hip pain was discovered and referred her to Dr. Margherita for evaluation of same. *Id.*

Petitioner presented to Dr. Margherita at the West County Spine & Sports Medicine Center on June 14, 2017, with complaints of neck and back pain with bilateral leg weakness, and left leg pain and paresthesias. (PX17, 6/14/17) Dr. Margherita noted Petitioner had tried therapy, medication, and injection with no improvement in her symptoms. *Id.* After his physical examination demonstrated excessive anterior pelvic tilt, abnormal crest motion, and pain and tenderness with motion and palpation, Dr. Margherita's assessment was segmental and somatic dysfunction of the sacral region. *Id.* He scheduled Petitioner for a diagnostic right SI joint injection with ultrasound guidance. *Id.* Petitioner returned to Dr. Margherita for the procedure on June 21, 2017, at which time he again noted abnormal crest motion and painful medial rotation with a sacral sulcus tender to palpation. (PX17, 6/21/17) He administered the injection, but when Petitioner returned on July 5, 2017, she reported no improvement in her symptoms. (PX17, 7/5/17) Physical examination findings remained positive, so he recommended evaluation with an EMG study to assess Petitioner's nerve roots and better localize any pathology. *Id.*

Petitioner completed the EMG studies on July 11, 2017, which were normal, and followed up with Dr. Margherita on July 17, 2017. (PX17, 7/11/17; PX17, 7/17/17) Dr. Margherita noted that Petitioner's current pain was emanating from her ischial tuberosity. (PX17, 7/17/17) Since there was no guarantee injection would benefit Petitioner, Dr. Margherita released Petitioner from his care. *Id.*

Petitioner returned to Dr. Lehman on August 24, 2017 and reported an injury during the IME examination in Chicago. (PX13, 8/24/17) Petitioner reported that the physician "overworked her knee" and caused a pulling sensation, and she reported significant swelling and soreness three days after the incident and has since had radiating pain throughout her lower leg. *Id.* Petitioner's pain in her spine remained severe and interfered with the rehabilitation of her knee. *Id.* Dr. Lehman refilled Petitioner's Percocet and referred her to a spinal orthopedist at Washington University. *Id.*

On October 23, 2017, Petitioner returned to the Orthopedic Specialists, saw NP Vangergriff with persistent complaints of back pain, and was referred for a new MRI. (PX14, 10/23/17) The MRI completed October 26, 2017, at Excel Imaging was normal. (PX18, 10/26/17) On January 1, 2018, Dr. Lehman noted that although Petitioner's knee pain was improved, she still suffered from weakness and was unable to stand or walk for more than 20 minutes. (PX13, 1/16/18) Petitioner also continued to exhibit tenderness in her right buttock on examination of the SI joint. *Id.* Dr. Lehman stated that though Petitioner was making progress with her left knee, her tibial screw would remain sore for a while. *Id.* He reiterated that her back required treatment. *Id.* Dr. Lehman noted that Petitioner had a palpable bulging knot on her right lower back and that her symptoms would not abate with any conservative treatment. (PX13, 3/8/18) He recommended an isolated CT scan of her inferior pubis region with an accompanying bone scan. *Id.* In the meantime, he refilled her Percocet and prescribed a Lidoderm patch for her right hip pain. (PX13, 4/12/18)

Petitioner presented to St. Mary's Hospital for the prescribed bone and CT scan. (PX19, 7/5/18) The bone scan was normal, and the CT scan showed a subcutaneous area of encased fatty signal surrounded by a low signal rim of fibrous tissue or calcification believed to represent traumatic injury with fatty necrosis and

calcification or incomplete granuloma formation. *Id.* On July 10th, Dr. Lehman stated, "Patient cannot sit or stand without pain and this is very concerning to me. The patient has extreme difficulty with performing age-appropriate activities of daily living such as ambulation of stairs and walking. . . I believe she will require an obturator nerve decompression procedure to be done by Dr. Hagan. . ." (PX13, 7/10/18)

On August 3, 2018, Petitioner presented to Dr. Matthew Bradley of Midwest Bone and Joint in follow-up of the June 7th IME appointment with complaints of right neck pain, right hip pain, and low back pain. (PX20, 8/3/18) He noted that Petitioner had not received the ischial bursa injection he recommended, and continued to have pain to palpation and when sitting on her right ischial tuberosity. *Id.* He again recommended the ischial bursa injection and advised Petitioner to continue treating with her physician for her neck complaints. *Id.*

On August 21, 2018, Petitioner presented to St. Anthony's Memorial Hospital for the right hip ischium injection. (PX21, 8/21/18) Petitioner returned to Dr. Bradley in follow up on August 30th, and reported resolution of her pain to palpation over the ischial tuberosity. (PX20, 8/30/18) She continued to have pain, however, along her SI joint with sitting. *Id.* Dr. Bradley noted that Petitioner suffered no intervening trauma. *Id.* He agreed that consultation with a nerve specialist was necessary and instructed Petitioner to return following her consultation with Dr. Hagan. *Id.*

Dr. Hagan saw Petitioner on October 1, 2018, took the history of the injury and her care and treatment for her symptoms and complaints thus far, and noted increased swelling with marked tenderness at the sacral sulcus and sacroiliac joint along her piriformis muscle and sciatic nerve with notable cavity. (PX22, 10/1/18) His impression was right posterior thigh/gluteal pain; right piriformis syndrome and known lumbar spine pathology. *Id.* He explained to Petitioner that she appeared to have irritation of her piriformis related to her sciatic nerve and posterior gluteal nerve which he believed was a direct result from her original injury in 2015. *Id.* He recommended that Petitioner move forward with the surgical intervention recommended by Dr. Rutz and then treat her symptoms related to her piriformis afterward with a diagnostic and therapeutic injection of her piriformis insertion. *Id.* He noted that if Petitioner responded well to the injection, she would be a candidate for surgical decompression of her piriformis and sciatic nerve. *Id.* He indicated he would hold treatment "until her lower back has been cleared." *Id.*

On October 9, 2018, Dr. Rutz evaluated Petitioner and remained of the opinion that her thoracic pathology at T11-12 correlated with her radicular complaints into her flank area, but he did not believe there was any evidence of nerve impingement in her lumbar spine based on his review of her previous MRIs. (PX14, 10/9/18) Petitioner then returned to Dr. Bradley on October 23, 2018, with continued complaints of right hip pain. (PX20, 10/23/18) She advised him that the SI joint injections helped for a few hours and brought a note from Dr. Hagan indicating that she would benefit from psoas injection but needed to have complete work-up for her spine completed first. *Id.* Dr. Bradley sought to review all of Petitioner's recent treatment records prior to recommending further care. *Id.*

On October 30th, Petitioner saw Dr. Felix Ungacta in Dr. Bradley's office and noted Petitioner continued to have pain, currently rated 8 out of 10, in her mid-back and neck. (PX20, 10/30/18) Physical examination demonstrated tenderness to palpation in the right trapezial, right latissimus dorsi areas. *Id.* She requested additional medication and was given a prescription for Tizanidine and was given a work slip. *Id.* Petitioner returned yet again on November 8, 2018, with persistent pain rated 6 on a scale of 10 in her neck, low back, and

right buttock. (PX20, 11/8/18) Petitioner reported that her neck pain radiated down her spine, and that this pain had been present since the May 13, 2018 accident. *Id.* Dr. Hagan wanted to proceed with surgery; but he wanted Petitioner's spinal problems addressed first, and Dr. Rutz had nothing further to offer Petitioner. *Id.* Petitioner requested referral to another spine specialist. *Id.*

Dr. Lehman saw Petitioner again on December 6, 2018, with complaints of right hip pain, and he noted that Dr. Hagan believed Petitioner's back required treatment prior to her hip. (PX13, 12/6/18) Petitioner continued to have significant symptoms in her back and hip. *Id.* He noted that while Petitioner was at maximum medical improvement with respect to her knee, he did not provide a release date for her hip. *Id.* He stated that Petitioner's release date for light duty work and full duty work were "TBD" with respect to her hip. *Id.* The accompanying work slip noted that Petitioner was to remain off work. *Id.*

Petitioner came under the care of Dr. Matthew Gornet on January 17, 2019, at the referral of Dr. Bradley. (PX23, 1/17/19) He took the history of Petitioner's injury and complaints and noted that she was having increasing pain in her neck, shoulder, and arm after she attempted to return to work light duty. *Id.* His physical examination was positive for pain in both trapezii, particularly the right trapezius and right arm, and decreased range of motion to the right, and decreased flexion/extension. *Id.* Deep tendon reflexes were trace and the motor examination revealed decreased biceps on the right and left at 4/5 and decreased wrist dorsiflexion and volar flexion on the on the left side at 4/5. *Id.* Based on his review of the photographs of the accident and Petitioner's progressive symptoms, he stated:

> Based on the notes provided, I do believe her current symptoms are causally connected to her work related motor vehicle accident. With a severe trauma such as this, her symptoms may manifest over time and it appears for the most part they have focused on her thoracic spine as the main etiology. I have discussed with her that a cervical spine problem can also refer pain between the shoulder blades or base of her neck. At this point, I have recommended a new MRI under whiplash protocol and a motion analysis. I will see her back and try to obtain all of the previous studies including the previous MRI from Excel Imaging. I do not have Dr. Bradley's notes. We will try to obtain previous studies from Imaging Partners. We have dispensed today Meloxicam 7.5 mg p.o. b.i.d. X 60 days and Cyclobenzaprine 10 mg p.o. q.h.s. X 60 days. I have kept her off work completely for right now until I can further understand her problem. Again, I do believe her current symptoms and requirement for treatment are causally connected to her injury as described. *Id.*

Petitioner obtained an MRI of her cervical spine on March 4, 2019, which showed: 1) a central annular tear and protrusion at C6-7 with a small caudally extruded disc fragment in the midline and severe bilateral foraminal stenoses; 2) a C5-6 circumferential disc bulge with a small caudally extruded disc fragment in the midline and bilateral foraminal protrusions resulting in severe bilateral foraminal stenoses, ventral cord flattening, and central canal stenosis; and 3) a C3-4 central broad-based protrusion that extends into both foramina resulting in moderate to severe right greater than left foraminal stenosis. (PX24, 3/4/19) Petitioner presented to Dr. Gornet afterwards, and he noted that Petitioner's examination was unchanged from her last visit. (PX23, 3/4/19) After reviewing the results of the cervical spine MRI, Dr. Gornet also reviewed an old MRI of Petitioner's lumbar spine from Imaging Partners of Missouri, which he noted showed some central protrusion at L5-S1 and degeneration at T11-12. *Id.* He recommended an injection of Petitioner's neck at C6-7 and C5-6, and potentially disc replacement if Petitioner failed conservative care. *Id.*

Petitioner underwent the recommended injections at C6-7 and C5-6 respectively on March 26th and April 9th of 2019 and returned to Dr. Gornet on May 9, 2019 for follow-up. (PX25, 3/26/19, 4/9/19; PX26; PX23, 5/9/19) Dr. Gornet noted that Petitioner obtained only temporary relief rather than sustained relief from the injections. (PX23, 5/9/19) He also reviewed the IME report Petitioner brought her authored by Dr. Singh and disagreed with his opinion that Petitioner's condition consisted of resolved strains. *Id.* He noted that his opinion did not comport with the timeline of events, Petitioner's clinical course, and the objective findings on MRI. *Id.* He stated that based on the failure of conservative care to resolve Petitioner's complaints, her best option was surgery. *Id.* On August 15, 2019, Dr. Gornet saw Petitioner and reiterated his recommendation for surgery. (PX23, 8/15/19)

Petitioner testified that she hurts constantly, particularly with increased activity. (T.18) She also stated she is unable to sit or stand for prolonged periods of time without an increase in her pain level. (T.18) She cannot currently use her CDL, because she cannot pass the physical. (T.19) Respondent had Petitioner examined on several occasions in Chicago. (T.14) Expenses for the trips were submitted as Petitioner's Exhibit 33 (PX33). (T.16-17)

Respondent obtained a records review for an opinion with respect to Petitioner's spinal condition from Dr. Kern Singh on July 13, 2016, and he was deposed by Respondent on November 30, 2016. (RX1, p.9) Based upon his review of Petitioner's records, he did not agree with Dr. Rutz's interpretation of Petitioner's February 22, 2016 MRI as demonstrating a foraminal disc herniation at T11-12. *Id.* at 13. He stated there was no spinal cord compression from a disc herniation, but a less smooth disc at T11-12 representing age-related change. *Id.* at 13. He also believed that any herniation at that level would not correlate with Petitioner's symptoms. *Id.* at 13-14. He stated that the area that Dr. Rutz circled on Petitioner's MRI was not a herniation, but the T12 exiting nerve root at that level, and he stated that there was no pathology that would indicate a need for surgery. *Id.* at 14-15. He believed Petitioner suffered only a muscular strain and did not require fusion of her disc space at T11-12. *Id.* at 17. He also believed that fusion of that level was a high-risk surgery not routinely done in the community. *Id.* at 17.

On cross-examination, Dr. Singh testified that "medicolegal work" was the largest portion of his practice. *Id.* at 22. He testified that all of his medical legal work was focused on workers' compensation, and that the vast majority of his IMEs were done on behalf of Respondents. *Id.* at 22-23. He acknowledged that he did not meet or examine Petitioner, and that he did not review or possess all of Petitioner's medical records. *Id.* at 23-24. He also did not see the photographs of the accident. *Id.* at 23. He admitted that Petitioner's complaints of thoracic pain radiating around the right chest wall would be in fact consistent with a potential herniated disc in the thoracic spine. *Id.* at 25. He did not possess the March 8, 2016, note of Dr. Rutz describing wraparound pain towards Petitioner's belly button. *Id.* at 26. Though he felt that Petitioner's off-work period was prolonged, he admitted that his opinion was limited to the spine and that Petitioner had other injuries which made her condition "less amenable to returning to work." *Id.* at 27.

Dr. Singh testified that he did believe that Petitioner's thoracic and lumbar strains were caused by the motor vehicle accident, and further acknowledged that "it's hard to differentiate the thoracic and lumbar region..." *Id.* at 28. He did not believe, however, that the accident aggravated Petitioner's thoracic disc degeneration. *Id.* at 29. He stated he believed so, because "the thoracic discs don't move. They're not meant to move. So unless it was accompanied by a fracture that extended into the disc space, then I would say that there was no aggravation of that disc space." *Id.* at 29. He subsequently admitted that it was "theoretically possible"

but he did not believe it to be so in this case absent fracture. *Id.* at 29. Although he earlier stated that the thoracic discs don't move, he testified:

> Q. Okay. So do you always link a fracture to aggravation of preexisting disc disease?
>
> A. No. In the cervical and thoracic spine, which are mobile segments, it can happen not uncommonly. The thoracic spine is very unique in that it's protected space and that's why pathology and injuries of the thoracic spine are very rare. *Id.* at 29.

He admitted that Petitioner had no thoracic or lumbar complaints prior to the May 13, 2015, work injury. *Id.* at 29-30. However, Dr. Singh also stated in his report that "any activity would have rendered the T11-12 disc space to be symptomatic," which he explained in his testimony to mean that if Petitioner's disc space was unstable, then any activity at all would have rendered it symptomatic. *Id.* at 30. He then stated that he believed that disc space was neither symptomatic before the accident nor after, even though Petitioner complained of symptoms which he admittedly testified were consistent with a potential disc herniation at that level. *Id.* at 30:11-24. He again confirmed that he saw no photos of the accident, but stated that these would not have changed his opinion. *Id.* at 36.

Dr. Singh testified by way of deposition again on June 27, 2018, following an independent medical examination he conducted on July 31, 2017. (RX2, p.7) He testified that Petitioner reported substantial pain in her neck and upper back rated 7-8 out of 10 with burning, throbbing, numbness, and tingling into both of her legs. *Id.* at 9. He testified that he found no abnormal findings during his examination, and his assessment was cervical and lumbar muscle strain. *Id.* at 10. He believed these to be related to her motor vehicle accident on May 13, 2015, but concluded that Petitioner had reached maximum medical improvement "approximately four to six weeks from the date of injury consistent with soft tissue strain." *Id.* at 11. He did not believe she required any further treatment with regard to her cervical or lumbar spine. *Id.* at 11-12.

On cross-examination, Dr. Singh testified that he still had not been provided with any photographs of the motor vehicle collision. *Id.* at 16. When asked whether he would characterize Petitioner's collision as a severe accident, he declined and stated, "I would say it's a high energy collision." *Id.* at 16. He acknowledged that the photos would perhaps help him "understand the mechanism," but did not believe they would ultimately change his opinion. *Id.* at 16. He agreed that a high energy collision or incident could cause a disc herniation to any part of the spine – cervical, thoracic, or lumbar. *Id.* at 16. He also acknowledged it could aggravate a preexisting condition and provoke symptoms. *Id.* at 17. He also admitted that he reviewed no records indicating that Petitioner had any problems or symptoms in any part of her spine prior to this accident. *Id.* at 17-18. He acknowledged that Petitioner has had persistent complaints since the accident. *Id.* at 20-21. He only had one additional note from Dr. Rutz's office for review at the time he authored his second report. *Id.* at 18-19. He also testified that he did not see Dr. Lehman's record of November 25, 2015, diagnosing Petitioner with thoracic spine dysfunction and herniated discs, but stated that this would not be significant to him. *Id.* at 21-22. He also believed that Petitioner had reached maximum medical improvement prior to the point that Dr. Lehman diagnosed her with a disc injury and recommended further treatment. *Id.* at 22-23. He acknowledged that he did not identify any Waddell signs during his examination. *Id.* at 23.

Dr. Singh did not believe it possible for a disc injury to present but not manifest on an MRI study. *Id.* at 25. He acknowledged, however, that pathology could be present and be asymptomatic, and that a patient can suffer from structural back or neck pain without having any neurologic findings. *Id.* at 29. Even though

Petitioner continued to have symptoms 3 years out from her accident, he did not believe that her condition was inconsistent with a sprain/strain. *Id.* at 27. He stated, "Ms. Reid can have complaints of anything she wants subjectively. I would state that objectively her strain had resolved, and her pain complaints are not objectifiable [sic]. *Id.* at 27. He stated that he could not answer the question of whether a patient could have an increase in his or her symptoms without an appearance of change on the MRI. *Id.* at 28. He reiterated his opinion that Petitioner's current complaints had nothing to do with the motor vehicle accident. *Id.* at 29.

Dr. Singh testified by way of deposition for a third and final time on July 17, 2019, regarding the contents of an addendum report authored on May 3, 2019, following an additional records review that Respondent requested for an opinion regarding Petitioner's cervical spine. (RX15, p.5-6) His diagnosis regarding Petitioner's cervical spine was degenerative disc disease at C5-6 and C6-7 with bilateral foraminal stenosis and cervical muscular strain. *Id.* at 6. He reached said conclusion based on his findings of loss of disc height on the MRI and Petitioner's contemporary complaints of neck pain at the time of the injury. *Id.* at 6. He testified that he believed the most injury Petitioner sustained was a soft tissue strain, and he did not feel that her disc degeneration was aggravated, exacerbated, or accelerated by the motor vehicle accident. *Id.* at 7. When asked the basis of this opinion, he stated that Petitioner would have developed associated radiculopathy had an aggravation occurred, and he did not observe any upper extremity complaints in the records he reviewed or note any at the time of his examination two years later. *Id.* at 7. He did not believe she needed any restrictions with respect to her cervical spine, and he continued to believe Petitioner was at maximum medical improvement. *Id.* at 8.

On cross-examination, Dr. Singh acknowledged that he did not examine Petitioner's cervical spine. *Id.* at 12. He also testified that disc replacement was effective in treating patients suffering from stenosis and radiculopathy. *Id.* at 13-14. He acknowledged that Petitioner's neck symptoms were consistent with the MRI findings. *Id.* at 14-15. He also admitted that it was possible for the C6-7 pathology to cause pain in the upper back. *Id.* at 15. He acknowledged that it was very difficult to date MRI findings, and that Petitioner had no prior record of cervical spine complaints prior to the accident. *Id.* at 16. He acknowledged that a patient can suffer structural injury to the spine without necessarily having nerve root impingement. *Id.* at 18. Although he did not note the same findings of decreased biceps strength and reduced wrist dorsiflexion and volar flexion, he acknowledged that said findings noted by Dr. Gornet would indicate involvement of the C6 nerve root. *Id.* at 19. He acknowledged that Petitioner was persistently symptomatic in the records he reviewed, and that he had no disagreement with Petitioner's course of treatment, including the injections administered and the disc replacement proposed. *Id.* at 20. However, he remained of the opinion that Petitioner suffered only a sprain/strain of the cervical spine from the accident. *Id.* at 21.

Respondent requested a records review from Dr. Nikhil Verma with respect to Petitioner's left knee condition, and he authored a report containing his opinion on September 4, 2016. (RX3, p.8) He did not examine Petitioner, but reviewed her records and concluded his assessment with a diagnosis of suspected internal derangement. *Id.* at 9. He recommended examination under anesthesia, diagnostic arthroscopy, and possible ligament reconstruction. *Id.* at 10. Following his initial report, he had the opportunity to examine Petitioner and generated a supplemental report dated July 31, 2017. *Id.* at 10. In said report, he noted tenderness over the tibial screw, complaints of back pain during standing, and complaints of hip pain during ambulation. *Id.* at 12. His assessment was subjective complaints with hardware pain and limitations in strength. *Id.* at 13. He did not believe that Petitioner required any further formal treatment at that time based on the time that had elapsed following her surgery, and he recommended over-the-counter medication for her remaining complaints.

Id. at 13-14. He testified that Petitioner reached maximum medical improvement approximately six (6) to eight (8) months following her surgery in January of 2017, which was approximately the time of his IME evaluation. *Id.* at 14-15.

On cross-examination, Dr. Verma testified that he performs approximately five (5) to seven (7) IMEs per week, 80% of which are on behalf of defense parties. *Id.* at 16. He also never saw any photographs of the accident and did not solicit her account of the accident when he examined her in July of 2017. *Id.* at 17-18. He agreed that Petitioner suffered a severe, high-energy collision and causally related Petitioner's knee condition to same in his initial report. *Id.* at 18-19. He also acknowledged that there was no evidence that Petitioner was symptomatic prior to the accident, and that she complained of pain over her hardware site at the time of his examination. *Id.* at 19. He differentiated these complaints, however, from "mechanical symptoms." *Id.* at 19. He acknowledged that in his initial report, he stated that Petitioner may require ACL reconstruction if her knee was unstable during the diagnostic arthroscopy he recommended. *Id.* at 20.

Dr. Verma admitted that hardware pain was a post-surgical complaint associated with the reconstruction procedure. *Id.* at 21. He did not believe there were any treatment options for that complaint. *Id.* at 21. He also believed that quadriceps atrophy was a typical finding after ACL reconstruction. *Id.* at 22-23. He did not believe that Petitioner's back or hip condition hindered her progress following knee surgery, but stated: "Now, that's not to say that she may not have limitations in functional capacity based on other joints; but from a knee standpoint alone, she was recovering as one would expect." *Id.* at 23-24. He had no opinion with regard to Petitioner's hip or back conditions but agreed that all of Petitioner's care and treatment rendered to her knee was reasonable, necessary, and causally related to the 2015 motor vehicle injury. *Id.* at 24.

Petitioner took the deposition of Dr. Kevin Rutz on September 30, 2016. (PX27) He testified that Petitioner was referred to him by Dr. Lehman when she failed conservative management of her lumbar and thoracic complaints. *Id.* at 8-9. He testified that his differential diagnosis at the time he initially evaluated Petitioner and reviewed the imaging studies she had to date was low back pain, thoracolumbar pain, possibly secondary to an injury at T11-12, and possible left-sided radiculopathy. *Id.* at 11. He testified that Petitioner had no prior history of back pain. *Id.* at 11-12. After the new thoracic MRI he recommended was obtained and demonstrated a disc herniation in her foramen at T11-12, he recommended transforaminal epidural steroid injection at that level. *Id.* at 14-15. This was not noted on the radiologist's report, so he took a copy of the MRI marked as an exhibit and indicated the injury with a red circle. *Id.* at 16-17. Dr. Rutz also noted degenerative changes at that level. *Id.* at 18-19.

Dr. Rutz was unable to form a diagnosis with respect to Petitioner's lumbar radiculopathy but testified that the herniated nucleus pulposus thoracic was commensurate with a disc herniation and consistent with Petitioner's other symptoms. *Id.* at 19, 22, 25. He testified that he could not tell if they performed the injection in the exact manner than he recommended, but ultimately Petitioner failed to improve with injection. *Id.* at 21-22. He testified that Petitioner remained unable to work up to the time he recommended surgery by way of T11-12 decompression with removal of the disc herniation and fusion with instrumentation, and that her status remained the same at the time of his deposition. *Id.* at 21-24. He testified that Petitioner's trucking accident caused the foraminal disc herniation at T11-12, aggravated her preexisting degeneration and made it symptomatic, and caused her need for the recommended thoracic surgery. *Id.* at 24-25.

On cross-examination, Dr. Rutz testified that he recommended the surgery whether or not Petitioner underwent the transforaminal injection in the manner specified, he "[didn't] think it will long-term fix the problem." *Id.* at 29. When asked whether he thought it would offer Petitioner some benefit, he testified that it would provide short-term relief but would not be "curative." *Id.* at 29-30. When asked about his diagnosis of a thoracic herniation and the lack of notation thereof by the radiologist, Dr. Rutz testified that he reviewed the actual films and characterized them as a "tricky read." *Id.* at 32. He stated:

> But I think it's a tricky read, because I personally missed it the first time when I looked at it. And then when getting the second MRI, which was a better MRI, I could see it. And then when I went back today and compared the two, it was interesting that there were certain sequences that they didn't run off the first MRI that were run on the new MRI, which made it a lot easier for me to see the pathology. So at 20/20 hindsight, then I look back, and on certain sequences I can see it, but it's much more evident on the new MRI. *Id.* at 32.

Dr. Rutz characterized Petitioner's thoracic degeneration as moderate and agreed that it existed before the accident but testified that he did not believe the herniation was present beforehand. *Id.* at 34-35.

Dr. Matthew Gornet testified by way of deposition on September 9, 2019. (PX26) Dr. Gornet testified that he actively participates in FDA IDE clinical trials, has written numerous publications, and lectures worldwide on spine care. *Id.* at 6-8. He testified that he specializes in disc replacement surgery and treating patients, but occasionally performs independent medical evaluations at the request of plaintiff or defense parties once or twice a month. *Id.* at 9. Dr. Gornet testified that in addition to performing his own evaluation and generating treatment records, he reviewed the records of Dr. Rutz, Dr. Kovalsky, Dr. Lehman, and the photographs of the motor vehicle accident. *Id.* at 10. He testified that from his review of records, Petitioner's symptoms she complained of when she presented to him were consistent with the symptoms she reported to all other physicians following the collision. *Id.* at 12. He also noted no evidence of prior symptoms or treatment for Petitioner's neck or low back. *Id.* at 12.

Dr. Gornet testified that his examination of Petitioner revealed that she suffers from weakness and irritation of the C5, 6, and C7 nerve roots. *Id.* at 13. He stated that the accident Petitioner was in could have easily caused injuries in the spine, and that the pain between her shoulder blades was most likely referred pain. *Id.* at 14-15. He also indicated that her degeneration in her spine was age appropriate, but made her more susceptible to disc injury. *Id.* at 15-16. He thus recommended an MRI of Petitioner's cervical spine under a whiplash protocol and recommended a motion analysis. *Id.* at 16-17. The MRI showed structural injury of the spine at C3-4, C5-6, C6-7, and potentially at C4-5. *Id.* at 18, 19. He testified that Petitioner's lumbar spine MRI also showed central disc protrusion at L5-S1, and disc degeneration at T11-12, which he believed was aggravated as a result of the injury. *Id.* at 18-20. He testified that since Petitioner had no problems prior to the accident, was working full duty, suffered a severe injury, had unabating symptoms since then, and the lack of any intervening accidents or injuries led him to believe conclusively that her symptoms and condition were still related to the motor vehicle accident of May 13, 2015. *Id.* at 17-18.

Dr. Gornet testified that since Petitioner failed to improve with conservative care, the only real option for Petitioner to improve at this point is surgical intervention. *Id.* at 21. Dr. Gornet recommended disc replacement at C3-4, C5-6, and C6-7. *Id.* at 23. Although there was strong suggestion of disc injury at C4-5 based on quantitative motion analysis, Dr. Gornet testified that he would recommend a new MRI scan to see if

Petitioner's pathology was increasing prior to determining whether to incorporate that level in the procedure. *Id.* at 23. He remained hopeful that Petitioner would be able to return to work full duty following her treatment, but also stated:

> We know that the longer this drags out the more difficult it is to return someone back to full duty. But my recollection of this patient is she was fairly motivated and wants to go back. I think if we can provide her with this type of benefit, there's a strong chance we could get back to work full duty, at least as an over-the-road truck driver, on touch freight, something like that. *Id.* at 25-26.

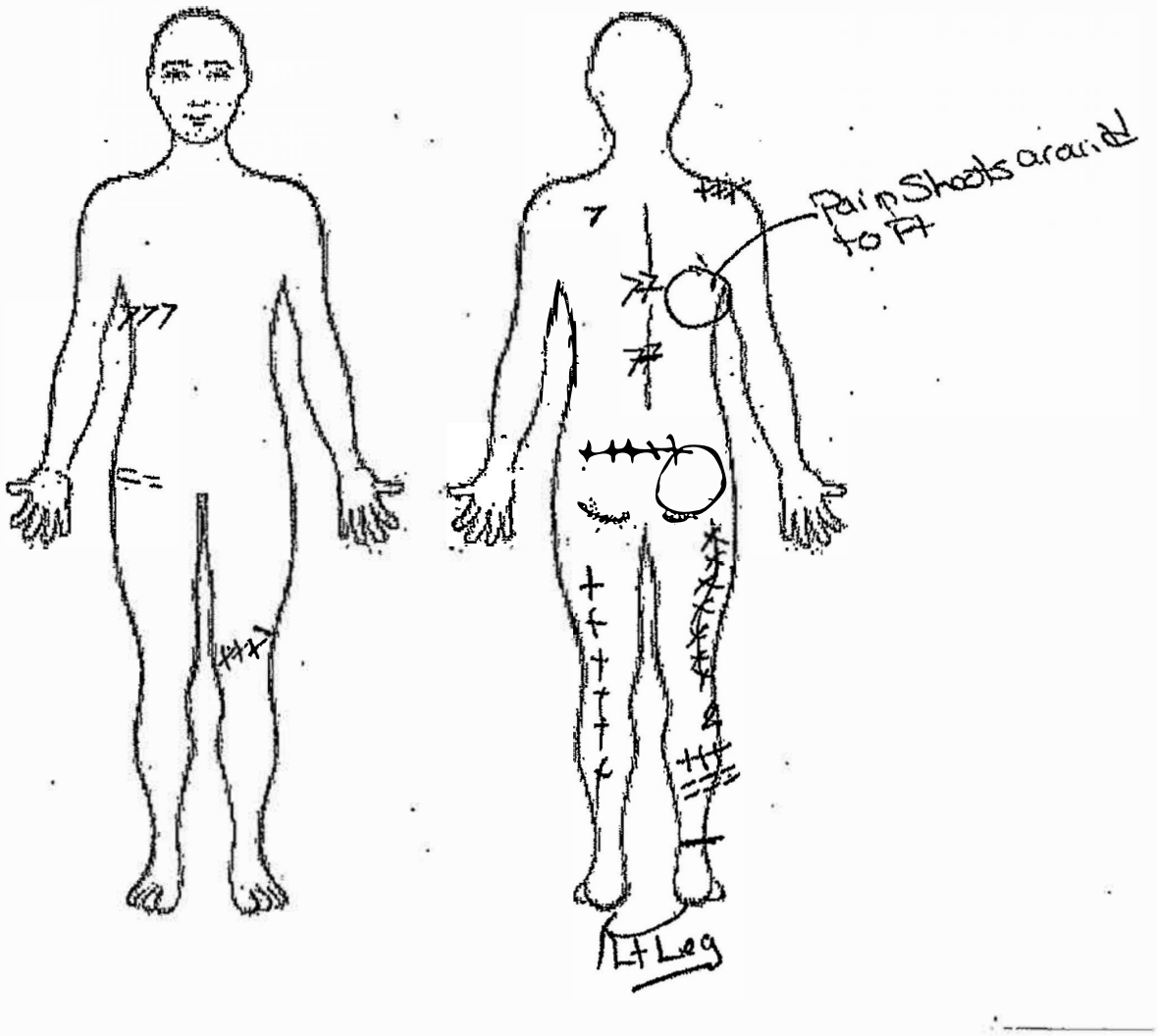
With respect to her lumbar spine, Dr. Gornet testified that his plan was to obtain a high resolution MRI, given that the machine that performed her previous scan was only 1.5 Tesla in strength, more than 20 years old, and was currently being replaced. *Id.* at 26-27. He recommended MRI spectroscopy and a CT discogram to see if she would be indicated for L5-S1 disc replacement. *Id.* at 26. On cross-examination, he testified that he placed Petitioner off work rather than restrict her to sedentary duty, "Because sedentary duty in this situation oftentimes aggravates people. . . Prolonged fixed head positions tend to really aggravate these people. There's not a lot they can do." *Id.* at 34. He further stated, "I would think it would be difficult for her to maintain gainful employment right now." *Id.* at 35-36.

CONCLUSIONS

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). The law also holds that accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (2003). If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967); see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 362 N.E.2d 339 (Ill. 1977).

The Arbitrator finds, based on the evidence in the record, that Petitioner suffered a severe motor vehicle collision that resulted in her current condition of ill-being. While it is unfortunate that it has been difficult to ascertain the exact cause of Petitioner's condition of ill-being, with sufficient time and adequate referrals, Petitioner's physicians have objectively demonstrated through imaging studies that she suffered injury to her neck, thoracic spine, and lumbar spine as a result of the motor vehicle collision. (PX13; PX14; PX15; PX23; PX24) The Arbitrator also notes that Petitioner has consistently complained of symptoms that correlated with injury to the cervical spine, (radicular shoulder complaints), thoracic spine, and lumbar spine, and her complaints are corroborated by the medical records submitted into evidence. *See below pain diagram from the records of Dr. Rutz dated January 26, 2016, contained in Petitioner's Exhibit 14.*



(PX14, 1/26/16).

In accordance with Petitioner's credible and persistent complaints and the objective medical evidence, the Arbitrator places significant weight on the opinions of Dr. Gornet and Dr. Rutz with respect to Petitioner's spine, as both of these physicians identified objective evidence through MRIs that correlated with Petitioner's symptoms. Dr. Gornet and Dr. Rutz believed that Petitioner suffered new injury and an aggravation of her preexisting asymptomatic conditions. The Arbitrator is unpersuaded by the opinion of Dr. Singh, who believed that Petitioner suffered only a strain that has since resolved, when Petitioner, who was asymptomatic prior to the collision, has at no point returned to baseline following the accident. Dr. Verma, on the other hand, agreed that Petitioner's knee condition was causally related to the injury. Consequently, the Arbitrator finds that Petitioner met her burden of proof on the issue of causal connection.

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

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

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

Based upon the above findings as to causal connection, the Arbitrator finds Petitioner entitled to recovery for the expenses contained in the record. At no point has Petitioner reached maximum medical improvement since the injury, and she has not exhausted all reasonable treatment options. Even Dr. Singh, who disagreed with respect to causation, testified he agreed that Petitioner's past and proposed course of care was reasonable for her condition. (RX15, p.20)

Respondent shall pay outstanding reasonable and necessary medical services of $193,669.48, as set forth in Petitioner's exhibit 1, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall further authorize and pay for prospective medical care as recommended by Dr. Gornet, as provided in Sections 8(a) and 8.2 of the Act.

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

The law in Illinois holds that "[a]n employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit." *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 561 N.E.2d 623 (Ill. 1990). The ability to do light or restricted work does not preclude a finding of temporary total disability. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 561 N.E.2d 623 (Ill., 1990) citing *Ford Motor Co. v. Industrial Comm'n*, 126 Ill.App.3d 739, 743, 467 N.E.2d 1018, 81 Ill.Dec. 896 (1984). Since neither Dr. Rutz nor Dr. Gornet have concluded Petitioner's care or placed her at maximum medical improvement, Petitioner has clearly not reached maximum medical improvement and remains entitled to temporary total disability benefits.

Respondent shall pay Petitioner temporary total disability benefits of $666.67/week for 231 3/7 weeks, commencing 5/15/15 through 10/24/19, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $89,998.98 for temporary total disability benefits that have been paid.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC007356
Case Name	REHFELDT, MICHAEL v. HUBBELL WIEGMANN, INC
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0229
Number of Pages of Decision	18
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Richard Salmi
Respondent Attorney	Rick Montgomery

DATE FILED: 5/10/2021

/s/ Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL REHFELDT,

Petitioner,

vs. NO: 18 WC 7356

HUBBELL WIEGMANN, INC.,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 27, 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, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 10, 2021

/s/ *Christopher A. Harris*

CAH/tdm
O: 5/6/21
052

/s/ *Barbara Flores*

DISSENT

I respectfully dissent from the majority decision and would reverse the decision of the Arbitrator. The Arbitrator concluded that Petitioner's current condition of ill-being was not causally related to the December 14, 2017 accident. He further found that Petitioner was at maximum medical improvement from his work accident on February 23, 2018 and denied TTD and medical expenses incurred after that date as well as prospective medical care. In my view, the evidence supports different conclusions.

Following Petitioner's accident, he consistently and regularly complained of low back pain radiating into his buttocks. Company physicians Dirkers and Breeden noted his complaints and found on exam he had a positive straight leg test. They placed restrictions on Petitioner's work. Because of Petitioner's complaints and exam findings, an MRI was ordered by Dr. Dirkers and performed on February 21, 2018. The MRI showed Petitioner suffered from lipomatosis. Just two days after the MRI, Dr. Breeden informed Petitioner that his condition was not work-related and released him from his care. At the time, he imposed further work restrictions.

While Petitioner had suffered a prior lumbar injury, there was no evidence in the record indicating he had any complaints or treatment for over two years prior to his December 14, 2017 work accident. An MRI in 2014 did not show Petitioner suffered from lipomatosis. In my view, a chain of events analysis reveals that Petitioner's current condition of ill-being is causally related to his work accident. As noted, his pain complaints began just after the accident and have remained unchanged. These complaints were corroborated by his physical examinations. The fact that it was discovered that Petitioner suffers from a pre-existing condition, lipomatosis, is not a sufficient basis to conclude on February 23, 2018 that his condition was not related to the December 14,

2017 accident. I would have awarded further TTD, additional medical expenses and prospective care.

For all the foregoing reasons, I respectfully dissent from the decision of the majority.

/s/ *Marc Parker*

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

21IWCC0229

REHFELDT, MICHAEL Case# **18WC007356**

Employee/Petitioner

HUBBELL WIEGMANN INC

Employer/Respondent

On 3/27/2020, 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 0.80% 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:

6296 JEROME SALMI & KOPIS LLC
RICHARD E SALMI
331 SALEM PL SUITE 260
FAIRVIEW HTS, IL 62208

5802 MONTGOMERY & WULFF
RICK MONTGOMERY
28 N 8TH ST SUITE 200
COLUMBIA, MO 65201-7708

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)

Michael Rehfeldt
Employee/Petitioner

v.

Hubbell Wiegmann, Inc.
Employer/Respondent

Case # 18 WC 07356

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 **Collinsville**, on **January 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. ☒ 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, **12/14/2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**4,946.10**; the average weekly wage was $**797.76**.

On the date of accident, Petitioner was **45** years of age, ***married*** with **3** dependent children.

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

Respondent shall be given a credit of $**15,637.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**20,976.55**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act. Respondent to receive a credit for medical paid of $**5,339.55**.

ORDER

Petitioner has not proven, by a preponderance of the evidence, that his current condition of ill-being is related to his accident of December 14, 2017, and therefore no past or future temporary total or medical benefits are awarded pursuant to the act.

Respondent shall be given a credit of $**5,339.55** for medical benefits that have been paid.

Respondent shall be given a credit of $**15,637.00** for temporary total disability benefits that have been paid.

Petitioner is not entitled to any penalties under Section 16 of the Act; Section 19(k) of the Act; or Section 19(l) of the Act.

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

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

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

Signature of Arbitrator

3/20/20
Date

ICArbDec19(b)

MAR 27 2020

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

MICHAEL REHFELDT
Employee/Petitioner

v. Case # 18WC007356

HUBBELL WIEGMANN, INC.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner first went to work for Respondent on November 1, 2017, as a brake press operator. Six weeks later on December 14, 2017, Petitioner was working alone in an area he described as "basically abandoned" when a piece of metal jammed in the machine. He went to go find someone to help but could not find anyone that was free and could go back to where he was by himself to help free the metal. Petitioner pulled the metal on its own unjamming it and it started sliding off the table so he grabbed it and when he did felt a pull in his low back. There were no witnesses to this incident. There was nobody there. It was time for his regular break so he went outside to his car and sat for about one-half hour. He testified that when he returned to work after break he noticed symptoms going down his left leg. He went home that night and received a call the following day from the safety department asking him to go to Midwest Occupational Medicine where he first sought medical treatment.

Petitioner was first seen the day after his incident on December 15, 2017, by Dr. Bradley Breeden. He noted a prior low back injury 11 years ago. Petitioner told Dr. Breeden that he was having burning sensation from his neck to low back. He indicated he had a low back injury 11 years ago. He denied numbness or tingling to lower extremities. Straight leg raise tests were negative bilaterally with subjective complaints of mild discomfort only. Petitioner was diagnosed with a lumbar strain and returned to work for Respondent the following day, December 16, 2017, working full time with restrictions of only "work as tolerated."

On December 28, 2017, Petitioner saw Dr. Breeden again. He had continued to work modified duty work as tolerated. He had full range of motion and a normal physical examination with mild subjective complaints of discomfort only. Dr. Breeden noted that his level of discomfort appears to be inconsistent with clinical evaluation. He was prescribed physical therapy and allowed to continue working "as tolerated."

On January 2, 2018, Petitioner presented to the Work Center for his first physical therapy. It was noted that he had elevated subjective complaints of left sided back pain. Objective findings were generally unremarkable. Subjective pain reports were not well reproduced during objective testing. There did not appear to be significant tissue tension or muscle spasm present. Three out of five Waddell Signs were positive which was clinically significant for non-organic low back pain.

Petitioner saw Dr. George Dierkers, also at Midwest Occupational Medicine, on January 12, 2018. He reported that he is getting better, the pain is no longer up and down the back, but focused more into his left low back only. He felt his mobility had improved a lot. Flexeril was refilled and additional physical therapy for 2 more weeks was prescribed. He was to continue working as he had been "as tolerated, as pain allows."

Petitioner's last day of physical therapy at The Work Center was on January 19, 2018, at which time he complained only of left sided low back pain that was a 3/10.

On January 22, 2018, Petitioner saw Dr. Dierkers again with increased pain and a straight leg raise suggestive of nerve root impingement. He was restricted to no lifting greater than 20 pounds and an MRI was ordered.

On January 27, 2018, Petitioner presented to the Emergency Room at Memorial Hospital with back pain that he reported was getting worse the week prior primarily after working all day or completing physical therapy. He now reported shooting pain down his left leg to the knee. He was taking Hydrocodone, Naproxen and muscle relaxers for pain; however, a search under the Illinois database revealed he had no current narcotics being legally prescribed to him. A CT scan of the lumbar spine was obtained that showed no abnormality. He was told to discontinue Hydrocodone, Valium, Dilaudid, and Toradol; asked to follow up with pain management and primary doctor; obtain MRI; and return to work.

Petitioner had an MRI of the lumbar spine at Brightway Imaging on February 21, 2018. The radiologist, Dr. Michael Walden, interpreted the MRI as showing epidural lipomatosis at the lower lumbar level and lumbosacral junction causing severe concentric narrowing of thecal sac at L5-S1 level and mild narrowing at L4-5 level. No bulging or protruding discs or annular tears were present.

On February 23, 2018, Petitioner saw Dr. Breeden to go over the results of the MRI. Dr. Breeden indicated:

> The patient's MRI of the lumbar spine revealed epidural lipomatosis at the lower lumbar level and lumbosacral junction causing severe concentric narrowing of the thecal sac at the L5-S1 level and mild narrowing at the L4-5 level. I did discuss this patient's MRI findings with Dr. Dierkers and we both agree that this is a chronic non-work relate health issue for which he should follow up with his primary care physician / neurosurgeon for further treatment.
>
> The patient is returned to modified duty consisting of 20 pounds push, pull, lift limit and no repetitive bending at the waist until the patient is seen by neurosurgeon for non-work-related epidural lipomatosis. The patient is discharged to follow up with the patient's primary care physician / specialist for non-work-related health issues.

Petitioner never went back to work for Respondent or anyone else after that date and remains unemployed today. He has not applied for work or tried to work anywhere since that date. Respondent accommodated him and he worked full time with Respondent until this date when Dr. Breeden determined this was not a work-related injury.

Petitioner began treating on his own with Daniel Brunkhorst, a chiropractor, in the beginning of March, 2018, and continued to treat with him until 11/29/2018. Every single note indicates that Dr. Brunkhorst took him off work only until 3/21/2018.

Dr. Brunkhorst referred Petitioner to Dr. Matthew Gornet who ordered another MRI of the lumbar spine. This was done at MRI Partners of Chesterfield on March 12, 2018, and the radiologist interpreted it the same finding circumferential epidural lipomatosis from L3-4 through sacral levels resulting in thecal sac constriction

progressively more severe. Below central canal stenosis was mild at L3-4, moderate at L4-5, and severe at L5-S1 with sacral sac construction at all levels. Just like the 11/7/14 MRI in Florida, this also revealed no disc bulge or protrusion or central canal stenosis present. No annular tear was noted either.

Petitioner saw Dr. Gornet on March 16, 2018. He complained for the first time of low back pain on both sides now, mostly on the left. He was 307 pounds. Physical examination was normal. Dr. Gornet reviewed the two MRIs and believed they showed a central annular tear present at L4-5. He did not believe the epidural lipomatosis was the source of his pain. Dr. Gornet indicated Petitioner could work light duty with restrictions.

On March 26, 2018, Dr. Gornet's recommended an epidural steroid injection at L4-5 to address the complaints Petitioner was having. This gave Petitioner significant relief for about one week.

Petitioner finally returned to Dr. Gornet again on 11/5/2018 having reached his weight loss goal. He was now complaining of low back pain on both sides, both buttocks, and particularly the left buttock, left hip and left leg. Dr. Gornet believed that at a minimum Petitioner aggravated an underlying condition that was present before his December 2017 incident. Dr. Gornet ordered a discogram at L4-5 and L5-1 for the purpose of "looking for a symptomatic annular tear or disc injury."

Dr. Gornet performed a discogram on 11/30/2018 that Petitioner testified was the most painful thing he has ever been through and he wouldn't take a million dollars to do it again because he won't go through that pain again. Dr. Gornet had previously diagnosed from MRI an annular tear at L4-5, but now the nucleogram at L4-5 was interpreted as completely normal and L5-S1 was interpreted as degenerative with a posterior annular tear. On December 17, 2018, Dr. Gornet recommended a disc replacement at L5-S1 with a diagnosis now of annular tear at L5-S1 with some mild facet changes.

Petitioner saw Dr. Peter Mirkin at Respondent's request on February 15, 2019. Petitioner told Dr. Mirkin that Dr. Gornet is recommending disc replacement surgery at L5-S1. Even though he did work up until Dr. Breeden and Dr. Dierkers determined the condition was not work related, Petitioner told Dr. Mirkin he had not returned to work since the accident. The MRI of 3/9/2018 that Dr. Gornet believes is of much better quality and shows an annular tear at L4-5 was done at a facility owned by Dr. Gornet. Dr. Mirkin reviewed that same MRI and saw no evidence of any post-traumatic pathology whatsoever. Dr. Mirkin noted a normal physical examination. He diagnosed a lumbar sprain with epidural lipomatosis which can cause stenosis and is unrelated to the incident in question. The proper treatment for epidural lipomatosis that causes nerve compression is a laminectomy and not a disc replacement. The MRI spectography Dr. Gornet relied on is not an accepted evaluation nor is a discogram performed by Dr. Gornet and his staff an acceptable evaluation. Most physicians find that discogram is not a reliable diagnostic study. The only significant pathology is pre-existing epidural lipomatosis. The MRI performed by Dr. Gornet's staff at his facility shows no bulge or protrusion at L4-5 or L5-S1 and there is no indication for disc replacement on a normal disc. The only diagnosis is a lumbar strain, resolved. His pre-existing lumbar lipomatosis may have caused the strain. The incident of December 14, 2017 did not aggravate or cause his pre-existing condition and while Petitioner may require laminectomy at some point in time due to stenosis, there is no indication for removing a relatively normal disc and placing a disc replacement. Petitioner could return to work without restrictions if he was motivated and so desired. He complains of pain in his left leg but his exam is completely normal. He is at MMI. Dr. Mirkin wonders why Dr. Gornet initially indicates Petitioner would need a disc replacement at L4-5 then changes his mind to L5-S1.

Petitioner then saw Dr. Gornet again for the last time on 2/25/2019, at which time Dr. Gornet said he was not a candidate for any further treatment until he loses weight and gets off all narcotics he was taking.

Petitioner had a prior history of falling 16 feet from a wooden ladder injuring his low back, and then another low back injury in Florida in 2014 just a few years prior to the incident with Respondent. He missed nine months of work and had to voluntarily resign. He thought he just pulled a muscle in his back just like he thought when this incident occurred with respondent. He had to get an MRI on November 7, 2014, that showed no significant disk bulge or protrusion, central canal or neural foraminal stenosis, or nerve root impingement which is the same that the two MRIs after his December, 2017 accident show as well. He also admitted to "pulling a muscle" in his back many times before in the construction area and that he has had the same symptoms he has now in the past before the accident with Respondent.

Dr. Gornet testified by deposition on September 16, 2019. Petitioner has irritation of the L5 nerve root. (Pet. Ex. 1, p. 13, 16, 18, 36). He explained that if there is a structural problem in the disc itself, removing part of the disc is not going to help him return to a laboring position. So the only way to do this is a fusion or disc replacement. (Pet. Ex. 1, p. 23). He explained Epidural lipomatosis is fat around the nerves that Petitioner probably had 2 months before his accident. (Pet. Ex. 1, p. 27). No disc protrusions were identified. (Pet. Ex. 1, p. 28). This patient clearly admitted he had a previous problem in his back. So you can't say that his back pain began at the time of December 17th. Something changed in his medical condition in December of 2017. (Pet. Ex. 1, pp. 30-31). If he cannot maintain his weight at 280 or less and cannot get off narcotics then he is at maximum medical improvement, permanent restrictions should be established and no further treatment should be allowed or performed. (Pet. Ex. 1, p. 34). He does not have a disc protrusion; His formal diagnosis is disc injury at L5-S1 with annular tear. (Pet. Ex. 1, p. 36).

Dr. Peter Mirkin testified by deposition on October 18, 2019. Dr. Mirkin is a fellowship trained board-certified spine surgeon. (Resp. Ex. 1, p. 7). He sees patients in his office 2 days per week, does surgery 2 days per week, and runs a satellite office in Festus, MO 1 day per week. (Resp. Ex. 1, p. 8). He sees 80-100 patients per week and performs about 300 surgeries per year. (Resp. Ex. 1, p. 9). Petitioner has epidural lipomatosis which can cause spinal stenosis and back and leg pain as well. (Resp. Ex. 1, pp. 11-12). Dr. Mirkin reviewed the MRI of 3/9/18 and agrees with the radiologist that there was some lipomatosis, but no structural abnormality of the spine, the discs, or bony abnormalities. This and the prior MRI of 2/21/18 both show epidural lipomatosis at the lowest part of the spine that causes narrowing of the thecal sac particularly at L5. (Resp. Ex. 1, p. 12). Epidural lipomatosis tends to wax and wane. Sometimes people do well and sometimes it flares up. You only do something if it gets severe. (Resp. Ex. 1, p. 13). This is not the result of an acute injury. (Resp. Ex. 1, p. 14). Dr. Mirkin diagnosed non-work-related lipomatosis and a December 2017 back strain. (Resp. Ex. 1, pp. 15-16). The appropriate treatment for lipomatosis is therapy, anti-inflammatory medicine, or laminectomy. Petitioner did not require any work restrictions related to his strain. (Resp. Ex. 1, p. 16). There is no indication for removing a normal disc and placing a piece of metal and plastic in there. This also is not the appropriate procedure for lipomatosis. (Resp. Ex. 1, p. 18). There are no torn discs, ruptured discs, tumors or anything like that on any of the films. (18). They also do not show any annular tears. (Resp. Ex. 1, p. 18). An annular tear is a normal finding in someone over 35-40 and doesn't require any treatment unless there is a ruptured disc pushing out through the annulus. (Resp. Ex. 1, p. 19). Petitioner does not have a ruptured disc. He has recovered from his work-related injuries. (Resp. Ex. 1, p.23). Discograms are harmful and cause damage by injecting the disc with dye it creates a hole in the disc and they dye can be toxic and accelerate degeneration. (Resp. Ex. 1, p.30-31). MR spectroscopy is an unrecognized tool for evaluating disc conditions. There is no data on that other than one paper written by Dr. Gornet and a couple of other guys that all own the machines giving conflicting information on its usefulness but it is not a recognized tool in the spine community. Resp. Ex. 1, p. (31-32).
He is not actively treating with anyone, doing any prescribed PT, or taking any prescribed medication for his back now.

Petitioner received treatment for a shoulder injury after he fell in a hallway and has submitted bills for treatment of that injury, but he testified that he doesn't know if he tripped on anything or not. He testified that he may have tripped on his dog and remembered him squealing as he fell.

Portioner testified that he now has symptoms similar to an electrical shock that feels like pins and needles down the left leg to the foot that comes and goes and low back pain.

Petitioner testified that he had to stop bicycling, hunting, motorcycling, and roofing, but on cross-examination admitted that he hasn't tried roofing since before accident, hasn't hunted since before the accident because he hasn't had time with his work schedule, hasn't ridden a motorcycle and sold his 6 months before the accident, and hasn't tried to ride a bicycle since 3 months prior to accident.

CONCLUSIONS OF LAW

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

It is established law that at hearing, it is the employee's burden to establish the elements of his claim by a preponderance of credible evidence. *See, Illinois Bell Tel. Co. v. Industrial Comm'n.,* 265 Ill. App. 3d 681; 638 N.E. 2d 307 (1•1 Dist. 1994). This includes the issue of whether Petitioner's current state of ill-being is causally related to the alleged work accident. *Id.* The claimant has the burden of establishing by a preponderance of the evidence the elements of his claim, including "some causal relation between the employment and the injury." *Isenhart v. Ill. Workers' Comp. Comm'n*, 2019 IL App (1st) 190373WC-U, ¶ 31, citing *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 63, 541 N.E.2d 665, 133 Ill. Dec. 454 (1989); see also *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 469, 949 N.E.2d 1158, 351 Ill. Dec. 63 (2011, and *Triplett v. Ill. Workers' Comp. Comm'n*, 2019 IL App (1st) 190647WC-U, ¶ 36.

As Dr. Gornet testified, "This patient clearly admitted he had a previous problem in his back. So you can't say that his back pain began at the time of December 17th." (Pet. Ex. 1, pp. 30-31). Dr. Gornet believes Petitioner has irritation of the L5 nerve root. (Pet. Ex. 1, p. 13, 16, 18, 36). Three radiologists, Dr. Breeden, Dr. Dierkers, and Dr. Mirkin, and even Dr. Gornet agree that Petitioner had pre-existing non-work-related epidural lipomatosis which is fatty deposits in the spinal canal most prominently around the L5 nerve. As Dr. Mirkin explained at his deposition, this can cause back pain and leg pain as well that can wax and wane over time. Sometimes a patient with this condition does well and sometimes the patient has pain. (Resp. Ex. 1, p. 13). After this accident Petitioner did gain so much weight that he was at 307 pounds which can only cause more restriction and likely increase pain. As of the last time Petitioner saw Dr. Gornet, he was still too heavy to undergo any procedure. Dr. Breeden, Dr. Dierkers, Dr. Mirkin, and three radiologists all agree that the objective MRIs and a CT scan show no disc bulges, no protrusions, and no annular tears. Even Dr. Gornet testified on page 36 of his deposition, that he has not diagnosed a disc protrusion. Dr. Breeden, Dr. Dierkers and Dr. Mirkin agree that Petitioner's condition of ill-being is pre-existing non-work-related epidural lipomatosis. Substantial overwhelming evidence exists that Petitioner's condition of ill-being is not causally related to the injury.

Dr. Gornet decided to order another MRI at his own facility because the first one was "of poor quality." No other doctor found the first MRI to be of poor quality. Dr. Gornet's MRI revealed exactly the same as the first. His own radiologist interpreted it the same. Dr. Gornet, however, looked at the same MRI and diagnosed a central annular tear at L4-5 and treated that with injection that provided significant relief to Petitioner. No other doctor saw or diagnosed an annular tear at L4-5. Dr. Gornet offers surgery to almost everybody that he sees and Dr. Mirkin offers surgery to a very small number of people that he sess. There is something wrong with offering surgery to 95% of your population. (Resp. Ex. 1, 36). Dr. Gornet then ordered a discogram "looking for a

symptomatic annular tear or disc injury" as none had been identified by anyone else. Dr. Gornet owns the facility and interpreted the discogram himself instead of using a neutral operator or observer which Dr. Mirkin indicated should not be done. Discograms are harmful in that by injecting the disc with dye it actually creates a hole in the disc. (Resp. Ex. 1, pp. 30-31). Petitioner himself testified this was the most painful thing he has ever been through and will never do it again, not for one-million dollars. Not surprisingly, Dr. Gornet concluded based on review of his own discogram that there was an annular tear (likely caused by the discogram), but this time at L5-S1 versus L4-5 as he had previously indicated. He did not find a disc protrusion: just an annular tear for which he recommended a disc replacement at L5-S1.

Even if an annular tear had been present before discogram that was not identified by three radiologists and three doctors that reviewed the objective findings, Dr. Mirkin explained that annular tears are a normal finding in someone Petitioner's age requiring no treatment unless there is a ruptured disc pushing out through the annulus. There is no evidence of that. Even Dr. Gornet testified there was no disc protrusion, just a normal tear. There is no indication for removing a normal disc and placing a piece of metal and plastic in there. (Resp. Ex. 1, p. 18).

Dr. Gornet is not credible. He profits from performing surgery, using his own MRI facilities, and his own discograms "looking for something" to treat. There is no disc bulge, rupture or protrusion: just pre-existing epidural lipomatosis that is likely worse with being overweight. This is consistent with the change in symptoms of nearly resolved low back pain to increased pain and first left then both leg symptoms with weight gain.

> "[O]n one side there is what appears to be relatively benign MRI findings, and the findings of Dr. Singh of symptom magnification positive Waddell signs. On the other side, there is the subjective complaints of [the claimant] and the diagnosis of [the claimant's] treating doctors that [the claimant] had a disc 'herniation' which caused mild-to-moderate foraminal stenosis." The claimant's medical providers relied extensively on the claimant's subjective complaints and the December 4, 2008, abnormal EMG, which was suggestive but **not** definitive for a left lumbosacral radiculopathy. *Triplett v. Ill. Workers' Comp. Comm'n*, 2019 IL App (1st) 190647WC-U, ¶ 38-39.

Such is the case here.

Therefore, while Petitioner may have strained his back, this has resolved as Dr. Mirkin indicated, and Petitioner has failed to prove by a preponderance of the evidence that his current condition of ill-being is not causally related to the injury.

Petitioner testified that he fell at home causing injury to his left shoulder suggesting that it may have been caused by his low back pain; however, while he may have back pain, it is not causally related to the work injury as referenced above, and even if there was a causal connection between his current back pain and work, no doctor has indicated to a reasonable degree of medical certainty that his back and leg pain cause him to fall or that it caused him to fall and injure his left shoulder. Petitioner himself testified that he doesn't know why he fell and he may have tripped over his dog because he heard the dog cry out when he fell. Mere possibilities are insufficient to prove causation under the Act. *County of Cook v. Industrial Comm'n*, 68 Ill. 2d 24, 31, 368 N.E.2d 1292, 11 Ill. Dec. 546 (1977). *Kazmierski v. Ill. Workers' Comp. Comm'n*, 2016 IL App (3d) 141011WC-U, ¶ 37. Petitioner has failed to prove that his left shoulder condition of ill-being and any treatment he received for that was causally related to his work for Respondent.

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?

Under section 8(a) of the Act (820 ILCS 305/8(a)), an employer is required to provide or pay 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." The claimant bears the burden of proving, by a preponderance of the evidence, his entitlement to an award of medical expenses under section 8(a). *Max Shepard, Inc. v. Industrial Comm'n,* 348 Ill. App. 3d 893, 903, 810 N.E.2d 54, 284 Ill. Dec. 401 (2004). *Westin Hotel v. Indus. Comm'n*, 372 Ill. App. 3d 527, 546, 310 Ill. Dec. 18, 35, 865 N.E.2d 342, 359 (2007); see also, *Gallentine v. Indus. Com.*, 201 Ill. App. 3d 880, 888, 147 Ill. Dec. 353, 359, 559 N.E.2d 526, 532 (1990).

Petitioner offered into evidence medical bills from several providers, most of which were providers seen after being released by Dr. Breeden once he and Dr. Dierkers determined Petitioner's condition of ill-being was not related to the injury. (Pet. Ex.16). Petitioner testified only that the unpaid medical bills in Exhibit 16 were "for treatments [he] underwent after [his] work accident." (Tr., 32). Dr. Gornet testified in his deposition that at treatment to date has been reasonable and necessary as a consequence of his work injury (Pet. Ex. 1, p. 24), but does not specify what treatment he is referring to. The bills offered in Petitioner's Ex. 16 contain charges for treatment for many obviously non-work-related conditions including left shoulder problems that date back to a prior surgery, weight issues, diabetes, allergies and other common ailments. No doctor reviewed those bills and testified that they were reasonable or that they were for treatment reasonably required to cure or relieve from the effects of the accidental injury. There simply exists no evidence that they were. Furthermore, even if they all relate to low back and leg symptoms, all doctors, including Dr. Gornet, agree that Petitioner had pre-existing back pain, that he has a non-work related lipidosis component to his back condition, and no doctor has separated out what is and is not related or reasonably required to cure or relieve from the work injury.

A party seeking the admission into evidence of a bill that has not been paid can establish reasonableness by introducing the testimony of a person having knowledge of the services rendered and the usual and customary charges for such services. Once the witness is shown to possess the requisite knowledge, the reasonableness requirement necessary for admission is satisfied if the witness testifies that the bill is fair and reasonable. *Baker*, 333 Ill. App. 3d at 493. Where the only foundational testimony came from claimant who testified that he received the bills and that, to the best of his knowledge, most of the balances remained unpaid, this testimony clearly did not meet the foundational requirements because Claimant was not someone who was familiar with the medical providers' business practices or who could testify about the reasonableness of the charges. *Land & Lakes Co. v. Indus. Comm'n (Dawson)*, 359 Ill. App. 3d 582, 590-91, 296 Ill. Dec. 26, 34, 834 N.E.2d 583, 59. Here, Petitioner didn't even do that: he testified only that the medical bills were for treatment he received (apparently for any condition) after his work accident.

The court in *Gray Hill, Inc. v. Indus. Com.*, 145 Ill. App. 3d 371, 378, 99 Ill. Dec. 295, 495 N.E.2d 1030, 1036 (1986) was presented with a situation where no evidence of claimant's medical treatment was presented outside of the voluminous treatment records submitted to the Industrial Commission upon review. The Court noted that in *Jewel Companies, Inc. v. Industrial Com.* (1984), 125 Ill. App. 3d 92, 465 N.E.2d 935, this court noted that claimants bear the burden of proving reasonable medical expenses by a preponderance of the evidence and that "a physician's bill which was a hodge-podge of items not clearly related to the injury" is not a sufficient basis upon which to award reasonable medical expenses. (125 Ill. App. 3d 92, 94-95, 465 N.E.2d 935, 936.). *Gray Hill, Inc. v. Indus. Com.*, 145 Ill. App. 3d 371, 378, 99 Ill. Dec. 295, 301, 495 N.E.2d 1030, 1036 (1986). This is exactly the same here.

Petitioner has failed to prove with by a preponderance of the evidence that he is entitled to an award of medical expenses. Respondent paid all medical bills reasonably required to cure and relieve from the effects of the injury along with some that were not up through a determination by MRI and Dr. Breeden and Dr. Dierkers that Petitioner's condition of ill-being was not due to a work-related injury.

K. Is Petitioner entitled to any prospective medical care?

Petitioner is not entitled to any prospective medical care. If he suffered any injury at all, he was restored and at maximum medical improvement when he was released by Dr. Breeden. The medical treatment recommended by Dr. Gornet is excessive and is not reasonable or necessary to cure or relieve from any work-related injury or even the benign non-work-related condition he diagnosed as explained above. Furthermore, Dr. Gornet testified that if Petitioner will not benefit from any additional treatment if he doesn't lose weight soon and doesn't get off narcotics. There is not medical evidence that Petitioner had done either, and Dr. Gornet's opinion is therefore that he is at maximum medical improvement, should have permanent restrictions placed upon him, and released from care. No other physician is recommending any additional treatment.

L. What temporary benefits are in dispute?

Petitioner is requesting temporary total disability benefits from January 22, 2018, to January 31, 2018 and from March 1, 2018, through January 27, 2020, which is 101 and 1/7ths weeks. An employee is temporarily totally disabled until he is restored, or his condition is stabilized. *Brinkmann v. Industrial Comm'n* (1980), 82 Ill. 2d 462, 413 N.E.2d 390. To prove a claim for temporary total disability, the employee must show not only that he did not work, but also that he was unable to work. *Boker v. Industrial Comm'n* (1986), 141 Ill. App. 3d 51, 489 N.E.2d 913. *Palmer House v. Indus. Com.*, 200 Ill. App. 3d 558, 564, 146 Ill. Dec. 322, 326, 558 N.E.2d 285, 289 (1990).

Petitioner testified that he returned to work 2 days after the incident working light duty up through February 28, 2018. He was able and did work up through this date and would not be entitled to TTD benefits. After it was determined that his condition of ill-being was not related to work, Petitioner met with Respondent who could no longer accommodate his non-work-related injury and Petitioner stopped working as referenced in Respondent's Ex. 3.

Petitioner has also requested TTD from March 1, 2018, through the date of the hearing, January 27, 2020. Petitioner testified that he has not tried to work or even applied for work anywhere. He has restrictions due to a non-work-related condition, but no doctor has indicated that he is unable to work or that it is because of a work-related condition. Dr. Mirkin testified that any strain he may have suffered resolved and Petitioner is therefore restored, and his condition is stabilized. Dr. Gornet testified that at this point having no lost weight or stopped taking narcotics Petitioner is at MMI and can be released with permanent restrictions even for his on-work related condition.

Petitioner has failed to prove he is entitled to temporary total disability benefits. Furthermore, Respondent advanced and paid TTD benefits of $15,637.00, which at $531.84 per week amounts to 29 2/7ths weeks that it did not owe. Respondent is entitled to a credit of this amount on any future PPD benefits owed.

M. Should penalties or fees be imposed upon Respondent?

The section 19(1) penalty is in the nature of a late fee. *McMahan v. Industrial Comm'n,* 183 Ill. 2d 499, 515, 702 N.E.2d 545, 234 Ill. Dec. 205 (1998). Assessment of the penalty is mandatory "if the [benefit] payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay." *McMahan,* 183 Ill. 2d at 515. In determining whether an employer has "good and just cause" in failing to pay or delaying payment of benefits, the standard is reasonableness. *McMahan,* 183 Ill. 2d at 515.

Generally, an employer's reasonable and good-faith challenge to liability does not warrant the imposition of penalties. *Matlock v. Industrial Comm' n,* 321 Ill. App. 3d 167, 173, 746 N.E.2d 751, 253 Ill. Dec. 930 (2001); see, *e.g., Complete Vending Services, Inc. v. Industrial Comm'n,* 305 Ill. App. 3d 1047, 1051, 714 N.E.2d 30, 239 Ill. Dec. 472 (1999) (Commission's imposition of penalties reversed in a case where the claimant was injured en route to a service call via a stop at his office while driving the company van; court found there was a valid dispute as to whether claimant's injuries arose out of and in the course of his employment and further found facts were somewhat unique and that one commissioner dissented). When the employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions, penalties ordinarily are not imposed. *Matlock,* 321 Ill. App. 3d at 173; see, e.g., *Ford Motor Co. v. Industrial Comm' n,* 126 Ill. App. 3d 115, 466 N.E.2d 1221, 81 Ill. Dec. 419 (1984) (Commission's assessment of section 19(1) penalties reversed, where the employer disputed causation relying on a physician's report that indicated the claimant suffered from conditions that were unrelated to his work accident). An employer's belief is honest only if the facts in the possession of a reasonable person in the employer's position would justify it. *Board of Education of City of Chicago v. Industrial Comm'n,* 93 Ill. 2d 1, 10, 442 N.E.2d 861, 66 Ill. Dec. 300 (1982). The burden of proof is on the employer. *Mobil Oil Corp. v. Industrial Comm'n,* 309 Ill. App. 3d 616, 625, 722 N.E.2d 703, 242 Ill. Dec. 919 (2000).

Imposition of section 19(k) penalties is discretionary. *McMahan,* 183 Ill. 2d at 515. They are assessed when a benefit payment delay is deliberate or results from bad faith or "improper purpose." *McMahan,* 183 Ill. 2d at 515. Section 16 applies in the same circumstances. *McMahan,* 183 Ill. 2d at 515. The imposition of section 19(k) penalties and section 16 attorney fees requires a higher standard of proof than an award of additional compensation under section 19(1). *McMahan,* 183 Ill. 2d at 514. Section 19(k) penalties may be awarded for an employer's failure to pay medical expenses. *McMahan,* 183 Ill. 2d at 512.

USF Holland, Inc. v. Indus. Comm'n (Baker), 357 Ill. App. 3d 798, 804-05, 293 Ill. Dec. 885, 892-93, 829 N.E.2d 810, 817-18 (2005).

Petitioner worked up through Dr. Breeden and Dr. Dierkers obtained an MRI and determined through objective evidence that Petitioner's condition of ill-being was not work-related, but instead due to a pre-existing unrelated condition. Dr. Mirkin later agreed. Respondent acted in reliance upon three reasonable medical opinions, including two supporting MRIs and a CT scan, that only conflict just somewhat with Dr. Gornet's opinion, and as a result, penalties should not be imposed. The employer's challenge to liability is reasonable and in good-faith and does not warrant the imposition of penalties.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC017633
Case Name	JAMERSON, SANDRA v. CONVENTION CONNECTION
Consolidated Cases	
Proceeding Type	8(a)/19(h) Petition
Decision Type	Commission Decision
Commission Decision Number	21IWCC0230
Number of Pages of Decision	18
Decision Issued By	Thomas Tyrrell, Commissioner DISSENT

Petitioner Attorney	Leandro Alhambra
Respondent Attorney	Brian Rosenblatt

DATE FILED: 5/10/2021

/s/ Thomas Tyrrell, Commissioner

Signature

21IWCC0230

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SANDRA JAMERSON,

Petitioner,

vs. NO: 16 WC 17633

CONVENTION CONNECTION,

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, causal connection, permanent disability, and being advised of the facts and law, reverses the Arbitrator's Decision regarding 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 affirms and adopts the Arbitrator's Statement of Facts in its entirety, however, disagrees with the Arbitrator's analysis of the evidence under a neutral risk analysis, instead finding that the Petitioner established that she suffered accidental injuries arising out of and in the course of her employment on February 25, 2016, that her bilateral knee condition is causally related to the work accident, that Petitioner is entitled to an award of permanent partial disability benefits as it relates to her knees, and that Respondent shall pay for the medical expenses under §8(a) and §8.2 of the Act, limited to the amount paid by the group provider, for the reasons set forth below.

The Commission strikes the Arbitrator's Conclusions of Law, except the Arbitrator's Credibility Assessment, and further modifies the Arbitrator's Decision by substituting the Conclusions of Law as referenced below. The Commission also strikes the last Finding on page two of the Decision, beginning with "Having found no accident" and ending with "are MOOT." The Commission further vacates and strikes the Order on page two beginning with "Petitioner

failed" and ending with "hereby denied."

Conclusions of Law

Accident

The Commission incorporates the Arbitrator's Statement of Facts herein. With respect to whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Commission finds that the Petitioner established that she sustained accidental injuries arising out of and in the course of her employment with Respondent.

There is no dispute Petitioner was in the course of her employment at the time of her fall. The issue in dispute is whether or not the Petitioner's accident arose out of her employment with Respondent. Petitioner testified that Respondent's office is located on Dearborn Street in Chicago, however Petitioner never worked at this location. The job required that she travel, depending on where she was hired to work, to various locations such as McCormick Place, the Hyatt, Navy Pier or another hotel. Petitioner testified that those were examples of the various convention venues where she would work for Respondent. She was notified where she should go to work that day by a supervisor, or the person who did the hiring for Respondent, on any given day via email. (T, 13-14) These various work sites are the locations where different types of conventions were held; dental conventions, different trade shows or other types of conventions were held at these various locations where she had to work. The conventions last typically for over a week and some would last about a week on average. It could be one location one week and maybe the next week could "be somewhere else possibly." (T, 14-15)

Petitioner's unrebutted testimony was that on the date of accident, Respondent did not have a regular satellite office at McCormick Place. They had what she described as a holding room, not a set office. They did not have a leased office space; they would have a room where the workers would check in. Petitioner was feeling fine on February 25, 2016, when she came into work that day. When she got to work, she was assigned to go into a holding room, at approximately ten or five minutes to 7:00 a.m. Her work time started at 7:00 a.m. The managers released the workers to go to their respective work-stations and, as she proceeded to go to her work-station, she went down the stairs, "about - I don't know -- six or seven. I don't remember how many, but not that many stairs, six or seven probably. And as I was walking down the stairs, I fell; and a couple of my coworkers helped me up." The co-workers asked her how she was doing. Petitioner testified, "well, my knees were burning at that time." (T, 16-18)

Injuries sustained by employees away from the workplace during travel to and from work are generally not compensable except when duties require travel away from the work site. There is an exception to the rule, if an employee is required to travel and is involved in the performance of reasonable services for the employer at an appropriate time and place, an injury that occurs will be considered to be in the course of the employment.

> A "traveling employee" is one who is required to travel away from her employer's premises to perform her job. *Cox*, 406 Ill. App. 3d at 545. It is not necessary for an individual to be a traveling salesman or a company representative

> who covers a large geographic area to be considered a traveling employee. *Hoffman v. Industrial Comm'n*, 128 Ill. App. 3d 290, 293, 470 N.E.2d 507, 83 Ill. Dec. 381 (1984), *aff'd*, 109 Ill. 2d 194, 486 N.E.2d 889, 93 Ill. Dec. 356 (1985).

Mlynarczyk v. Ill. Workers' Comp. Comm'n (Obrochta), 2013 IL App (3d) 120411WC, 16, 999 N.E.2d 711, 717, 2013 Ill. App. LEXIS 341, *12, 376 Ill. Dec. 536, 542, 2013 WL 2362118

In *Mlynarczyk*, the Petitioner sustained injuries from a slip and fall on a public sidewalk as she was walking to her vehicle to her next assignment. In finding that Petitioner was a traveling employee, the court noted that Petitioner did not work at a fixed jobsite and that her duties required that she travel to various locations in the Chicagoland area. Similar to the claimant in *Mlynarczyk*, the Petitioner does not work in a fixed location, but rather, she is required to travel to different convention venues such as McCormick Place, Navy Pier, the Hyatt and other hotels/venues. These assignments typically last five days.

In a case where the claimant's position as Director of Health Services required her to travel to schools throughout Winnebago and Boone counties, the Supreme Court agreed with the appellate court that claimant's status was that of a "traveling employee" and that courts generally consider such employees differently from other employees when considering whether an injury arose out of and in the course of employment. (*Wright v. Industrial Com.* (1975), 62 Ill. 2d 65, 68; *David Wexler & Co. v. Industrial Com.* (1972), 52 Ill. 2d [***6] 506, 510.) *Hoffman v. Industrial Comm'n.,* 109 Ill. 2d 194, 199, 486 N.E.2d 889, 891, 1985 Ill. LEXIS 314, *5-6, 93 Ill. Dec. 356, 358

The *Venture-Newberg-Perini* Supreme Court enunciated the test to determine the next step if a traveling employee is injured as follows.

> The court then considers whether [****828] [**540] the employee's activity was compensable. *Wright*, 62 Ill. 2d at 69. This court has found that injuries arising from three categories of acts are compensable: (1) acts the employer instructs the employee to perform; (2) acts which the employee has a common law or statutory duty to perform while performing duties for his employer; (3) acts which the employee might be reasonably expected to perform incident to his assigned duties. *** Considering the third category, this court has found that traveling employees may be compensated for injuries incurred while performing an act they were not specifically instructed to perform. The act, however, must have arisen out of and in the course of his employment. To make this determination, [***9] the court considers the reasonableness of the act and whether it might have reasonably been foreseen by the employer.

V*enture-Newberg-Perini v. Ill. Workers' Comp. Comm'n,* 2013 IL 115728, P16-P18, 1 N.E.3d 535, 539-540, 2013 Ill. LEXIS 1625, *7-9, 376 Ill. Dec. 823, 827-828, 2013 WL 6698421

The Commission finds that at the time Petitioner fell, she was doing what she was instructed to do by her employer and further, she was also performing an act that she would reasonably be expected to perform incidental to her assigned duties, which was walking down

stairs to get to her work station from her initial check point.

The Commission finds that walking down a staircase at McCormick Place is reasonable and foreseeable when, as Petitioner testified, as part of her job and in order to fulfill her job duties, she has to walk around various convention centers to go first to the check-in point to get her specific assignment location and then to her work station which the Commission infers, can involve multiple unfamiliar routes, and stairs or ramps. Petitioner also testified that she goes to these various locations for conventions to fulfill her job duties where she has to check people in, to take payments and do the appropriate clerical work associated with those tasks. She has to go to different locations, depending on where the conventions are being held, to perform her job duties, getting the assignments via email at home from her supervisor.

The Commission finds that the Petitioner, as a traveling employee, was engaged in a reasonable and foreseeable activity at the time of her injury, was exposed to a greater risk of injury as a result of her employment and employment duties, and thereby sustained her burden of proving an accident arising out of and in the course of his employment with Respondent on February 25, 2016.

Causal Connection

The evidence in the Petitioner's medical records documents that Petitioner had a past medical history of falling in February 2015 (PX1) before the subject accident and as a result of that incident having bilateral knee and lumbar back pain, diagnostics and conservative treatment. The last physical therapy session ended approximately four weeks prior to the subject incident. (PX1) However, given the Petitioner's description of falling on her knees, the Commission finds that the Petitioner sustained an aggravation injury to her bilateral knees.

Petitioner alleges she sustained injury to her lower back. However, the Commission does finds Petitioner's low back condition unrelated to the subject accident and believes her back pain was more likely than not related to other idiopathic, medical conditions based on the medical evidence. On March 25, 2016, the Petitioner went to the emergency room at Rush University Medical Center and gave a history to Nurse O'Callaghan of falling the prior month, noting that at the time of the fall she had right upper abdominal pain and then started having upper abdominal pain and right side pain for (the past) three days. (PX1) She also reported having emesis, abdominal pain, and that her urine had been dark. *Id.*

Emergency notes from Nurse Voogt document that Petitioner presented with multiple complaints stating that she was having mid back pain for about a month since falling down stairs at work. Petitioner reported that she had been taking Ibuprofen and muscle relaxers with some relief, but the pain persisted. *Id.* She had seen her PCP for the pain and was supposed to see orthopedics for the persistent pain. She presented with complaints of right upper quadrant pain, nausea and vomiting since Tuesday. She stated she also had this pain after falling a month ago, but it went away so she thought it was related to the fall. *Id.*

Subsequently at the emergency room, the Petitioner was seen by Dr. Perumalsamy and he documented that Petitioner was found to have transaminitis on labs, no cholecystitis, but CBD

dilation. He was concerned for ductal stone per surgery service. The Radiology US Abdomen Limited test result confirmed a preliminary result showed:

1. Dilated common bile duct, measuring up to 1.1. cm. No definite stone visualized withing the common bile duct. Mild intrahepatic biliary ductal dilation.
2. Gallbladder sludge. No gallbladder wall thickening or significant pericholecystic fluid.
3. Simple hepatic cysts. (PX1)

Dr. Perumalsamy recommended that Petitioner be admitted to surgery for "ERCP v OR." *Id.* She declined at that time, however, by February 2017, the Petitioner underwent surgery for cholecystectomy/cystogastrostomy/appendectomy and hysterectomy, all in one surgery. (PX2)

Based on the Commission's conclusion regarding the issue of accident, the Commission finds that Petitioner's bilateral knee conditions are causally related to the accident on February 25, 2016.

Medical Expenses

We find that Petitioner's medical expenses related solely for treatment to her knees have been reasonable, necessary, and causally related to her accident and Respondent is liable for the Mercy Medical Center medical bills in the amount of $2,812.04 contained in Petitioner's exhibits pursuant to §8(a) of the Act, subject to the fee schedule in §8.2 of the Act. Respondent is entitled to a credit under §8(j) of the Act for payments made by its group insurance carrier; if any, provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

Permanent Disability

According to Section 8.1b(b) of the Act, for injuries that occur after September 1, 2011, in determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

(i) The reported level of impairment pursuant to AMA guidelines;
(ii) The occupation of the injured employee;
(iii) The age of the employee at the time of the injury;
(iv) The employee's future earning capacity; and
(v) Evidence of disability corroborated by the treating medical records.

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 an administrative worker with Respondent at the time of her injury, and there is no evidence that Petitioner was unable to return to this type of work as a result of her bilateral knee conditions. Thus, this factor is assigned moderate

weight.

(iii) Petitioner was 58 years old at the time of the accident and while Petitioner did not testify regarding the number of years she intends to work, she is approaching social security retirement eligibility age. This factor is assigned moderate weight.

(iv) There is no evidence of reduced future earning capacity in the record thus this factor is assigned moderate weight.

(v) Regarding evidence of disability corroborated by the treating medical records, as a result of the work-related accident of February 23, 2016, Petitioner sustained an aggravation of pre-existing bilateral knee pain. For Petitioner's knees, she was treated conservatively and discharged on July 26, 2016. The final physical therapy note of July 26, 2016, from Mercy documented that Petitioner reported continued pain in her knees. The assessment documented that the Petitioner had attended a total of 15 therapy sessions with reports of continued pain, however of less intensity and frequency. She noted improved walking, however, she was still not able to do a mile or more. There were remaining strength deficits, however, those had not improved since her last progress note and the therapist believed she reached her maximum potential in therapy at that time and discharge was recommended. The Commission notes that after Petitioner underwent extensive surgery in 2017, she resumed therapy in 2018 apparently to regain strength. Petitioner testified that since the fall she continues to have sharp pain, weakness in her knees and feels that they will "give out." Based on the treating medical records, this factor is assigned moderate weight.

Based on the foregoing factors, the Commission awards 2.5% loss of use of the Petitioner's left leg and 2.5% loss of use of the Petitioner's right leg, a total of 10.75 weeks under §8(e) for permanent partial disability.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on February 21, 2019, is hereby reversed on the issue of accident and modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHE ORDERED BY THE COMMISSION that the Arbitrator's Order on page two beginning with "Petitioner failed" and ending with "hereby denied" is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $220.00 per week for a period of 10.75 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused 2.5% loss of use of the left leg and 2.5% loss of use of the right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay for the Mercy Medical Center medical bills in the amount of $2,812.04 contained in Petitioner's exhibits pursuant to §8(a) of the Act, subject to the fee schedule in §8.2 of the Act. Respondent is entitled to a credit under §8(j) of the Act for payments made by its group insurance carrier, if any; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the

benefits for which Respondent is receiving credit under this order.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 10, 2021

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

KAD/bsd
O030921
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/s/*Maria E. Portela*
Maria E. Portela

DISSENT

I respectfully dissent from the majority opinion finding that Petitioner was a traveling employee and that she sustained her burden of proving accident because her injury was foreseeable. Although Petitioner's job required her to go to a different convention location for up to a week at a time to perform her administrative duties, she did not have to go to the Respondent's main office at all. Instead, she received her assignment locations via email. Petitioner was not traveling between jobs in any given day, or going to a different location more than once per week. Therefore, Petitioner was neither traveling nor on the street when her injury occurred, therefore I find that analysis inapplicable. Instead, Petitioner was traversing stairs at the location of her job on the accident date, and therefore, the Arbitrator used the appropriate neutral-risk analysis and found that Petitioner did not meet her burden of proving accident. Therefore, I would affirm and adopt the Arbitrator's well-written decision in its entirety for the following reasons.

The Petitioner's attendance at various job locations in the subject case is similar to the claimant in *Jones v. Moreman* (citations omitted) In *Jones*, the Appellate Court upheld the Commission's Decision finding that the claimant was not a traveling employee. The *Jones* court first explained that the traveling employee rule is an exception to the general rule that when accidents occur coming and going from work, they are not compensable except "when the employer provides a means of transportation to or from work or affirmatively supplies an employee with something in connection with going to or coming from work." *Xiao Ling Peng v. Nardi*, 2017 IL App (1st) 170155, ¶ 10 (citing *Hall v. De Falco*, 178 Ill. App. 3d 408, 413, 533 N.E.2d 448, 127 Ill. Dec. 576 (1988) (citing *Hindle v. Dillbeck*, 68 Ill. 2d 309, 320, 370 N.E.2d 165, 12 Ill. Dec. 542 (1977) and *Sjostrom*, 33 Ill. 2d at 40). *Jones v. Moreman*, 2019 IL App (4th)

180525WC-U, P20, 2019 Ill. App. Unpub. LEXIS 786, *10.

The *Jones* court further analyzed the outcomes of multiple traveling employee cases to determine compensability under the doctrine of traveling employee. In denying compensation to the claimant, the Appellate Court explained, in pertinent part, the following factors that they considered to make that determination.

> The Commission Decision was reversed where, unlike the claimant in *Mlynarczyk,* there was no evidence that the claimant left a job site to perform subsequent work-related travel to perform his required job duties. Moreover, the claimant was not injured during a trip to a distant work location to perform further work-related job duties, as seen in *Kertis*, where travel to and from the branch locations during the workday was required of the branch manager to perform his work-related functions. Furthermore, the claimant was not injured in a vehicle assigned to him by Moreman's Improvement during a trip from a remote job site to his home, as seen in *Cox*, where the claimant was injured while operating a company vehicle on his regular route home from a distant job site. As such, unlike the facts in the present case, there was a requirement, in all three cases cited by the claimant, to travel from one job site to the next job site in order to fulfill each claimant's job duties. Accordingly, we cannot [**20] conclude that the Commission's decision was against the manifest weight of the evidence in finding that the claimant was not a traveling employee.

Jones v. Moreman, 2019 IL App (4th) 180525WC-U, 2019 Ill. App. Unpub. LEXIS 786

In his supplemental concurrence on denial of a rehearing, Justice Rakowski defined the traveling employee exception to the coming and going general rule as follows:

> This exception stems from the fact that employees whose employment dictates that they travel away from home are subject to certain risks created by such travel and being away from home. The rule originated in resident employee cases and was then applied to employees who were required to travel and stay in lodgings. It was first applied to risks incident to staying in a hotel or motel and risks incident to eating meals. Such activities were found to be incidental to the conduct of business. 2 A. Larson & L. Larson, Workers' Compensation Law § 25.21(a) [***13] (1998). The rule was then extended to bathing and dressing activities (2 A. Larson & L. Larson, Workers' Compensation Law § 25.22 (1998)), U.S.O. entertainers (2 A. Larson & L. Larson, Workers' Compensation Law § 25.23(a) (1998)), travel abroad in risky countries (2 A. Larson & L. Larson, Workers' Compensation Law § 25.23(b) (1998)), and then to all travel (2 A. Larson & L. Larson, Workers' Compensation Law § 25.23(c) (1998)). The rule has also been [*1053] applied to include recreational activities while traveling since employees can reasonably be expected to partake in recreational activities on their day off. See *Bagcraft Corp. v. Industrial Comm'n,* 302 Ill. App. 3d 334, 705 N.E.2d 919, 235 Ill. Dec. 736 (1998). Under a traveling employee analysis, determination of whether an injury arose out of and in the course of the employee's employment depends on the

> reasonableness of the employee's conduct at the time of the injury and whether the employer could anticipate or foresee the employee's conduct or activity. (citations omitted) Thus, an employee traveling away from home may be considered in the course of employment, not just while working, but 24 hours a day so long as his activities are reasonable and foreseeable.

C*omplete Vending Servs. v. Industrial Comm'n (Thompson*), 305 Ill. App. 3d 1047, 1052-1053, 714 N.E.2d 30, 34, 1999 Ill. App. LEXIS 352, *11-14, 239 Ill. Dec. 472, 476.

The Petitioner in this case went to one job site generally for a week at a time, and there was no evidence that she left a job site to perform subsequent work-related travel to perform her required job duties. She met no other criteria under the umbrella of traveling employee cases. This Petitioner was not injured during a trip to a distant work location to perform further work-related job duties, as seen in *Kertis*, where travel to and from the branch locations during the workday was required of the branch manager to perform his work-related functions. Furthermore, the claimant was not injured in a vehicle assigned to her by Respondent during a trip from a remote job site to her home, as seen in *Cox*, where the claimant was injured while operating a company vehicle on his regular route home from a distant job site. Thus, I find that the Arbitrator applied the appropriate neutral risk analysis and I would affirm and adopt her well-reasoned decision.

Based on the foregoing, I respectfully dissent from the majority opinion.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0230
NOTICE OF ARBITRATOR DECISION

JAMERSON, SANDRA
Employee/Petitioner

Case# **16WC017633**

CONVENTION CONNECTION
Employer/Respondent

On 2/21/2019, 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 2.45% 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
LEANDRO ALHAMBRA
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

2542 BRYCE DOWNEY & LENKOV LLC
JONATHAN ZARATE
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

SANDRA JAMERSON
Employee/Petitioner

v.

CONVENTION CONNECTION
Employer/Respondent

Case # 16 WC 17633

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 **MARIA S. BOCANEGRA**, Arbitrator of the Commission, in the city of **CHICAGO**, on **11/16/2018 and 12/11/2018**. 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 _____

Jamerson v. Convention Connection
16 WC 17633

FINDINGS

On **February 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 not*** sustain an accident that arose out of and in the course of employment.

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

In the year preceding the injury, Petitioner earned **$684.00**; the average weekly wage was **$228.00**.

On the date of accident, Petitioner was **58** years of age, ***single*** with **0** dependent children.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0.** Respondent is entitled to a credit of $0 under Section 8(j) of the Act.

Having found no accident occurred, the remaining disputed issues of notice, causal connection, liability for unpaid medical bills, temporary total disability and prospective medical care are **MOOT.**

ORDER

Petitioner failed to prove she sustained accidental injuries arising out of and in the course of her employment. All other claims for compensation 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

2/21/2019
Date

FEB 2 1 2019

FINDINGS OF FACT

Background

Sandra Johnson ("Petitioner") alleged injuries to her left shoulder arising out and in the course of her employment with Convention Connection ("Respondent") occurring on February 25, 2016. Ax1, Ax2. On November 16, 2018 and December 11, 2018, the parties proceeded to arbitration on the disputed issues of accident, causal connection, liability for unpaid medical bills, temporary total disability benefits and nature and extent of the injury.

Testimonial and Other Evidence

It was stipulated by the parties that Petitioner, Sandra Jamerson, worked for Respondent, Convention Connection, on February 25, 2016. Petitioner testified that she began working for Convention Connections in 2010. Petitioner's job duties included checking in convention attendees, room monitoring, and administrative work.

Respondent's office is located on 500 N. Dearborn in Chicago. Petitioner did not work at this location. As part of her job duties, Petitioner was required to travel to various conventions sites. Petitioner testified in the past she was assigned to work tradeshows or trade conventions in various locations such as, McCormick Place, the Hyatt, Navy Pier and other hotels. These conventions typically lasted 1 week. Petitioner testified that her supervisor would email her the location of the conventions.

On February 25, 2016, Petitioner was assigned to work at McCormick Place in Chicago. Petitioner was scheduled to begin work at 7 am. Petitioner arrived at McCormick Place 5 to 10 minutes before 7 am and was assigned to go into a holding room. At 7 am she was instructed by the managers to proceed to their work stations. As Petitioner proceeded to her workstation, she descended down a stairway that had six to seven stairs. About half way down the stairway Petitioner fell forward onto the landing. Petitioner testified that both knees and both hands struck the floor and she landed face down. Immediately after the fall Petitioner felt burning and aching in both knees, as well as pain in the right upper quadrant of her abdomen.

Petitioner testified that she did not know what caused her to fall. However, Petitioner testified that she noticed that it was dark in that area and the floors were being buffed. Petitioner did not notice any wet flor signs in the area. Petitioner testified that the area that she fell was open to the general public.

Petitioner continued to work for about three hours. Due to the pain Petitioner sought medical attention at McCormick Place nurse's station, where her knees were iced. Petitioner was eventually picked up by her son and went home. Petitioner testified that evening she very achy in her knees and back. Petitioner took over the Tylenol for pain. Petitioner called her doctor that same day, but she was not in the office. Petitioner called her doctor's office back the next day and made an appointment.

Petitioner was seen by Dr. Nancy Bryan on 3/1/16. The exam revealed tenderness over the patellar area bilaterally and tenderness over lower lumbar area. X-ray of the left shoulder were normal. X-ray of the lumbar spine revealed no fracture and degenerative changes of the lumbar spine most pronounced at L5-S1. X-rays of the bilateral knees showed minimal bilateral degenerative changes. Petitioner was diagnosed with bilateral knee pain.

Petitioner followed up with Dr. Bryan on 3/31/16 with complaints of "lightning type pain in her knees which is limiting her walking. Petitioner was referred to Midwest Orthopedic for evaluation and management

of musculoskeletal issues. Petitioner testified that Dr. Bryan ordered physical therapy for her back and knees. Petitioner underwent a course of physical therapy at Mercy Hospital. Petitioner attended a total of 15 therapy sessions between 4/26/16 and 7/26/16.

Petitioner testified that prior to the 2/25/16 fall she had mild problems with both knees. Petitioner testified that she sustained a fall on both knees about a year before the 2/25/16 fall. Petitioner underwent physical therapy at Stroger Hospital. Petitioner testified that she was not actively treating for the prior fall on 2/25/16. At the time of the 2/25/16, Petitioner was not on any restrictions for her knees and was working full duty.

Petitioner testified that since the fall down the stairs she has increased pain and weakness in her knees. She experiences these symptoms on a daily basis and they are triggered by activities of daily living. Petitioner takes Acetamin (sic) three to four times per week for the pain. Petitioner also testified that since the fall she has constant pain in her back. Petitioner described the pain as "pushing a fist in my back or I get aches, like sharp pains too." Petitioner testified that she experiences these low back symptoms every day.

On cross-examination Petitioner testified that she walked past a man buffing the floors. Petitioner admitted that she did not notice that the stairs were wet. Petitioner testified there was the area she fell had internal lighting but no a lot. She also testified there was not a lot of light coming through the windows at that time in the morning. On cross examination Petitioner testified that she did experience pain in her knees prior to the 2/25/16 fall. On cross examination Petitioner testified that she did not have weakness in her knees prior to the 2/25/16 fall. On re-direct Petitioner testified that she now gets sharp pains in her knees and feels like it's giving out. Petitioner also pointed out that she now walks with a cane. Petitioner began using the Cane in March or April of 2016.

James Nelson (Nelson)_testified on behalf of Respondent. Nelson is employed by McCormick Place as a Loss Control Manager. He has held this position for McCormick Place for 22 years. Nelson was working at McCormick Place on February 25, 2016; however, he was not made of aware of Petitioner's fall until a two days later. Nelson testified that the stairway where Petitioner fell is open to the general public.

On cross-examination Nelson admitted he did not investigate the location of the fall that same day. Nelson admitted that he investigated the area of the fall a couple days later. He also admitted that he did not know if the floors in the surrounding areas were being buffed at the time of the fall. Nelson's first learned of the fall by way of a report a couple days later. Nelson did not produce the report when he testified.

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment

Petitioner was the only witness to testify at trial. The Arbitrator had an opportunity to observe Petitioner's demeanor and the Arbitrator found her to be credible, forthcoming and candid as to her recollection of her duties, the mechanism of injury, her course of treatment, her delay in obtaining ongoing care and her current condition.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having considered all evidence, the Arbitrator concludes that Petitioner failed to prove by a preponderance of the evidence that she sustained accidental injuries arising out of and in the course of her employment with Respondent.

Here, there is no dispute Petitioner was in the course of her employment at the time of her fall. Petitioner's unrebutted testimony was that on the date of the incident, she was assigned to McCormick Place and had just been released to her work station. On the way to her work station, she fell down several stairs.

At issue is whether Petitioner's injury arose out of her employment. Falling while traversing stairs is a neutral risk, and the injuries resulting therefrom generally do not arise out of employment. *Illinois Consol. Telephone Co. v. Indus. Comm'n,* 314 Ill. App 3d 347, 353, 732 N.E.2d 49. *Builder's Square v. Indus. Comm'n*, 339 Ill. App. 3d 1006, 1008 (3d Dist. 2003). *First Cash Fin. Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 103 (1st Dist. 2006).

Despite finding Petitioner otherwise credible at trial, unfortunately Petitioner has failed to prove that her fall down the stairs arose out of her employment. Petitioner specifically admitted that she did not know what caused her to fall but noticed that it was dark and that there was a man nearby buffing the floors. Petitioner did not identify lighting or the buffing as the cause. In short, Petitioner's speculative testimony as to the cause is insufficient to overcome the neutral risk analysis.

Further, Petitioner did not show that she was exposed to this risk to a greater degree than the general public. In fact, petitioner went on to testify that she believed the stairway was open to the general public. In this regard, Petitioner did not provide any testimony as to whether she was required to use the stairs in question more frequently compared to the general public, that this was a route specified to be taken or usually taken, that there was any defect in the stairs and otherwise did not provide any testimony that would tend to show she was exposed to this risk of falling down stairs to a greater degree than the general public. Petitioner testified that she only had her purse on her and that she usually wore a crossbody purse. She did not give any additional information to indicate that she carried or wore anything work related. Even so, petitioner did not state whether the purse played any role in her fall.

Given that Petitioner failed to prove greater exposure to a neutral risk, Petitioner's accident claim must fail. All other claim for compensation is denied.

ISSUE (F) Is Petitioner's current condition of ill-being causally related to the injury?
ISSUE (J) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
ISSUE (K) What temporary benefits are in dispute?
ISSUE (L) What is the nature and extent of the injury?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found no accident, all other issues are moot.

Signature of Arbitrator

2/21/2019
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	12WC043640
Case Name	DELLINGER, JAMES v. AMERICAN NICKELOID CO
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0231
Number of Pages of Decision	11
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Frederick Glassman
Respondent Attorney	Kevin Luther

DATE FILED: 5/10/2021

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LA SALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Dellinger,
Petitioner,

vs. No. 12 WC 043640

American Nickeloid Co.,
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, and nature and extent of 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.

With regard to out-of-pocket expenses, Petitioner listed a total of $2,197.52 on the cover sheet in Petitioner's Exhibit 1, and the Arbitrator awarded this amount. Respondent argued on review in its Statement of Exceptions and in oral argument that the correct amount of out-of-pocket expenses was $2,021.87. Petitioner conceded that an error had been made in the calculation of his expenses in Petitioner's Exhibit 1 and agreed to the correction recommended by Respondent. Based upon the parties' agreement on review, the Commission modifies the award of out-of-pocket expenses to be paid to Petitioner to reduce the award from $2,197.52 to $2,021.87.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 22, 2019, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner $2,021.87 in reimbursement of his out-of-pocket expenses related to medical treatment of his work-related injury.

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00.The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 10, 2021

/s/ *Marc Parker*
Marc Parker

mp/dak
o-5/6/21
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/s/ *Barbara N. Flores*
Barbara N. Flores

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0231

DELLINGER, JAMES
Employee/Petitioner

Case# **12WC043640**

AMERICAN NICKELOID CO
Employer/Respondent

On 5/22/2018, 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 2.08% 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:

1097 SCHWEICKERT & GANASSIN LLP
SCOTT J GANASSIN
2101 MARQUETTE RD
PERU, IL 61354

1408 HEYL ROYSTER VOELKER & ALLEN
KEVIN LUTHER
PO BOX 1288
ROCKFORD, IL 61107

21IWCC0231

STATE OF ILLINOIS)
)SS.
COUNTY OF LA SALLE)

- [ ] 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 Dellinger
Employee/Petitioner

Case # 12 WC 43640

v.

American Nickeloid Co.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Ottawa**, on **April 25, 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. [ ] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

FINDINGS

On **November 19, 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 $**39,971.00**; the average weekly wage was $**768.80**.

On the date of accident, Petitioner was **54** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**7,029.39** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**7,029.39**.

Respondent is entitled to a credit of $**2,622.43** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule of $756.00 (Loyola University Physicians: $129.00 and Loyola University Medical Center: $627.00). Respondent shall pay Petitioner for his out of pocket expenses in the amount of $2,193.51.

Respondent shall be given a credit of $2,622.45 for medical benefits that have been paid by Respondent's group insurance, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $461.28/week for 175 weeks, because the injuries sustained caused the 35% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Arbitrator Anthony C. Erbacci

May 16, 2018
Date

MAY 22 2018

FACTS:

On November 19, 2012 the Petitioner sustained undisputed accidental injuries which arose out of and in the course of his employment with the Respondent when he was struck in the forehead by an overhead crane being operated by the respondent's plant manager. The Petitioner testified that the impact caused his neck to snap backward and he experienced immediate head and neck pain and was dizzy. The Petitioner continued to work but his symptoms did not improve, so he sought treatment from his family physician, Dr. Thaw Tun.

The Petitioner first saw Dr. Tun for the injury on November 29, 2012. Petitioner provided a history of being struck in the left forehead at work and reported lightheadedness and dizziness, left-sided headache, and significant neck pain after the accident. He reported the symptoms had gotten worse over the past seven days and he also reported some memory loss and confusion off and on. Dr. Tun made note of the Petitioner's previous cervical spine fusion in 2006. Dr. Tun noted that the Petitioner had restrictions of movement in all directions of the cervical spine as well as spasm over the left trapezius muscle. Dr. Tun's diagnosis was head injury, concussion, as well as cervical strain versus cervical disc disease. Dr. Tun ordered a CT scan of the head and MRI of the cervical spine.

On December 27, 2012, the Petitioner followed up with Dr. Tun for the head and cervical injury and Dr. Tun recommended the Petitioner see another physician for a second opinion. Thereafter, the Petitioner came under the care of Dr. Ghanayem, whom he first saw on January 14, 2013. Dr. Ghanayem ordered an MRI of the cervical spine and the Petitioner continued to see Dr. Tun with complaints of significant neck pain and pain in both shoulders.

On March 4, 2013, the Petitioner returned to Dr. Ghanayem after obtaining a cervical MRI. Dr. Ghanayem noted cervical disc herniation and stenosis at C3-4 and C4-5, which were two levels above the prior fusion. Dr. Ghanayem concluded that the herniation/stenosis at the C3-4 and C4-5 levels were aggravated/caused by the Petitioner's work injury of November 19, 2012. Dr. Ghanayem ordered physical therapy for the cervical spine.

The Petitioner returned to Dr. Ghanayem on May 5, 2013 and reported a little bit of relief with physical therapy. Dr. Ghanayem recommended continued physical therapy and then a cervical epidural injection. Dr. Ghanayem also compared the previous MRI to the new MRI and found clear structural changes from the C3-4 and C4-5. Dr. Ghanayem confirmed the changes were caused by the November 2012 work accident. The Petitioner returned to Dr. Ghanayem on June 6, 2013 and reported two days' relief following the injection. Dr. Ghanayem ordered another injection and modified the physical therapy program. On July 18, 2013, the Petitioner returned to Dr. Ghanayem, who recommended a cervical decompression and fusion at C3-4 and C4-5.

At the request of the Respondent, the Petitioner was examined by Dr. Zelby on July 31, 2013. The Petitioner's history to Dr. Zelby was consistent with his testimony and Dr. Zelby reviewed the Petitioner's cervical MRIs from November 2, 2007 and January 23, 2013. Based upon the Petitioner's history, his examination, and the diagnostic tests, Dr. Zelby concluded the cervical fusion, as prescribed by Dr. Ghanayem, was reasonable and necessitated by the November 2012 work injury.

The Petitioner returned to Dr. Ghanayem on October 24, 2013 and his cervical condition remained unchanged. Dr. Ghanayem advised the Petitioner to let him know when he decided to proceed with the cervical surgery. On March 27, 2014, the Petitioner returned to Dr. Ghanayem. His

condition was unchanged. Petitioner told Dr. Ghanayem he was scared to have surgery but was suffering with the ongoing cervical spine condition.

On January 12, 2015, the Petitioner returned to Dr. Ghanayem and voiced a concern as to whether he could be causing permanent nerve damage by delaying the surgery. Dr. Ghanayem ordered a repeat MRI which the Petitioner ultimately obtained on February 18, 2015. The MRI showed large disc bulges at C3-4 and C4-5 with the C4-5 representing the most significant worsening since the prior exam with severe neural foraminal encroachments at both levels.

The Petitioner returned to Dr. Ghanayem on February 26, 2015 and Dr. Ghanayem noted that the C3-4 disc problem remained, but the C4-5 disc was about a millimeter and a half bigger than on the old study. Dr. Ghanayem's surgical recomendation remained the same.

On March 30, 2015, the Petitioner was again examined by Dr. Zelby at the request of the Respondent. Dr. Zelby reviewed the recent MRI and noted a significant worsening of the disc herniation at the C4-5 level. Dr. Zelby opined that although Petitioner still required an anterior cervical disc decompression at C3-4 and C4-5, the need for surgery was no longer the result of the November 2012 work accident. Dr. Zelby based this opinion on the fact that the Petitioner was able to work, there was a new herniation at the C4-5 level, and that the Petitioner's condition had reached a stable condition as of November 2013.

The Petitioner then returned to Dr. Ghanayem who was critical of Dr. Zelby's new opinion on causation of the Petitioner's cervical condition. Dr. Ghanayem did not find the increase in the disc herniation at the C4-5 level to be uncommon, as the Petitioner had continued to work with the condition as he contemplated and dealt with his fear of surgery. Dr. Ghanayem felt the findings were the natural progression of the injury.

On referral from Dr. Ghanayem, the Petitioner saw Dr. Patrick T. O'Leary of Midwest Orthopaedic Center on July 2, 2015 for a surgical consultation. Dr. O'Leary agreed the Petitioner should undergo a two-level fusion at the C3-4 and C4-5 levels. Dr. O'Leary acknowledged the Petitioner had the pre-existing disc disease but noted the Petitioner's symptoms seemed to have worsened since the work accident of November 19, 2012.

The Petitioner then saw Dr. Patrick Sweeney of Minimally Invasive Spine Specialists for a second opinion regarding cervical spine surgery. Dr. Sweeney agreed with Dr. Ghanayem's opinion that the Petitioner required C3-4 and C4-5 surgery and agreed with Dr. Ghanayem's opinion on causation.

The records of Dr. Ghanayem included treatment at Loyola by Dr. Guido Marra and Dr. Bajaj. The records dated back to 2009. Dr. Marra's treatment was for an unrelated right shoulder injury, for which Dr. Marra performed surgeries in 2009 and 2010. These records also showed the Petitioner received treatment for his unrelated lower and thoracic back condition by the pain doctor, Dr. Bajaj, as well as Dr. Ghanayem. Although Dr. Ghanayem had performed previous cervical surgery at the C5-6 and C6-7 level, which was in 2006 or 2008, there is no indication in these records, or any other records introduced into evidence, that the Petitioner had received any treatment to his cervical spine since his release in approximately 2008.

Following the initial 19(b) hearing and decision, the Petitioner underwent surgery at the L3-4 and L4-5 levels on July 5, 2016. The surgery consisted of a discectomy and fusion with plating. It was performed by Dr. Ghanayem at Loyola University Medical Center.

Subsequent to the surgery, the Petitioner returned to work with the employer on October 10, 2016. He also submitted to one or two examinations by Dr. Zelby. The reports of those examinations were admitted into the record as Respondent's Exhibits 1-3.

Prior to his injury in November of 2012, the Petitioner was employed by the Respondent as an assistant operator. According to the Respondent's plant manager and witness, Jack O'Malley, the Petitioner's current position is as assistant lead operator. The Petitioner described his job duties, which included inspection of the line as well as some minor setup.

The Petitioner continues to earn at or near his pre-accident earnings or in excess of his earnings. (The Petitioner provided no testimony as to hourly rate.) The Petitioner continues to work for the employer and has not changed his occupation. He is a factory worker for the Respondent, and no testimony or evidence was presented that the Petitioner changed his occupation. Rather, the Petitioner simply has physical restrictions which have been accommodated by the employer on a permanent basis. The Petitioner has no future medical appointments scheduled.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The undisputed evidence indicated the Petitioner injured his cervical spine in the work accident of November 19, 2012. The Petitioner's treating physicians, Dr. Tun and Dr. Ghanayem, as well as the subsequent Petitioner's examining physicians, Dr. O'Leary and Dr. Sweeney, all concur that the Petitioner's present cervical condition for which he should undergo a cervical fusion at the C3-4 and C4-5 levels was caused by the work accident of November 20, 2012.

Based upon the foregoing, the Arbitrator finds the Petitioner's cervical herniated discs and spinal stenosis with encroachment at the C3-4 and C4-5 levels (for which the Petitioner had surgery), were caused by the work accident of November 19, 2012.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

As the Arbitrator has found the Petitioner's cervical spine injury at C3-4 and C4-5 was caused by the work accident, and the medical evidence supports the medical bills claimed by the Petitioner, the Arbitrator awards all medical bills incurred for the sums due pursuant to Section 8 and Section 8.2 of the Act. The Respondent shall be given credit for all payments made pursuant to Section 8(j).

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

In the instant case, the Petitioner suffered injuries to his neck as the result of an undisputed work accident. The Petitioner underwent fusion surgeries at the C3-4 and C4-5 levels and has been

released to work duties with permanent restrictions, which are being accommodated by the employer. The Petitioner testified that he currently continues to experience pain in his neck and between his shoulders which increases as he works.

Because the Petitioner's work accident occurred after September 1, 2011, Section 8.1(b) of the Act requires consideration of the following criteria in determining the level of permanent partial disability:

* The reported level of impairment based upon the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment;
* the occupation of the injured employee;
* the age of the employee at the time of the injury;
* the employee's future earning capacity; and
* evidence of disability corroborated by the treating medical records.

With regard to the reported level of impairment pursuant to Section 8.1(b), the Arbitrator notes that no impairment report was submitted into evidence. Thus, the Arbitrator gives no weight to this factor.

With regard to the occupation of the injured employee, the Petitioner's occupation is that of a factory worker, which the Arbitrator notes requires work in excess of the Petitioner's restrictions. The Arbitrator also notes, however, that the Respondent is providing work for the Petitioner within his restrictions and no evidence was presented from which it can be concluded that the Respondent will not continue to provide that work for the Petitioner. As noted above, the Petitioner continues to work in a factory setting with no reductions in earnings or any other benefits. The Arbitrator therefore gives moderate weight to this factor.

With regard to the age of the employee at the time of injury, the Arbitrator notes that the Petitioner was 54 years old at the time of the accident. The Arbitrator considers the Petitioner to be a somewhat older individual and concludes that the Petitioner's permanent partial disability will have more of a deleterious effect on the Petitioner's ability to continue to work than it would on a younger individual who would be better able to overcome his/her restrictions and difficultoes. The Arbitrator therefore gives significant weight to this factor.

With regard to the employee's future earning capacity, the Arbitrator notes that no evidence of any actual impairment to future earnings was offered into the record. The Arbitrator also notes, however, that the Petitioner does have permanent work restrictions which might impact his future earning capacity should his accommodated employment by the Respondent come to an end. Because there is no evidence of any actual impairment to future earnings, the Arbitrator gives minimal weight to this factor.

With regard to the evidence of disability corroborated by the treating medical records, the Petitioner credibly testified that he currently experiences pain in his neck and between his shoulders which increases as he works and which limits his activities of daily living. These complaints are corroborated in the medical records of the Petitioner's treating physicians and the other physicians that examined the Petitioner. The Petitioner's complaints as supported by the medical records, evidences a disability as indicated by Commission decisions regarded as precedent pursuant to Section 19(e). The Arbitrator gives significant weight to this factor.

The determination of permanent partial disability is not simply a calculation but an evaluation of all 5 factors as stated in the Act. In making this evaluation of permanent partial disability, consideration is not given to any single enumerated factor as the sole determinant. Therefore, having considered the factors enumerated in Section 8.1(b) of the Act, 820 ILCS 305/8.1(b), the Arbitrator finds that as a result of his accidental injuries the Petitioner has sustained 35% disability to his whole pursuant to Section 8(d)2 of the Act.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC026160
Case Name	HOOVER,BOBBY v. WALMART DISTRIBUTION CENTER
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0232
Number of Pages of Decision	10
Decision Issued By	Marc Parker, Commisioner

Petitioner Attorney	Daniel Capron
Respondent Attorney	Julie Schum

DATE FILED: 5/11/2021

/s/ Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
KANKAKEE

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Bobby Hoover,

Petitioner,

vs. NO: 19 WC 26160

Wal-Mart Distribution Center,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 23, 2019, 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 $2,000.00. 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.

/s/ *Marc Parker*
Marc Parker

/s/ *Barbara N. Flores*
Barbara N. Flores

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

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0232
NOTICE OF 19(b) ARBITRATOR DECISION

HOOVER, BOBBY Case# **19WC026160**
Employee/Petitioner

WAL-MART DISTRIBUTION CENTER
Employer/Respondent

On 12/23/2019, 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 1.55% 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:

2208 CAPRON & AVGERINOS PC
DANIEL F CAPRON
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

5074 QUINTAIROS PRIETO WOOD & BOYER
JULIE SCHUM
233 S WACKER DR 70TH FL
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF KANKAKEE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Bobby Hoover
Employee/Petitioner

Case # **19** WC **26160**

v.

Wal-Mart Distribution 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 **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Kankakee**, on **November 19, 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. ☐ 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 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 $**29,868.80**; the average weekly wage was $**574.40**.

On the date of accident, Petitioner was **45** years of age, ***married*** with **1** 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 $**1,586.40** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**1,586.40**.

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 $**282.93**/week for **10 1/7** weeks, commencing **September 10, 2019** through **November 19, 2019**, as provided in Section 8(b) of the Act.

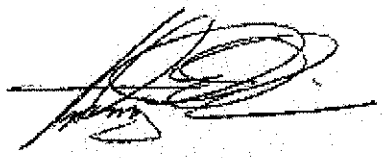
Respondent shall pay reasonable and necessary medical services of $**579.92**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay the reasonable and necessary medical expenses associated with the right knee replacement surgery prescribed by Dr. Puri, 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.



Arbitrator Anthony C. Erbacci

December 18, 2019
Date

DEC 23 2019

FACTS:

Petitioner testified to a history of right knee problems dating back to 2010 when he underwent an ACL reconstruction and meniscal repair after a scooter accident. He underwent a second surgery on October 31, 2013 consisting of a partial lateral meniscectomy. He underwent a third surgery on May 13, 2016 consisting of a microfracture of medial femoral condyle and trochlear groove defects. He underwent a fourth surgery on February 17, 2017 consisting of an osteochrondral allograft transplant to the medial femoral condyle. This final surgery was performed by Dr. Brian Forsythe at Rush Medical Center. When Petitioner returned to Dr. Forsythe on May 1, 2017, he still had persistent pain along the lateral aspect of his right knee. Dr. Forsythe noted that Petitioner had well-preserved joint spaces on x-rays. He remanded Petitioner to the care of his local orthopedic surgeon and recommended physical therapy, Meloxicam and pain management. There was no mention of the need for knee replacement surgery.

Petitioner testified that he did not pursue any of the treatment recommendations from his final visit to Dr. Forsythe. He returned to his job at Momence Packing, a slaughterhouse at which he worked on the assembly line processing hogs. Petitioner testified that he performed this job until May, 2019 when he lost it because he contracted pneumonia. In July 2019, Petitioner began working for Respondent in a job that required him to load trucks.

On August 5, 2019, Petitioner had not seen a doctor for his right knee since his final visit to Dr. Forsythe on May 1, 2017. He testified that his right knee would intermittently ache depending on the level of his physical activity at work, but he was able to perform his job without restriction.

On August 5, 2019 toward the end of his shift, Petitioner was loading a semi-trailer for Respondent. He lifted a box weighing approximately 20 to 30 lbs which slipped out of his hands, causing him to twist his right knee and fall over a stool which was next to him. He noted an immediate increase in pain in his right knee. He reported the incident to his supervisor, finished his shift and went home. The following day, Petitioner was directed by Respondent to Physicians Immediate Care.

When Petitioner was seen at Physicians Immediate Care on August 6, 2019, he gave a history of injury consistent with his testimony. Petitioner also gave a history of having sustained four previous surgeries to his right knee. He was provided with Naproxen, a light duty restriction and a prescription for an MRI.

When Petitioner returned to Physicians Immediate Care on August 13, 2019, his MRI had not yet been approved. He reported that he still had pain and swelling in the medial aspect of his knee, difficulty walking and increased pain with going down stairs.

Petitioner underwent the MRI of his right knee on August 15, 2019. He returned to Physicians Immediate Care on August 20, 2019 continuing to complain of pain and swelling in the right knee. He was referred to OAK Orthopedics, the group that performed the first three of Petitioner's knee surgeries.

On September 3, 2019, Petitioner saw Dr. Rajeev Puri at OAK Orthopedics. Petitioner gave a history of prior right knee problems, including the four surgeries, as well as the accident at work on

August 5, 2019. Dr. Puri diagnosed end stage osteoarthritis of the right knee and he recommended knee replacement surgery. When Petitioner returned to Dr. Puri on September 10, 2019, the doctor was awaiting surgical authorization. He told Petitioner to remain off work. This was again the case when Petitioner returned to Dr. Puri on October 1, 2019.

Petitioner was examined at Respondent's request pursuant to Section 12 of the Act on October 9, 2019 by Dr. Vijay Thangamani, a board certified orthopedic surgeon at DuPage Medial Group. Dr. Thangamani diagnosed end-stage osteoarthritis. He agreed that Petitioner should undergo knee replacement surgery, but he felt that this was unrelated to the accident at work. That accident, the doctor felt, resulted in a knee sprain and contusion. Petitioner's recent MRI revealed no new structural damage, only the pre-existing changes.

Petitioner returned to Dr. Puri on October 29, 2019. Dr. Puri reviewed the examining report of Dr. Thangamani. The chart note from that visit reflects:

> Pt had had a number of previous surgeries prior to recent injury including acl graft and partial meniscectomy. Post-injury MRI is significant for acl attenuation and meniscal tear as well as significant diffuse djd which is likely due to work injury....We discussed that the injury 08/2019 contributed to his current state and possibly surgery noted that the current mri with mmt and acl injury is consistent with a twisting injury to knee. (PX 3)

Petitioner testified that his right knee pain has been much worse since the accident of August 5, 2019 as compared with prior to that date.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The issue before the Arbitrator is a narrow one. Petitioner admits, and the evidence reflects, that he had a serious and longstanding pre-existing osteoarthritic condition in his right knee prior to his accident of August 5, 2019. All doctors agree that Petitioner needs a total knee replacement at the present time. The issue is the effect, if any, of the Petitioner's accident at work on his underlying knee condition.

Two qualified physicians have overtly addressed this question. Dr. Thangamani, Respondent's examining doctor, feels that Petitioner's accident constituted a mere knee sprain which is unrelated to the current need for knee replacement surgery. Dr. Puri, Petitioner's treating physician, feels that Petitioner's accident was a contributing factor.

In evaluating this issue, the Arbitrator is persuaded by the chronology of events. Petitioner's fourth and most recent knee surgery took place on February 17, 2017. Petitioner's last post-operative

doctor visit was on May 1, 2017. At that time, Dr. Forsythe prescribed additional physical therapy, prescribed Meloxicam, and remanded Petitioner to the care of his local orthopedic surgeons in Kankakee. Petitioner testified that he did not pursue any further treatment after May 1, 2017. There is no evidence to the contrary.

Petitioner also testified that he was able to return to work at Momence Packing and continued working there until he contracted pneumonia in May, 2019. The Arbitrator notes that this was a heavy and physical job, and that Petitioner was able to perform it on a full time basis for approximately two years without needing additional treatment for his right knee. After losing his job at Momence Packing, Petitioner began working for Respondent in July, 2019. Again, this was a physically taxing job which involved loading trucks. Petitioner testified that his right knee would ache during this period, but not to the level that required additional medical treatment.

It was only after the accident of August 5, 2019, an accident which involved twisting of the right knee, that Petitioner resumed medical treatment. The resumption of treatment was almost immediate. Petitioner's history admits to the previous surgeries, and identifies the work accident as the reason why treatment was required. Petitioner has credibly testified that his right knee has been symptomatic since the time of the accident. In addition, the first recommendation for knee replacement surgery took place only after Petitioner's accident at work.

The Arbitrator is mindful of the standard which Petitioner is called upon to meet in proving causation. He need not prove that his accident was the sole cause, nor even the predominant cause, of his current condition. It is sufficient if Petitioner can demonstrate that his work accident was a causative factor in the need for his knee replacement surgery. *Williams v. Industrial Comm'n*, 85 Ill.2d 117, 51 Ill.Dec. 685, 421 N.E.2d 193 (1981).

Given that the condition of Petitioner's right knee was stable for a period of more than two years during which Petitioner worked at physically taxing jobs without the need for medical treatment; and given the resumption of treatment immediately following the acute episode on August 5, 2019 and the continuous treatment since that time; the Arbitrator finds it highly unlikely that the recommendation for knee replacement surgery in the immediate wake of the accident was a mere coincidence.

Based on the foregoing, the Arbitrator concludes that Petitioner's current condition of ill-being regarding his right knee is causally connected to the accident of August 5, 2019.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

Petitioner has incurred medical expenses on account of the post-accident treatment of his right knee. (PX 4) Respondent has objected to these bills not on the basis of reasonableness or necessity, but solely on the basis that they are not causally connected to the accident. Having determined that Petitioner's current condition of ill-being is causally connected to the accident, the

Arbitrator further concludes that Respondent shall be liable for the medical expenses which Petitioner has introduced.

Based on the foregoing, the Arbitrator concludes that Petitioner is entitled to have and receive the sum of $579.92 pursuant to Sections 8(a) and 8.2 of the Act.

In Support of the Arbitrator's Decision relating to (K.), Is Petitioner entitled to any prospective medical care, and (L.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

Both Dr. Puri and Dr. Thangamani believe that Petitioner's current condition of ill-being requires a total knee replacement and impairs his ability to return to work. They disagree only on whether Petitioner's accident at work contributed to his current condition of ill-being. Having determined that causation does exist, the Arbitrator further concludes that Petitioner is entitled to prospective medical care and TTD benefits.

Based on the foregoing, the Arbitrator concludes that Petitioner is entitled to undergo knee replacement surgery, has not yet attained maximum medical improvement and remains temporarily totally disabled.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC003732
Case Name	MARTIN,EDWARD E v. DEPENDABLE PLUMBING, INC
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0233
Number of Pages of Decision	17
Decision Issued By	Barbara Flores, Commisioner

Petitioner Attorney	Rich Hannigan
Respondent Attorney	Jason Stellmach

DATE FILED: 5/11/2021

/s/ Barbara Flores, 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

EDWARD MARTIN,

Petitioner,

vs. NO: 19 WC 3732

DEPENDABLE PLUMBING,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care, temporary total disability, permanent partial disability, maintenance and vocational rehabilitation, and penalties and fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator with the change noted herein, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980).

The Commission corrects a typographical error in the Decision of the Arbitrator to reflect that the temporary total disability benefits awarded for the period from December 10, 2018 through January 7, 2020 represents a period of 56 and 2/7ths weeks, not 66 and 2/7ths weeks.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on August 31, 2020 is hereby affirmed and adopted in all other respects with the change stated herein.

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 expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

Bond for the removal of this cause to the Circuit Court is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

/s/*Barbara N. Flores*
Barbara N. Flores

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

/s/*Marc Parker*
Marc Parker

21IWCC0233

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

MARTIN, EDWARD
Employee/Petitioner

Case# **19WC003732**

DEPENDABLE PLUMBING
Employer/Respondent

On 8/31/2020, 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 0.12% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0247 HANNIGAN & BOTHA LTD
RICHARD D HANNIGAN
505 E HAWLEY ST SUITE 240
MUNDELEIN, IL 60060

0560 WIEDNER & McAULIFFE LTD
JASON T STELLMACH
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)
X None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION
19(b)

Edward Martin
Employee/Petitioner

v.

Dependable Plumbing
Employer/Respondent

Case # **19 WC 03732**

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 **Kay**, Arbitrator of the Commission, in the city of **Chicago**, on **July 17, 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 X Maintenance X TTD

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

N. ☐ Is Respondent due any credit?

O. X Other **Vocational rehabilitation**

FINDINGS

On the date of accident, **12/10/2018**, 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 $**52,000.00**; the average weekly wage was $**1,000.00**.

On the date of accident, Petitioner was **52** 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 $**12,285.59** for TTD, $**-0-** for TPD, $**-0-** for maintenance, and $**-0-** for other benefits, for a total credit of $**12,285.59**.

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 $666.67/week for a period of 66 2/7 weeks from 12/10/2018 through 1/7/2020.

Respondent shall pay Petitioner maintenance benefits of $666.67/week for 27 3/7 weeks, commencing 01/08/2020 through 07/17/2020, as provided in Section 8(a) of the Act.

Respondent shall be given a credit of $12,285.59 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services contained in Petitioner's exhibit 6 in the amount of $117,820.61 to the Petitioner, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay reasonable and necessary vocational rehabilitation as provided in Section 8(a) of the Act and Section 9110.10 of the Rules Governing Practice before the Illinois Workers' Compensation Commission.

Respondent shall pay Petitioner maintenance benefits of $666.67/week for 27 3/7 weeks, commencing 01/08/2020 through 07/17/2020, as provided in Section 8(a) of the Act.

Petitioner's request for Section 19(l) late fee, 19(k) penalties and Section 16 attorney fees is denied.

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

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

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

Signature of Arbitrator

08/25/2020
Date

ICArbDec19(b)

AUG 3 1 2020

PROCEDURAL HISTORY

This matter was pursued under Section 19(b) of the Illinois Workers' Compensation Act (hereinafter "Act") by Mr. Edward Martin (hereinafter "Petitioner") who is seeking relief from Dependable Plumbing Inc. (hereinafter "Respondent"). This matter was heard on July 17, 2020 in Chicago, Illinois before Arbitrator Tiffany Kay (hereinafter "Arbitrator Kay"). This matter was tried, the submitted records examined and a decision rendered by Arbitrator Kay.

The parties proceeded to hearing with disputed issues as to whether Petitioner's current condition of ill-being was casually connected to his injury on December 10, 2018, whether Respondent is liable for unpaid medical bills in the amount of $120,614.27, whether Petitioner is entitled to temporary total disability for the period of December 10, 2018 through July 17, 2020 representing 83 3/7 weeks, the nature and extent of the injury if the Arbitrator is to find the Petitioner is at maximum medical improvement and not entitled to vocational rehabilitation, and whether the Petitioner is entitled to penalties and attorney's fees under Sections 19k, 19l and 16. (Arb. X1)

The parties stipulated that Petitioner and Respondent were operating under the Illinois Workers' Compensation Act on December 10, 2018, that there was a relationship of employee and employer, that Petitioner sustained an accident that arose out of and in the course of his employment with Respondent, and that timely notice in accordance to the time limits stated in the Act was given to Respondent. The parties stipulated that Petitioner's average weekly wage in accordance to Section 10 of the Act was $1000.00, he was 52 years old, married and had no dependent children. (Arb.X1)

The Arbitrator notes that at the beginning of the hearing the petitioner's attorney waived the *Clarence Thomas v. Industrial Commission* 78 Ill.2d 327mandate that if a 19(b) petition is filed an arbitrator cannot rule on any permanency.

SUMMARY OF TESTIMONY AND FACTS

It has been stipulated that the Petitioner sustained a work-related injury on December 10, 2018. The disputes is whether there is a causal connection between the subsequent surgery for the right shoulder and the accident of December 10, 2018 and the need for vocational rehabilitation.

Prior to the accident of December 10, 2018, Petitioner was treating with Dr. DeLew. On March 1, 2016, Dr. DeLew saw Petitioner for a complete physical examination. In the history Dr. DeLew noted that Petitioner has chronic right shoulder pain from a torn labrum and that he has declined surgery due to extensive rehab and loss of work (Px.1 pg. 29). On May 11, 2018, Dr. DeLew noted that the patient presented with right shoulder pain and wanted an injection in his right shoulder. He indicated the right shoulder was waking him up at night. Petitioner indicated that he had right shoulder pain for the past five months and that he worked as a plumber. He indicated that he saw Dr. Erickson 20 years ago and a prior MRI indicated he had a torn labrum. Apparently, he re-injured that shoulder eight years previously. Dr. DeLew's assessment on May 11, 2018 was impingement syndrome of the right shoulder. Dr. DeLew administered a cortisone injection into the right shoulder (Px. 1 pg. 24-28, 53-54). Petitioner followed up with Dr. DeLew on July 12, 2018. There is no mention of any complaints of the right shoulder (Px.1 pg. 21-23).

On October 16, 2018, Petitioner saw Dr. Walsh per referral from Dr. DeLew. The chief complaint was pain and discomfort in the right shoulder as well as numbness and tingling in the right hand. He indicated this has been going on for years and was told he had a labral tear in 1995. An injection in May 2018 provided him

with temporary relief. He reported that he worked as a plumber and did overhead activities. He was found to have excellent range of motion but exhibited weakness with abduction and internal rotation and especially external rotation. The assessment was right rotator cuff tear and probable radiculopathy in the upper extremity perhaps cervical. Petitioner desired a rotator cuff injection into the subacromial space. Dr. Walsh suggested an MRI but Petitioner did not want to take the time off work. He received the cortisone injection into the subacromial space (Px.3 pg.112). He was told to follow-up in a month should he remain symptomatic, otherwise he would follow-up as needed. He was not taken off of work. Petitioner did not follow-up one month after the injection. He sustained his work-related injury on December 10, 2018 and saw Dr. Walsh the next day on December 11, 2018.

Petitioner testified that he began working for Respondent in 2017. Petitioner testified that his job duties included him driving the company van to a job site and picking up plumbing equipment that was no longer needed on the site. That would include PVC fittings that would weigh up to 50 pounds, occasionally wheelbarrows, jackhammers, shovels, pumps, hilti boxes which contain a large drill and electric shovel, trim boxes which included various plumbing fittings, a concrete circular saw, and bags of concrete weighing 40 to 60 pounds, that he would have to load the top of the cargo van. The cargo van was approximately 7 feet high with a rack on top. On top of the rack he would place copper pipes, PVC pipes, occasionally ladders and extension ladders. He would have to stand on the rear wheel of the cargo van to reach up with his right upper extremity and strap on or strap off the piping that was either placed on the van or removed from the van. He would then step in the driver's compartment and reach up and either secure or unsecure the strapping with his right upper extremity. Petitioner testified that he performed these job duties up until has accident of December 10, 2018.

On December 10, 2018, Petitioner testified that he loaded the van that morning as he usually did. This included loading the top of the van. This was accomplished by raising both arms above his head. That while at a construction site he was carrying some equipment and tripped over some debris falling on his right shoulder. He went directly to Central DuPage Hospital's emergency room. He gave a history of a mechanical trip and fall that morning. His assessment was pain in the right shoulder and that he was unable to lift his arm at the shoulder height. He noted tingling that radiated down to the fingers. They prescribed Norco and took x-rays of the right shoulder which were negative. He was placed in a sling (Px. 5 pg.6, 12-13).

On December 11, 2018, Petitioner saw Dr. Walsh. He gave a history of falling at work on December 10, 2018 and landing directly on the right shoulder. Dr. Walsh noted limited range of motion and some tingling in the digits. At minimum he had an acute impingement syndrome with possible tear of the rotator cuff with the injury. Dr. Walsh prescribed an MRI (Px.3 pg. 109110). On December 18, 2018, Petitioner had the MRI which revealed, according to the radiologist, a full thickness tear of the supraspinatus tendon without medial retraction and probable biceps tenosynovitis. He did not note a labral tear. Petitioner saw Dr. Walsh for a follow-up on January 7, 2019. Dr. Walsh noted significant limited range of motion and difficulty lifting his arm up to shoulder height and limited abduction. He prescribed surgical repair of the right shoulder and took Petitioner off work because of the disability (Px.3 pg. 106-107). Dr. Walsh attempted to get the surgery approved by workers compensation. Petitioner continued to treat with Dr. Walsh on January 28, 2019 and March 5, 2019 with each visit keeping him off work and recommending right shoulder surgery (Px.3 pg.101-104).

Mr. Tom Herman (hereinafter "Mr. Herman"), the owner of Respondent company for over 30 years, testified on behalf of the Respondent. Mr. Herman testified that Petitioner never missed work before December 10, 2018. That his job involved a lot of overhead reaching with the right upper extremity. That Petitioner was never admonished for not being able to do his job. He acknowledged that Petitioner has not worked since the accident of December 10, 2018. Petitioner was never seen by the employer wearing a sling for his right shoulder

prior to December 10, 2018. After the accident of December 10, 2018, Petitioner was placed in a sling for his right shoulder.

Testimony of Dr. Cohen

On April 11, 2019, Respondent had Petitioner evaluated by Dr. James Cohen pursuant to Section 12 of the Worker's Compensation Act. Based upon Dr. Cohen's review of the medical records from 2016 and 2018 including the right shoulder MRI on December 18, 2018, the petitioner's right shoulder condition was present prior to the accident of December 10, 2018. He testified that based upon his review of the MRI of December 18, 2018 all of the objective findings were present prior to the accident of December 10, 2018. In addition, his interpretation of the December 18, 2018 MRI was that there was no labral tear. Based upon Dr. Cohen's opinion that Petitioner's need for surgery was something that existed prior to the December 10, 2018 accident, the respondent terminated temporary total disability benefits and did not authorize the surgery prescribed by Dr. Walsh (Rx.3).

Testimony of Dr. Walsh

Dr. Walsh testified that he saw Petitioner on October 16, 2018. At that time, Petitioner had excellent range of motion but weakness in abduction with internal rotation and especially external rotation. An MRI of the right shoulder was recommended but Petitioner was reluctant to have the MRI because he did not want to take time off work. He also declined the offer of an EMG. He was to follow-up with Dr. Walsh in a month if he remained symptomatic. He did not return to see Dr. Walsh until after the accident of December 10, 2018. (Px.4 pg.7-9). On December 11, 2018, Petitioner saw Dr. Walsh and gave him the history of his fall on to the right shoulder on December 10, 2018. Dr. Walsh testified that when comparing his October 16, 2018 examination with his examination of December 11, 2018 there were significant limitations of motion and obviously more pain on December 11, 2018. On that date, Petitioner was taken off work (Px. 4 pg. 10). On January 7, 2019, Dr. Walsh reviewed Petitioner MRI of the right shoulder conducted on December 18, 2018. The doctor discussed the fall at work and the pain that he had since then. Dr. Walsh noted the significant limitations of motion with difficulty lifting his arm up to shoulder height or abducting. He was taking Norco for pain. There is no testimony or evidence that he took Norco for pain for his right shoulder prior to December 10, 2018. Dr. Walsh recommended surgical repair of the right shoulder (Px. 4 pg. 11-12). On October 16, 2018, Dr. Walsh noted that his patient had two problems, one was a right rotator cuff tear, and the second problem is radiculopathy of the upper extremity, perhaps a cervical radiculopathy. "The patient returned on 12/11/2018. He had fallen at work, landing on his right shoulder. He was seen at Central DuPage Hospital emergency room." The doctor noted he was then unable to work as a plumber and could not return to work because of significant limitations of motion. On June 19, 2019 petitioner underwent surgery for the chronic right rotator cuff tear (Px.2 pg.3-4). He had subacromial decompression with repair of the chronic right rotator cuff tear, the AC ligament was completely released, the avulsion of the rotator cuff was debrided. Dr. Walsh testified that the accident of December 10, 2018 "more likely than not did aggravate the pre-existing condition. This was based upon his physical examinations in the history of the accident. He also testified that the action of December 10, 2018 "certainly accelerated the patient's decision to proceed with surgery" (Px.4 pg. 14-17). Authorization for Petitioner's surgery that was prescribed was denied by Respondent based upon a report from Dr. Jim Cohen (Px. 3 pg. 98-99).

Petitioner engaged in physical therapy at DuPage Medical Group Orthopedics from July 23, 2019 through October 22, 2019 (Px.3 pg. 16-68, 71-87, 90-96). This included the work conditioning that was prescribed by Dr. Walsh on September 24, 2019 (Px.3 pg.43). On October 29, 2019, Dr. Walsh noted a setback in therapy when Petitioner developed an onset of pain in the right shoulder. The doctor prescribed an MR arthrogram (Px.3 pg. 13-14). That was performed on November 14, 2019. On November 19, 2019, Dr. Walsh

noted that the MRI arthrogram showed no evidence of a significant recurrent tear. However, there was some partial tearing of the tendon and there was a linear interstitial tear of the supraspinatus which might communicate with the articular surface. Dr. Walsh was of the opinion that this was not worth exploring surgically. He kept Petitioner off of work at that time (Px.3 pg. 4).

On January 7, 2020, Dr. Walsh indicated that Petitioner had reached maximum medical improvement and was released with a lifting restriction of no more than 10 pounds above the head (Px.3 pg. 2-3). There was testimony that Respondent did not offer the petitioner work within his restrictions (Px.3 pg.97). Respondent has not filed a vocational rehabilitation plan or provided a vocational assessment. Petitioner at that point in time had been off work for 56 2/7 weeks.

Petitioner testified that after January 7, 2020 he looked for work and was able to find some side jobs for cash. He also noted in February, based on conversations with his wife who works at DuPage Medical that the Covid-19 virus in Europe and Asia was spreading. On March 12, 2020, Gov. Pritzker announced that the State of Illinois will be on lockdown because of Covid-19 beginning March 17, 2020. Petitioner testified, in result, he was not able to look for work. On March 10, 2020 Petitioner's attorney filed a motion to compel vocational rehabilitation (Px. 8).

Petitioner testified that he did not miss any time from work because of his right shoulder before December 10, 2018. He testified that at the present time he is unable to sleep on the right side without waking up with pain. He also has pain when putting his shirt on and lifting his right arm overhead. He has pain when lifting his arm in the shower to wash his armpits. He has pain when dries off in the shower and lifts his right his arm. He has difficulty putting a belt on through the loops of his pants. In addition, he testified that when reaching into the console of his truck to get something causes pain. He testified that he is unable to do simple chores above his head like washing windows or dusting around the house. Petitioner testified that he is right arm dominate.

Testimony of Dr. Cohen

On April 11, 2019, Respondent had Petitioner evaluated by Dr. James Cohen pursuant to Section 12 of the Worker's Compensation Act. Based upon Dr. Cohen's review of the medical records from 2016 and 2018 including the right shoulder MRI on December 18, 2018, the petitioner's right shoulder condition was present prior to the accident of December 10, 2018. He testified that based upon his review of the MRI of December 18, 2018 all of the objective findings were present prior to the accident of December 10, 2018. In addition, his interpretation of the December 18, 2018 MRI was that there was no labral tear. Based upon Dr. Cohen's opinion that Petitioner's need for surgery was something that existed prior to the December 10, 2018 accident, the respondent terminated temporary total disability benefits and did not authorize the surgery prescribed by Dr. Walsh (Rx.3).

CONCLUSIONS OF LAW

With respect to issue (F), whether Petitioner's current condition of ill-being is casually 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 finds that the Petitioner proved by a preponderance of the evidence that his current condition of ill-being related to his right shoulder is casually connected to his December 10, 2018 work accident.

A prerequisite to the right to recover benefits under the Act is some causal relationship between the claimant's employment and the injury suffered. *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n*, 409 Ill.App.3d 463, 470, 949 N.E.2d 1158, 1165 (2011). Compensation may be awarded under the Act even if the conditions of employment do not constitute the sole or principal cause of the claimant's injury. *Brady v. Louis Ruffolo & Sons Construction Co.*, 143 Ill.2d 542, 548, 578 N.E.2d 921, 924 (1991). A Petitioner need only prove that some act or phase of his employment was a causative factor in the ensuing injury. *Vogel v. Industrial Comm'n*, 354 Ill.App.3d 780, 821 N.E.2d 807, (2005). A work-related injury need not be the sole or principal causative factor so long as it was "A" causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n* 207 Ill. 2d 193, 205, 797 N.E. 2d 665. (2003).

In Illinois, employers take their employees as they find them. *Land and Lakes v. Industrial Comm'n*, 359 Ill. App. 3d 582, 834 N.E. 2d 583 (2 Dist. 2005). Although a preexisting condition may make a worker more vulnerable to injury, compensability cannot be denied where a Petitioner can show that a work related injury accelerated the preexisting disease such that the current condition of ill being is causally related to the work injury and not merely the result of a normal degenerative process of the preexisting condition. *Sisbro,* 207 Ill.2d at 205. "[A] preexisting condition does not prevent recovery under the Act if that condition was aggravated or accelerated by the claimant's employment." *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill.2d 30, 36, 440 N.E.2d 861, 864 (1982). Further, "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove causal nexus between the accident and the employment." *International Harvester v. Industrial Comm'n,* 93 Ill. 2d 59, 442 N.E. 2d 908 (1982).

If the claimant is in a certain physical condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, the intervening accident caused the acceleration of the pre-existing condition. The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been. *Nanette Schroeder v. Illinois Worker's Compensation commission* 79 N.E.3d 833, 414 Ill.Dec. 198.

The testimony Petitioner was that he began working for the respondent in 2017. Both the employer, Mr. Herman, and Petitioner testified that Petitioner worked uninterrupted from the time he was hired until December 10, 2018, when he fell at work on to the right shoulder. Respondent has stipulated to this accident. Petitioner admitted that he had a pre-existing right shoulder issue. The employer testified that Petitioner never provided him with any medical note indicating that, before December 10, 2018 he had restrictions regarding the right shoulder. Before December 10, 2018, the employer never sent Petitioner home because he could not do his job. Everything changed for Petitioner when on December 10, 2018 while at work he tripped and fell onto his right shoulder. He went immediately to the hospital for treatment. In result, on December 11, 2018, Dr. Walsh noted a significant decrease in the Petitioner's range of motion of his right arm as compared to the prior October 16, 2018 examination. This is the first time any medical provider had taken Petitioner off of work because of right shoulder problems. After the accident of December 10, 2018, Petitioner agreed to have an MRI of the right shoulder. Dr. Walsh reviewed the MRI with Petitioner on January 7, 2019, noted the history of the accident of December 10, 2018, the difficulty lifting his arm up to shoulder height and limited abduction and prescribed surgical repair of the right shoulder. Dr. Walsh testified that Petitioner's fall of December 10, 2018 more likely than not aggravated the pre-existing condition and definitely accelerated the need for the surgery.

The "chain of events principle" is not limited to claimants whose condition prior to the accident is of absolute good health. That holding would contradict years of Illinois precedent concerning pre-existing conditions. *Nanette Schroeder v. Illinois Worker's Compensation commission* ¶29. In the Schroeder case the petitioner was injured on December 19, 2013. That accident was to her low back. Prior to the accident she had

undergone two low back surgeries. From the date she was hired she worked full-time. The claimant declined surgery for the low back in the spring of 2013 because she was getting along well until December 19, 2013 when she had her injury. Respondents Section 12 physician testified there was no change in the underlying pathological condition from before December 19, 2013 and after December 19, 2013. Therefore, it was his opinion there was no causal connection between the accident and the subsequent treatment. There was no difference between MRIs before and after the accident of December 19, 2013. The court noted that it is undisputable that the claimant had a significant back condition before the accident; it is also undeniable that her ability to work completely deteriorated after the accident. "We certainly cannot say that her consistent reports of pain were required to be given more weight than changes in her ability to work".¶30. The court went on to state "where an accident accelerates the need for surgery, a claimant may recover under the act. The claimant was able to work full duty before the accident after declining to pursue surgery and that she quickly decided to undergo surgery after the accident supports a similar inference." ¶30.

Here, the fact pattern is very similar to the *Nanette Schroeder v. Illinois Worker's Compensation Commission* decision. Petitioner worked full duty from 2017 until December 10, 2018. Immediately after the accident of December 10, 2018 he sought medical treatment in the emergency room at Central DuPage Hospital. Within 24 hours he saw Dr. Walsh who noted very limited range of motion of the right shoulder. An MRI was immediately prescribed and on January 7, 2019 Dr. Walsh prescribed Petitioner right shoulder surgery. The only inference that is acceptable is that the accident of December 10, 2018 accelerated Petitioner's need for the right shoulder surgery and based upon all the case law this is sufficient to establish a causal connection between the accident of December 10, 2018 and the petitioner subsequent condition of ill being regarding the right shoulder. Petitioner was capable of working full-time with the right shoulder prior to December 10, 2018. Dr. Cohen was of the opinion that the surgery for the right shoulder was appropriate but simply not related. It is that opinion that the respondent relied upon in terminating temporary total disability benefits.

With respect to issue (J), whether the Respondent is liable for the unpaid medical expenses incurred; the Arbitrator finds as follows:

Under Section 8(a) of The Act, Petitioner is entitled to recover reasonable medical expenses that are causally related to the accident and that are necessary to diagnose, relieve, or cure the effects of her injury. *Absolute Cleaning/SVMBL v. Illinois Workers Compensation Comm'n* 409 Ill.App.3d 463 (2011). Having found causal connection between Petitioner's injury of December 10, 2018 and his subsequent treatment the arbitrator finds that the medical bills contained in Petitioner's exhibit number six are related to the Petitioner's injury of December 10, 2018. Petitioner testified that the group payments were made through his wife's group health insurance. Respondent shall pay to the Petitioner $26,502.03 which represents payments made on behalf of his treatment by his wife's group health carrier, reimburse Petitioner his $1,346.14 for his out-of-pocket expenses including co-pays and the balance for treatment in the amount of $89,972.44 for a total of $117,820.61.

With respect to issue (L), whether Petitioner is entitled to temporary total disability benefits from December 10, 2018 through July 17, 2020 representing 83 3/7 weeks, the Arbitrator finds as follows:

It is a well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, i.e., whether the claimant has reached maximum medical improvement. *Westin Hotel v. Industrial Comm'n*, 372 Ill.App.3d 527, 542, 310 Ill.Dec. 18, 865 N.E.2d 342 (2007).

The fundamental purpose of the Act is to provide injured workers with financial protection until they can return to the work force. *Flynn*, 211 Ill.2d at 556, 286 Ill.Dec. 62, 813 N.E.2d 119. Therefore, when determining whether an employee is entitled to TTD benefits, the test is whether the employee remains

temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force.

Having found a causal connection between the accident of December 10, 2018 and the subsequent treatment to the right shoulder with Dr. Walsh taking the petitioner off of work through January 7, 2020 the arbitrator finds that Petitioner is entitled to temporary total disability benefits from December 10, 2018 through January 7, 2020 when he was released at maximum medical improvement with a 10 pound lifting restriction regarding his right upper extremity.

With respect to issue (L& O), whether the Petitioner entitled to maintenance pursuant to Section 8(a):

Section 8(a) states: "The employer shall also pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto."

The Rules governing practice before the Illinois Worker's Compensation Commission Section 9110.10 Vocational Rehabilitation state:

a) An employer's vocational rehabilitation counselor, in consultation with the injured employee and, if represented, with his or her representative, **shall** prepare a written assessment of the course of medical care and, if appropriate, vocational rehabilitation required to return the injured worker to employment. The vocational rehabilitation assessment is required when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which he or she was engaged at the time of injury. When the period of total incapacity for work exceeds 365 days, the written assessment required by this subsection **shall** likewise be prepared.

In *Roper Contracting v. Industrial Commission* 349 Ill.App.3d 500, the Appellate court stated that an employee is not required to make demand of the employer for vocational rehabilitation before maintenance may be awarded. Further, a self-directed and created job search does constitute vocational rehabilitation. The rule places no duty an employee to prepare a written assessment of the course of appropriate rehabilitation. When Petitioner was placed at maximum medical improvement with a 10-pound lifting restriction with the right arm and Respondent did not take him back to work they were required to do a vocational assessment. Respondent relied on the results of their IME stating that the injury was not work related and therefore did not provide a vocational assessment. Having found that it is work-related the respondent's obligations pursuant to the Rules Governing Practice before the Illinois Worker's Compensation Commission must be realized. Petitioner did do a job search and was able to secure some side jobs for cash. Then the pandemic placed the State of Illinois on lockdown and shelter in place. Petitioner has been unable to look for employment because of the pandemic. Arbitrator orders the respondent to pay maintenance from January 8, 2020 through July 17, 2020 and provide the Illinois Worker's Compensation Commission with a vocational rehabilitation plan pursuant Section 8(a) of the Worker's Compensation Act and Section 9110.10 of the Rules Governing Practice before the Illinois Worker's Compensation Commission.

With respect to issue (M), whether Petitioner is entitled to penalties/attorney's fees under Section 19k, 19l, and 16, the Arbitrator finds as follows:

Section 19(k) of the Illinois Workers' Compensation Act states that "[i]n cases where there has been any unreasonable or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous for the delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award.

Section 19(l) of the Act states that "[i]f the employee has made written demand for payment of benefits under Section 8(a0 or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30.00 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000.00. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

Section 16 of the Act states that "[w]henever the Commission shall find that the employer, his or her agent, service company or insurance carrier has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee within the purview of paragraph (c) of Section 4 of this Act; or has been guilty of unreasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier.

Evidence was introduced that on April 11, 2019, Respondent had Petitioner evaluated by Dr.Cohen pursuant to Section 12 of the Worker's Compensation Act. Based upon Dr. Cohen's review of the medical records from 2016 and 2018 including the right shoulder MRI on December 18, 2018, Petitioner's right shoulder condition was present prior to the accident of December 10, 2018. He testified that based upon his review of the MRI of December 18, 2018 all of the objective findings were present prior to the accident of December 10, 2018. In addition, his interpretation of the December 18, 2018 MRI was that there was no labral tear. Based upon Dr. Cohen's opinion that Petitioner's need for surgery was something that existed prior to the December 10, 2018 accident, the respondent terminated temporary total disability benefits and did not authorize the surgery prescribed by Dr. Walsh (Rx.3). The Arbitrator does not find Respondent's actions to be vexatious, or that there was an unreasonable delay to pay Petitioner TTD benefits. Therefore, Petitioner's request for Section 19(l) late fee, 19(k) penalties and Section 16 attorney fees is denied.

Signature of Arbitrator

08/25/2020
Date

ICArbDec19(b)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC005939
Case Name	WARE,JACLYN v. ILLINOIS STATE UNIVERSITY
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0234
Number of Pages of Decision	32
Decision Issued By	Barbara Flores, Commissioner

Petitioner Attorney	William Trimble
Respondent Attorney	Louis Laugges

DATE FILED: 5/11/2021

/s/ Barbara Flores, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jaclyn Ware,

Petitioner,

vs. NO: 15 WC 5939

Illinois State University/State of Illinois,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Decision of the Arbitrator delineates the facts of the case in detail. As relevant to the issues on review, the Commission writes additionally to address the issues of accident and medical expenses.

A. Accident

The Arbitrator found that, on December 8, 2014, Petitioner tripped over worn stairs and injured her back while sweeping the stairs. Sweeping stairs was a part of her duties, thus satisfying the 'arising out of' requirement of accident, as tripping on a defect at the employer's premises is a risk connected to Petitioner's employment, as it is a risk to which the

general public would not be exposed. *First Cash Financial v. Industrial Comm'n*, 367 Ill. App. 3d 102, 106 (2006). The Arbitrator also found the 'in the course of' requirement of accident had been satisfied, as this element refers to time, place, and circumstances of the injury. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 162 (2000). The Commission agrees, and finds that the totality of evidence supports an affirmance of the Arbitrator's finding of accident when analyzed under *McAllister*. *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124828.

B. Medical Expenses

In the Decision, the Arbitrator awarded medical expenses to Petitioner pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. The Commission modifies this award to exclude medical expenses claimed between August 19, 2014 and September 8, 2014, reconciling it with the medical expenses awarded in Petitioner's companion Case No. 16 WC 743.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay Petitioner's reasonable and necessary medical expenses related to her lumbar condition, causally connected to the December 8, 2014 accident, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. This award excludes those medical expenses awarded in Case No. 16 WC 743.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given credit for all medical benefits related to this accident that have been paid, and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, pursuant to section 8(j) of the Act. Respondent shall be given a credit for $7,750.89 for medical bills that have been paid by Petitioner's group health insurance as provided in Petitioner's Exhibit 18 and shall hold Petitioner harmless from any claim by any insurer who has paid for these medical bills which are causally related to the December 8, 2014 accident.

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 the Respondent pay to Petitioner interest under section 19(n) of the Act, if any.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on December 11, 2019 is hereby affirmed as modified herein.

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.

/s/*Barbara N. Flores*
Barbara N. Flores

/s/*Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0234

WARE, JACLYN
Employee/Petitioner

Case# **15WC005939**

ST OF IL/ILLINOIS STATE UNIVERSITY
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:

0564 WILLIAMS & SWEE LTD
WILLIAM D TRIMBLE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0988 ASSISTANT ATTORNEY GENERAL
LOIS LAUGGES
500 S SECOND ST
SPRINGFIELD, IL 62706

0903 ILLINOIS STATE UNIVERSITY
1320 ENVIRONMTL HEALTH SAFETY
NORMAL, IL 61790

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

DEC 11 2019

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

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jaclyn Ware
Employee/Petitioner

v.

State of Illinois/Illinois State University
Employer/Respondent

Case # **15** WC **05939**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* and *Petition for Immediate Hearing Under Section 19(b)* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Bloomington**, on **9/25/19**. 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 to include spinal cord stimulator**

FINDINGS

On **12/8/14**, 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 $**31,980.00**; the average weekly wage was $**615.00**.

On the date of accident, Petitioner was **35** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.0**.

Respondent is entitled to a credit of $7,750.89 under Section 8(j) of the Act.

ORDER

The Arbitrator finds that Petitioner's conditions of ill-being, those being the conditions diagnosed by Dr. Rink, are causally related to the December 8, 2014, accident.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $410.00/week for 250 weeks, commencing December 10, 2014, through September 25, 2019, as provided in Section 8(b) of the Act.

Prospective Medical

Respondent shall authorize the medical treatment prescribed by Dr. Rink, including but not limited to the implantation of a spinal cord stimulator, and such follow-up care for the spinal cord stimulator implantation as prescribed by Dr. Rink.

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $883.04 to Advocate Bromenn Medical Center, $2,067.00 to Fort Jesse Imaging, $5,536.20 to OSF St. Joseph Medical Center, $13,182.14 to OSF St. James Medical Center, $452.00 to Heartland Emergency Specialists, and $3,880.70 to OSF Medical Group, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall hold Petitioner safe and harmless from any and all claims by any providers of the services for which the Respondent is receiving credit as provided in Section 8(j) of the Act. Respondent shall be given a credit for $7,750.89 for medical bills that have been paid by Petitioner's group health insurance as provided in Petitioner's exhibit 18 and shall hold Petitioner safe and harmless from any claim by any insurer that has paid for these medical bills.

Respondent shall hold Petitioner harmless from any and all claims by the Illinois Department of Public Aid for the services OSF St. James Medical Center and OSF Medical Group.

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

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

Signature of Arbitrator

December 6, 2019
Date

DEC 11 2019

FINDINGS OF FACT

Petitioner testified that prior to August 19, 2014, she had suffered medical issues with back pain, and that this would occasionally require that she take Tylenol or Ibuprofen. Nevertheless, prior to this date she was very active, and one of her favorite activities was to go hiking. She also liked to go on the water, and engaged in boating and tubing.

Petitioner testified that when she was hired by Respondent she had to receive clearance from a doctor, and then undergo a physical test, which included walking, standing while holding weights, and going up and down stairs, as well as lifting, pushing, or pulling weight. She testified that she passed that test, and she testified that prior to her injury in August of 2014 she was able to get through a complete day of work. Petitioner testified that prior to August, 2014, her back pain never interfered with her ability to work or come to work and do her job.

Petitioner testified that on August 19, 2014, she weighed between 220 and 250 pounds, although she has lost weight since, due mostly to gastric bypass surgery. Petitioner's duties on August 19, 2014, were cleaning bathrooms, mopping, vacuuming, stripping and waxing floors, washing windows, and performing other cleaning and janitorial tasks.

Petitioner testified that on August 19, 2014, she was vacuuming with a heavy vacuum cleaner, and was required to get under a table to vacuum. After she got home that day her back hurt. She took a long hot bath and figured she would be okay the next day, but the next day she could not get out of bed. She called Respondent to notify her foreman that because her back was hurting she would be unable to come in to work.

Petitioner testified the procedure for making this call in was to call an answering machine and leave a message for her foreman. She testified that she stated her name, the area she worked in, and the reason that she was unable to come in, which was because she had a lot of back pain and didn't know whether she twitched it vacuuming the night before but that's what it felt like.

When she did go back to work, she talked to her foreman, who she believes at the time was Linda Williamson. Petitioner testified that she told her foreman that she thought she injured her back while vacuuming and trying to go underneath a desk with the vacuum cleaner.

Petitioner testified that on August 27, 2014, she saw Dr. Jyotir Jani, and that she told Dr. Jani that she had back pain from vacuuming, and that although she sometimes had back pain, this was worse than usual. Dr. Jani set Petitioner up with an MRI and provided her with pain medications. (Px. 6, pp. 36-38) Petitioner underwent the MRI. (Px. 7)

Petitioner testified that her next work injury was December 8, 2014. Petitioner testified that on December 8, 2014, she was sweeping some stairs. She was going down the stairs sideways. All the stairs had rubber cover on them, but without first seeing it, she encountered one stair step where the rubber cover at the end was broken or chipped off and her foot slipped. At arbitration, Petitioner identified photographs of the broken stair. (Px. 17) Petitioner testified that to break her fall, she dropped her broom and grabbed hold of the handrail. When she

grabbed the railing she still fell, although not as hard, but she felt like something in her back had been jerked completely, and immediately experienced the worst pain she had ever felt in her back.

Petitioner testified that she yelled for a co-worker who came and sat with her and called the foreman. Petitioner's foreman came over, and Petitioner told her that something had happened, that she thought she had broken her back, that she was in pain, and that she had to go to the hospital. Petitioner drove to the closest hospital, Bromenn, where she went to the emergency room. (Px. 3). At Advocate Bromenn, lumbar x-rays were taken to rule out fractures and dislocations, and Petitioner was given pain medication and discharged home. (Px. 3) Petitioner testified that she did not go to work the next day, December 9, 2014, but went in to work to fill out a written accident report with her supervisor.

On December 10th, Petitioner saw Dr. Jani, and gave a history of the accident and that she had pain in her left lower back radiating down her left leg, sharp and stabbing, and moving to stand up makes it hurt. (Px. 6, pp. 47-50) Dr. Jani ordered the Petitioner off work for a week, and ordered an MRI, which Petitioner underwent on December 12, 2014. (Px. 8)

Petitioner next saw Dr. Naseer January 23, 2015. Dr. Naseer ordered a course of oral steroids, and noted that he would like to start Petitioner on physical therapy. He also put Petitioner on work restrictions of lifting no greater than 10 pounds of weight, no bending and squatting, and position changes every 30 minutes. Petitioner could not perform her job with those restrictions. Petitioner went to physical therapy and then was referred by Dr. Naseer to Dr. Rink, who she saw February 20, 2015. (Px. 9, pp. 80-82)

Dr. Rink gave Petitioner a steroid injection into her lower back March 12, 2015 (Px. 9, pp. 83-84). Physical therapy was started March 17, 2015. (Px. 9, pp. 84 – 87)

Petitioner saw Dr. Rink again March 20, 2015. At that time, Dr. Rink told Petitioner that he believed that with her job requirements she was unable to return to work. (Px. 9, pp. 88-89) Petitioner continued to undergo physical therapy in March and April of 2015, and on April 9, 2015, Dr. Rink provided Petitioner with another steroid injection. (Px. 9, pp. 94-95) As of this date, Dr. Rink provided written restrictions stating that Petitioner was unable to lift more than 10 pounds or perform frequent bending or squatting, and that she required frequent changes in position. (Px. 9, pp. 157-160)

Petitioner again saw Dr. Rink May 7, 2015. At that time, Dr. Rink offered a third steroid injection, but told Petitioner it would be her last for a while. (Px. 10, pp. 1-4). Petitioner continued to treat with Dr. Rink, and Dr. Rink continued to have Petitioner go to physical therapy and continued to hold Petitioner off work. On May 11, 2015, Petitioner signed a pain medication agreement with Dr. Rink. (Px. 12)

Dr. Rink provided Petitioner with shots in her back May 28, 2015. (Px. 10, pp. 4-5)

Petitioner testified that she provided off work notices or work restrictions to Respondent on a regular basis as she received them from Dr. Rink, Dr. Naseer, and Dr. Jani.

In July of 2015, Petitioner again saw Dr. Rink. (Px. 5, pp. 11-12; Px. 10, pp. 5-6). At that time he did not believe she could return to work. (Px. 10, pp. 5-6) Her pain had not gone away, and she had physical therapy from Dr. Rink or his office through the beginning of August. Petitioner testified that overall, Dr. Rink prescribed physical therapy three times, two of which were based on land one of which was water therapy, but that the physical therapy did not help her condition.

Petitioner again saw Dr. Rink for her back pain on August 5, 2015. (Ex. 5, pp. 21-22)

Petitioner saw Dr. Rink again September 15, 2015, at which time Dr. Rink indicated that he believed that sacroiliac joint injection would be appropriate for treatment for her condition. (Px. 10, pp. 7-9)

November 7, 2015, Petitioner went to the emergency department at St. Joseph Medical Center (Px.5 pp. 8-16) with acute exacerbation of chronic back pain. Petitioner testified that at this point her back pain had gotten so much worse that she had to go to the emergency room. She had not suffered any other accident or incident to cause this increase in back pain between her fall in December of 2014 and this emergency department admission.

Petitioner testified that after this emergency room visit, she continued to treat with Dr. Rink, who she saw again November 10, 2015, at which time she told him she had had an abrupt change where she had more symptoms in legs and more weakness in her legs. (Px. 10, pp. 9-11). Petitioner testified that both numbness and pain have progressed through this time, although since the fall in December of 2014, she has always had numbness shooting down her legs.

Petitioner called Dr. Rink November 23, 2015, about symptoms she was having. (Px. 10, p. 11)

On December 9, 2015, Petitioner again saw Dr. Rink. (Px. 5, pp. 36-39; Px. 10, pp. 11-14) On this date, Dr. Rink certified in writing that Petitioner continued to be disabled from work because of "(1) Lumbar disc herniation, (2) Aggravation of lumbar degenerative disc disease, (3) Sacroilliac joint pain." (Px. 10, pp. 55-57).

On January 19, 2016, Dr. Rink performed more injections. (Px. 5, pp. 39-40)

Petitioner next saw Dr. Rink on February 9, 2016, at which point Dr. Rink discussed with Petitioner the possibility of a spinal cord stimulator. (Px. 5, pp. 40-42) Petitioner testified that although Dr. Rink had mentioned spinal cord stimulator before, previously he had been trying to treat Petitioner's condition with injections and physical therapy. However, on February 9, 2016, he sent Petitioner home with a DVD explaining spinal cord stimulator to her in depth. Dr. Rink advised Petitioner that at her age spinal cord fusion was not appropriate, and that spinal cord stimulator would work best for her condition.

Petitioner was again seen by Dr. Rink for back pain on March 29, 2016. (Px. 5, pp. 42-43) Petitioner testified that on March 29, 2016, she remained off work, and Dr. Rink gave her a note for that which she took to Respondent.

Petitioner testified that she again saw Dr. Rink April 26, 2016 (Px. 5, pp. 43-44), at which point he gave her another note saying she was unable to return to work because of her back.

Petitioner saw Dr. Rink May 24, 2016, for low back pain. (Px. 5, pp. 45-48) She had not been receiving relief from injections at this point.

June 17, 2016, on referral from Dr. Rink Petitioner was evaluated by Dr. Jianxun Zhou at Illinois Neurological Institute in Peoria for a second opinion regarding her back pain, noting that since a December 2014 work injury, Petitioner's back pain had been worse. Dr. Zhou examined Petitioner, reviewed Petitioner's medical records including MRI taken in November of 2015. Dr. Zhou considered Peitioner's pain to be most likely discogenic. Dr. Zhou's diagnoses included lumbar discogenic pain syndrome and lumbar radiculopathy. (Px. 13, pp. 14-17)

Petitioner testified that by the time she saw Dr. Rink again on August 10, 2016, pain was beginning to radiate not just into her left leg but into her right leg. Dr. Rink again prescribed physical therapy. (Px. 5, pp. 49 – 52) Petitioner underwent this physical therapy. (Px. 5, 52 – 56)

Petitioner saw Dr. Rink again on October 18, 2016, at which point he recommended she undergo more injections, which she underwent on November 8, 2016. (Px. 5, pp. 56 – 61, 61-62)

Petitioner again saw Dr. Rink January 12, 2017, at which point she testified that she determined that she did want a spinal cord stimulator. She was referred to Illinois Neurological Institute in Peoria for evaluation. (Px. 5, pp. 62 – 63)

Dr. Rink referred Petitioner again to Illinois Neurological Institute in Peoria, where on February 6, 2017, Petitioner saw Dr. Daniel Fasset, who examined Petitioner and took a history from her, and ordered another MRI (Px. 13, pp. 17 - 19)

Petitioner followed up with Illinois Neurological Institute on March 10, 2017, to discuss spinal cord stimulator. Dr. Todd McCall recommended that she proceed with spinal cord stimulator. (Px. 14)

Petitioner again saw Dr. Rink March 15, 2017. Dr. Rink noted that neither Dr. Fassett nor Dr. McCall believed that Petitioner had a surgically treatable issue and noted that recommendations were for a trial of a spinal cord stimulator. (Px. 5, pp. 65-69) As of this date, Dr. Rink authored a letter indicting that after surgical recommendations, it was not believed that Petitioner had a surgically correctable issue, and that a spinal cord stimulator had been issued. Dr. Rink indicated that "at this time, Jaclyn A. Ware remains unable to return to work . . . At this time it is not anticipated that Jaclyn A. Ware will be able to return to her previous occupation." (Px. 5, p. 150).

Petitioner testified that while she had been receiving Norco and Gabapentin as well as a muscle relaxer by prescription from Dr. Rink, Dr. Rink never released Ms. Ware to go back to work. Petitioner saw Dr. Rink again June 7, 2017. (Px. 11, pp. 6-10). Petitioner testified that at this date, Dr. Rink decided that Petitioner really needed to get a spinal cord stimulator. Dr. Rink expressed concern at this point that Petitioner had been on opioid pain medications for a long time. He and Petitioner agreed that Petitioner needed to reduce the amount of opioid pain medication she was taking.

When Petitioner saw Dr. Rink again on October 17, 2017, although he had previously expressed the goal of decreasing her opioid pain medication, he actually had to increase the amount she was on because the medication she was taking was insufficient to deal with the pain she was suffering. (Px. 11, pp. 10 – 12)

Petitioner then switched her pain medication contract from Dr. Rink to Dr. Djagarian, who also tried to transition Petitioner from chronic opiates. Petitioner saw Dr. Djagarian on numerous dates, including March 16th, March 26th, April 5th, May 7th, June 4th, and June 18th, 2018, all partially addressing the problem that Petitioner was on chronic opiate medications. Petitioner tried medication to reduce her dependence, including Suboxone, but this did not cover all of her pain management needs. (Px. 19)

Petitioner saw Dr. Taimoorazy March 16, 2018, for another opinion about a stimulator for her back. Dr. Taimoorazy wanted to provide Petitioner with more injections in her back but could not get authorization to do so. (Px. 15)

Petitioner continued to see Dr. Djagarian for chronic pain July 2nd, July 17th, August 16th, September 6th, September 14th, October 19th, and December 14th, 2018. On each of those visits one of the reasons that she saw him for was her back pain and one of the problems was that she was having problems with her pain medications. (Px. 19)

In 2019, Petitioner saw Dr. Djagarian January 24th, March 11th, April 9th, April 25th, and May 2nd. On each of those dates her concerns included ongoing back pain since her fall of December 4, 2014, and the ongoing symptoms which had been worsening since that date, and her desire to get off of pain medications. (Px. 19)

On May 2, 2019, Petitioner discussed with Dr. Djagarian whether she would be able to go back to her work duties, and she was not ready to go back at that point. (Px. 19, pp. 121 – 125)

Petitioner continued to follow-up with Dr. Djagarian May 31st, June 25th, July 23rd, August 13th, August 20th, August 26th, and September 3rd, 2019. Again, on each of these dates, her concerns included back pain, and her chronic need for opiate pain medication. (Px. 19)

Petitioner testified that through the date of hearing she continued to want spinal cord stimulator surgery. She testified that she does not have a life right now. She testified that she cannot climb stairs, cannot watch children, and has missed important events including family reunions and funerals.

Petitioner has not been paid TTD. She initially received disability through SURS, but that ran out and she is now receiving disability from a privately purchased plan through Prudential, which will run out in April 2020. Off-work notes and work restrictions from various of Petitioner's treating health care providers were entered into evidence at the time of arbitration as Petitioner's exhibit 16.

Deposition of Dr. Christopher Rink, taken July 6, 2015

Treating physician Dr. Christopher Rink was deposed on July 6, 2015, and again on April 4, 2018. The deposition of Dr. Christopher Rink taken on July 6, 2015, was entered into evidence at the time of arbitration as Petitioner's exhibit 1. Dr. Rink testified that his specialty is physical medicine and rehabilitation, with a sub-specialty in pain management, which he has been practicing for 20 years. Dr. Rink testified that he is board certified in both physical medicine and rehabilitation and pain management. (Px. 1, p. 5)

Dr. Rink testified that he saw Jaclyn Ware on February 20, 2015, and took a history of injury that while she was at work, December 8, 2014, Petitioner fell going down stairs, grabbed the handrail to break her fall, and suffered a twisting of her body and felt something pull in her lower back region and had an onset of prominent low back pain that had been persistent ever since. (Px. 1, p. 7)

Dr. Rink testified that in addition to low back pain, Petitioner also had radiating pain inside the leg, most of which stopped at the knee, but with sensation of numbness and tingling below the knee. (Px. 1, p. 7-8)

Dr. Rink testified that when Petitioner came to see him she had an MRI, which showed disc herniation at the L4-5 level, more prominent to the right-hand side, with a moderate right neuroforaminal stenosis, anadthat at L5-S1 there was a central disc extrusion, which is another term for disc herniation, with arthritic changes in facet joints on both left and right side. (Px.1, p. 8)

Dr. Rink testified that Petitioner's most recent MRI was in December 2014, although there were not significant changes as far as he or the radiologist were concerned between the December, 2014 MRI and a previous MRI of September 8, 2014. (Px.1, p. 8)

Dr. Rink testified that when he saw Petitioner on February 20, 2015, he performed an examination, and found tenderness or soreness with palpation over the location of the buttock area in the region of the sacroiliac joint. He also found pain mostly in the buttock area on straight leg raise, as well as during stretching of hip joint and flexing which produced left buttock pain, and she had slight decreased in reflexes on the right-hand side. (Px. 1, p. 9)

Dr. Rink testified that his diagnosis as of February 20, 2015 was that Petitioner had a sprain of the left sacroiliac joint with possible left lumbar radiculopathy or a pinched nerve. (Px. 1, pp. 9-10)

Dr. Rink testified that he believed there was lumbar radiculopathy because of the description of pain radiating into the leg and numbness, as well as the reduction in reflex in Petitioner's leg. He testified that his conclusion that Petitioner had an SI joint issue was mostly from the tenderness she had over the joint region as well as the increased pain in the buttock region with flexion of the left hip. (Px. 1, p. 10)

Dr. Rink testified that the hip flexion test showed SI joint problem as opposed to radiculopathy because it did not produce a lot of radiating discomfort down the leg. (Px. 1, p. 10) At this point, because Petitioner was physically very limited due to her symptoms, Dr. Rink recommended getting more aggressive with her treatment and performing an injection of the joint which appeared to be involved, as well as covering the potential pinched nerve or radicular involvement with an epidural steroid injection as well. (Px. 1, p. 11) Dr. Rink testified that because Petitioner had a previous gastric bypass, he believed it was important to be cautious regarding the use of any anti-inflammatory medications. (Px. 1, p. 11)

As of February 20, 2015, Dr. Rink also recommended physical therapy, which he believed was necessary since Petitioner hadn't been progressing with medication and time since her injury, and was physically very limited. Given Petitioner's conditions and the length of time since the onset of symptoms, Dr. Rink considered this treatment standard. (Px. 1, p. 11-12) Dr. Rink testified that as of February 20, 2015, he placed Petitioner on restrictions of no lifting greater than 10 pounds, no bending or squatting, or change bending and squatting positions every 30 minutes. (Px. 1, p. 12)

Dr. Rink testified that although Petitioner's MRI films were unchanged from before and after her December 2014 injury, nevertheless, to a reasonable degree of medical and surgical certainty, her fall could have aggravated those findings. Dr. Rink testified that this was the case based on the history he had been provided including that she had not missed much work related to her condition prior to the fall, and that she had really seen a change in symptoms after the fall, and because the MRI was unable to see small changes. (Px. 1, p.12-13) Dr. Rink testified that "it may not take much to push her over the edge, where the condition she had becomes more symptomatic." (Px. 1, p. 13)

On March 12, 2015, Dr. Rink performed an injection of Petitioner's left sacroiliac joint and an epidural steroid injection for left L4 radiculopathy. (Px. 1, p. 13) He felt both injections were necessary to cover both potential sources of pain "try to get things calmed down so we could get her moving a little bit quicker." (Px. 1, p. 14) Dr. Rink testified that Petitioner's restrictions were unchanged at the time of injection.

Dr. Rink testified that he next saw Petitioner March 20, 2015. Although things were better since the injection a week earlier, she was still symptomatic and was just starting physical therapy where she would work on lumbar traction. (Px. 1, p. 14) Dr. Rink testified the lumbar traction could be considered stretching of the spinal region such by separating the vertebra, an environment was created where the disc could slide back into place, and where separation of the vertebra and stretching of the spine would take pressure off the nerve. (Px. 1, p.15)

On March 17th, Dr. Rink examined Petitioner. He noted she still had tenderness to palpation over the sacroiliac joint and that her range of motion in the lumbar spine was very restricted in all directions. On examination, straight leg raising not only caused left buttock pain but also left leg pain, mostly into the thigh, not past the knee. Hip range of motion activities did produce buttock pain. (Px. 1, p. 15-16) At that visit, Dr. Rink's impression was aggravation of advanced lumbar degenerative disc disease with multiple disc herniation with radicular features, and suspicion of the sprain in the left sacroiliac joint with persistent pain. (Px. 1, p. 16) Because of the significance of Petitioner's symptoms when she first saw Dr. Rink, he anticipated that it would be necessary to repeat the injections, primarily the epidural steroid injection for the pinched nerve. Dr. Rink testified that because he did not want to give too large a dose with each injection, typically it would take more than one epidural steroid injection to calm down nerve irritation. (Px. 1, p. 16)

At that visit, Dr. Rink also recommended mediation. Petitioner had been on Gabapentin and Dr. Rink increased the dose to 600mg three times a day. Dr. Rink testified that Gabapentin was a non-narcotic pain medication which seemed to have good effect on nerve pain. (Px. 1, p. 17) Dr. Rink testified that at this time, he believed Petitioner continued to have significant physical limitations, and that given her job requirements she was unable to return to the type of work she had been doing. (Px. 1, p. 17) Dr. Rink also recommended physical therapy at this time. (Px. 1, p. 17) Dr. Rink testified that the findings regarding Petitioner's hip, her SI joint tenderness, her decreased range of motion, and findings on straight leg raise supported the necessity for physical therapy, medication and injections. (Px. 1, p. 18)

Dr. Rink testified that on April 9, 2015, he considered Petitioner to have left L4 radiculopathy, and performed a left L4 transforaminal epidural steroid injection for this condition and continued Petitioner's restrictions. (Px. 1, p. 18)

Dr. Rink testified he next saw Petitioner May 7, 2015, and that although Petitioner still had benefit from the first injection, her symptoms were progressively increasing. Due to an unrelated illness, she had had to stop physical therapy, and was now going to be restarting it. (Px. 1, p. 18-19) Dr. Rink performed an examination May 7, 2015 and found the Petitioner still had significantly decreased lumbar range of motion, and some decreased strength in her left hip flexors. Because she noted added benefit with her second injection, Dr. Rink planned to proceed with a third injection, but advised Petitioner that would be all the epidural steroid injections for a while. (Px. 1, p. 19) Dr. Rink testified that on that visit, he considered Petitioner's symptoms more suggestive of L4 distribution, but that, since her MRI findings showed another disc involvement, an injection was performed for that disc at the same time just to cover that possibility pending a nerve test. On May 7, 2015, he recommended another injection at suggested L4 and L5. (Px. 1, p. 19-20) Dr. Rink testified that examination findings led to the conclusion that injection was necessary, due both to weakness of the hip flexors suggesting a nerve involvement, and to persistence of symptoms. (Px.1, p. 20) At this visit, Dr. Rink continued to recommend Gabapentin and Norco. Petitioner's restrictions remained the same. (Px. 1, p. 21)

On May 28, 2015, Dr. Rink performed a third injection. At this time, his diagnosis was that Petitioner suffered from disc herniation with left radiculopathy, and he performed a left L5 transforaminal epidural steroid injection, and left L4 transforaminal epidural steroid injection. (Px. 1, pp. 21-22) Dr. Rink testified that Petitioner's restrictions remained the same as of that visit. (Px. 1, p. 22)

Dr. Rink next saw Petitioner July 2, 2015. At that time, Petitioner was reporting her pain was worse, predominantly back pain. Although she would still get discomfort down her legs, if it was all she had to deal with, it was very manageable. The most extreme pain was to the low back. (Px. 1, p. 22) Dr. Rink performed an examination, which showed Petitioner continued to demonstrate significant restriction of lumbar range of motion, with more production of pain with extension of her back, and only back pain with straight leg raising or flexing the hip and no radicular pain appreciated on those maneuvers. Petitioner was tender to palpation throughout her low back region and the pelvic region although not specific to the sacroiliac joint. (Px. 1, p. 22-23) On this date, Dr. Rink believed that the primary issue was aggravation of underlying disc issue rather than radicular pain and that is was more of a mechanical or structural issue, with a possibility of irritation of facet joints. (Px. 1, p. 23) Dr. Rink testified that although Petitioner's Gabapentin had previously been reduced due to sedation since she was on it, she was no longer seeing as much sedation, so the Gabapentin would again be increased to 600mg three times a day, and Dr. Rink planned to get her involved again in therapy after the third injection had been performed, which she had not performed since her second injection. (Px. 1, p. 24) Dr. Rink testified that as of July 2, 2015, Petitioner remained unable to return to work. As of the time of deposition, Dr. Rink continued to treat Petitioner, and Petitioner had appointments to see him subsequent to the date of deposition. (Px. 1, p. 25)

At the time of his July 6, 2015, deposition, Dr. Rink testified that to a reasonable degree of surgical and medical certainty, his diagnosis of Petitioner was aggravation of degenerative disc disease and disc herniation, sprain of the left sacroiliac joint, and possible facet joint involvement. Dr. Rink expressed the opinion, to a reasonable degree of medical and surgical certainty, that the fall described to him by Petitioner as occurring at work in December, 2014 aggravated the lumbar spinal condition and caused the sprain of the sacroiliac joint. (Px. 1, p. 26)

On cross-examination, Dr. Rink testified that in 2014, Petitioner had an MRI because she was having lumbar back pain. Although lumbar back pain can be confused with sacroiliac pain, Dr. Rink testified that he did not believe Petitioner was having sacroiliac pain at the time of her 2014 MRI.. (Px. 1, p. 29-30) Dr. Rink reiterated that Petitioner had undergone a series of three injections, after which she was not describing much leg pain at all but still persistent back pain. He testified he would atrribute the loss in leg pain to the injection. (Px. 1, p. 33)

On cross-examination, Dr. Rink reiterated that he would not necessarily expect the change in the MRI with the change in condition since a minor progression which could cause Petitioner to become symptomatic would not necessarily be shown on MRI. (Px. 1, p. 34)

Dr. Rink testified that he believed objectively documenting injury to the spinal cord required a combination of history, exam findings, and imaging, including subjective evidence that correlates with the complaints. (Px. 1, p. 34)

Dr. Rink agreed that degeneration to a disc could be caused by natural processes as well as injury (Px. 1, p. 36), but testified that persons whose degenerative disc disease was caused by aging would experience a gradual rather than abrupt onset of symptoms. (Px. 1, p. 37-38)

On cross-examination, Dr. Rink testified that based on Petitioner's medical history, he would consider her to have an aggravation of pre-existing degenerative condition. Dr. Rink testified that there was no point during his treatment of Petitioner at which her subjective complaints failed to match her objective findings. Dr. Rink testified that even through his last office visit with Petitioner, Petitioner was still having persistent back pain, located particularly at the sacroiliac joint, with possible contribution from facet joints, although radicular pain had settled down at that point. (Px. 1, p. 45) Dr. Rink testified that Petitioner explained her issues clearly to him, and did not show any evidence of malingering or pain magnification. (Px. 1, p. 47)

Dr. Rink testified that twisting type motions are common aggravators of degenerative disc disease or facet joint arthropathy. (Px. 1, p. 52) Dr. Rink testified that Petitioner's conditions are more consistent with that type of aggravation than they were with age related processes based on her abrupt change in symptoms as reported in December. (Px. 1, p. 52)

Dr. Rink testified on re-cross-examination that although Petitioner was a smoker and that she was obese, the injury she described could still have aggravated her condition of ill-being. (Px. 1, p. 57) On re-cross-examination, Dr. Rink also examined findings from Dr. Naseer from January 28 and February 5, 2013. Dr. Rink testified that these did not appear to be as severe as the exams he had after February 20, 2015. According to Dr. Rink, this "supports that there was a difference in what I was seeing when I initially evaluated the patient compared to what [Dr. Naseer] was documenting at that time." (Px. 1, p. 58-59) Likewise, Dr. Rink testified that the note of Jessica Johan, of October 31, 2013 indicated no findings of tenderness of the SI joint, decreased range of motion, positive straight leg raise, decreased strength, resisted hip flexion, or decreased reflexes, leading him to conclude that "I was seeing more severe findings compared to what was documented that…she was seeing on October 31, 2013." (Px. 1, p. 59-60) Dr. Rink testified that it was fair to say that his findings after February, 2015 were more severe than findings in October, 2013. (Px. 1, p. 60) Likewise, reviewing a March 25, 2014 note by Advanced Practice Nurse, Jessica Johan, APN Johan did not really have any exam findings associated with the back on that date, further supporting the contention that after December, 2014 Petitioner's condition had changed and her presentation was more severe. (Px. 1, p. 61)

Likewise, Dr. Rink testified that on August 13, 2014, a visit where Dr. Naseer recommended the MRI, Dr. Naseer noted that "inspection of back is normal." This likewise supported Dr. Rink's opinion that following the December 8, 2014 incident, Petitioner's condition had changed and become more severe. (Px. 1, p. 62)

Dr. Rink further testified on re-cross-examination that reviewing Dr. Jani's note of August 27, 2014, in which Dr. Jani noted that Petitioner could testified that Petitioner was able to bend at her waist and touch her ankles, and at which visit there were no findings regarding tenderness in the SI joint, decreased range of motion, positive straight leg raise, decreased strength, resisted hip flexion, or decreased reflexes in the quadriceps or Achilles, everything was normal and Petitioner had a pretty good range of motion, all of which further supports the contention that the Petitioner's condition changed and was more severe after her December 8, 2014 injury. (Px. 1, p. 64-65)

Similarly, Dr. Rink testified that Petitioner was seen by Marlene Robertson, APN, September 2, 2014, at which visit she had a full range of motion, with no findings of tenderness in the SI joint, positive straight leg raise, decreased strength, resisted hip flexion, or decreased reflexes in the quadriceps or Achilles, again supporting the contention that Petitioner's condition changed and was more severe after December 8, 2014. (Px. 1, p. 65-66)

Likewise, on re-cross-examination, Dr. Rink testified that Petitioner was seen by Dr. Naseer September 4, 2014, and that Dr. Naseer recorded no findings of tenderness of the SI joint, decreased range of motion, positive straight leg raise, decreased strength, resisted hip flexion, or decrease reflexes in the quadriceps or Achilles, also supporting that Petitioner's condition had changed and became more severe following her December 8, 2014 accident. (Px. 1, p. 66-67) Dr. Rink testified on re-cross-examination that after going through all previous medical notes, it remained his opinion that Petitioner's fall of December 8, 2014 aggravated her condition of ill-being. He testified that in his review of Dr. Naseer and Dr. Liu's office notes, they didn't specify anything abnormal. (Px. 1, p. 67-68)

Deposition of Dr. Christopher Rink, taken April 4, 2018

Treating physician Dr. Christopher Rink was deposed on July 6, 2015, and again on April 4, 2018. The deposition of Dr. Christopher Rink taken on April 4, 2018, was entered into evidence at the time of arbitration as Petitioner's exhibit 2. Again, Dr. Rink testified that he is board certified in physical medicine and rehabilitation and the subspecialty of pain management, and that he provided treatment to Petitioner. (Px. 2, p. 4)

Dr. Rink testified that he saw Petitioner August 5, 2015 for follow up visit, and that she was complaining of pain at a level of 6/10, ranging over the previous month between 5-8/10. Although she had noted on follow-up intake that she was somewhat improved, she had no changes at that time, and reported that some physical therapy which had been tried, which was traction, had actually made her back pain worse. Dr. Rink and Petitioner discussed that the potential source of her pain might have been the joint involvement of a facet joint versus ongoing sacroiliac joint involvement. (Px. 2, p. 5) Dr. Rink testified that on August 5, 2015, Petitioner was still noting radiating leg pain from her back, primarily to the knee level. She was still tender to palpation over the sacroiliac joint, but her tenderness could also include the area where the sciatic nerve tended to travel down the leg, and therefore could possibly be related to sciatica or the sciatic nerve. (Px. 2, p. 6) Dr. Rink testified that facet joint pain was pain in the joint at each vertebral or spine segment level, although facet joint pain did not normally cause true sciatic pain which would radiate all the way down into the calf or the foot. (Px. 2, p. 6-7) The sacroiliac

joint on the other hand, a joint in the pelvic area, could cause pain mostly in the low back or buttock area although it can cause referred pain into the legs. (Px. 2, p. 7) Disc pain, although it could also be very similar, normally would not result in any discomfort on examination, like tenderness to palpation over the buttock area. (Px. 2, p. 7)

Dr. Rink testified that as of August 5, 2015, Petitioner would have been unable to work as of that date, and was unable, as also reflected in his note of that date to return to her work activity. (Px. 2, p. 8)

Dr. Rink testified that he next saw Petitioner on September 15, 2015, at which time she was complaining of pain in the low back, greater on the left side than the right, and continued to report radiating pain down the leg but much less than in the past. She noted that an increase in activity increased the pain. (Px. 2, p. 9) On examination, Dr. Rink found that Petitioner was still tender to palpation over the region of the left sacroiliac joint, with no tenderness over the outer aspect of the hip, major motion of her hip joint, buttock pain upon straight leg raising, which could indicate SI joint pain, and good strength throughout the lower extremities. (Px. 2, p. 9-10)

Dr Rink testified that on September 5, 2015, he recommended that Petitioner have a left sacroiliac joint injection, which was necessary because Petitioner was not improving. He believed the next most aggressive treatment at that point was an injection. Dr. Rink did not change any of Petitioner's restrictions. (Px. 2, p. 10-11)

Dr. Rink testified that he next saw Petitioner September 10, 2015, at which time she complained of low back pain bilaterally on both right and left side with radiating pain down her leg, with pain level of 7 on a 1-10 pain scale, tingling in the legs, and numbness of the legs, which would have indicated a condition significantly worse than seen at her previous visit. (Px. 2, p.11) Dr. Rink testified that the numbness and tingling to Petitioner's leg would suggest there was more nerve irritation and more sciatica. (Px. 2, p. 11) Dr. Rink testified that he performed an examination on that date, and that Petitioner had very limited range of motion with reports of radiating pain into her legs. (Px. 2, p. 11-12) At this point, Dr. Rink recommended an updated MRI of Petitioner's low back to see if there were any changes, and placed her on a course of oral steroids to help settle down possible nerve irritation. Dr. Rink testified that Petitioner's restrictions would have remained the same as of that date. (Px. 2, p. 11-12)

Dr. Rink testified that he next saw Petitioner on December 9, 2015, at which time she had complaints of bilateral low back pain and numbness and tingling of the leg, with bending forward, standing and lifting increasing her symptoms. (Px. 2, p. 12-13) Dr. Rink testified that updated MRI, performed on November 20, 2015, noted degenerative disc disease involving the lower three disc levels of the lumbar spine, and slight curvature of the spine, supposedly related to the degenerative arthritis. (Px. 2, p. 13)

Dr. Rink testified that he believed the findings on that MRI could be a pain generator for Petitioner. (Px. 2, p. 14)

Dr. Rink testified that although he had Petitioner see a surgeon, the surgeon did not recommend surgery as it would be unlikely to resolve Petitioner's problem. Dr. Rink testified that he agreed with that opinion. (Px. 2, p. 15)

Dr. Rink testified that the remaining treatment option for Petitioner was a spinal cord stimulator. He testified that although the spinal cord stimulator doesn't fix the pathology, it does interrupt the pain signals, and would therefore make the symptoms more tolerable. He testified that Petitioner had already exhausted conservative care, had given her condition plenty of time to resolve or settle down on its own both with medication and with activity modification, that Petitioner was not found to be a surgical candidate, and that spinal cord stimulator was one of the remaining options for management. (Px. 2, p. 15-16) Dr. Rink testified that Petitioner had undergone extensive physical therapy, had numerous injections, had tried oral medications, and was basically out of options. (Px. 2, p. 16)

Dr. Rink testified that on December 9, 2015, he performed an exam which showed limited lumbar flexion with increased pain and tenderness to palpation over the SI joint. (Px. 2, p. 16-17) Dr. Rink testified that Petitioner's restrictions would have remained the same as of that date. (Px. 2, p. 17)

Dr. Rink testified that he performed a sacroiliac joint injection on January 19, 2016, because Petitioner was still demonstrating findings on exam that could suggest that the sacroiliac joints were involved. (Px. 2, p. 17) Dr. Rink next saw Petitioner on February 9, 2016, at which time Petitioner gave a history of a fall shortly after her one week follow-up regarding the injection. He noted she wasn't really complaining of a lot of radicular or sciatic pain down her legs any more, and he did not note that she had been steadily declining over the last previous several months but had had an abrupt reduction in radicular pain. (Px. 2, p. 17-18) At this visit, Dr. Rink recommended Petitioner take a look at a spinal cord stimulator. (Px. 2, p. 18)

Dr. Rink testified that he next saw Petitioner March 29, 2016, and that she noted that she was having some low back pain but attributed that to traveling up to Chicago for the Easter holiday, and also having run out of her medication while traveling. He noted that at that visit her pain level was 8/10, and that she was still not describing any radiating pain or pain going into her legs, with her pain mostly localized in the low back. (Px. 2, p. 18-19)

Dr. Rink testified the fact that Petitioner's pain was mostly localized at the low back region as opposed to the leg, did not really change his opinion on consideration of the spinal cord stimulator, and that although spinal cord stimulators help more with radicular pain, they can be effective with localized low back pain as well. (Px. 2, p. 19)

Dr. Rink testified that Petitioner remained unable to work as of March 29, 2016. (Px. 2, p. 19-20)

Dr. Rink testified that he next saw Petitioner April 26, 2016, at which point she told him that a fall had increased her exacerbation, and that although she was improving she was not necessarily back to baseline. (Px. 2, p. 20) At that point, Dr. Rink recommended she see a surgeon, and that she change her medication back to Hydrocodone since her symptoms were

settling down. (Px. 2, p. 20) At this point, Dr. Rink's diagnosis only changed in that he was not considering sacroiliac joint as a likely prominent source of pain. (Px. 2, p. 20-21) Petitioner's described fall from February, 2016, did not really change anything dramatically about her complaint, Dr. Rink's examination, his impression, or his recommendation for treatment. (Px. 2, p. 21)

Dr. Rink testified that he next saw Petitioner May 24, 2016, at which point she had not seen a surgeon. Her complaints were about the same as previously, including persistent low back pain, and resolved pain radiating down the leg. (Px. 2, p. 21-22) Dr. Rink did note very limited flexion with reports of increased pain, and tenderness with palpation in the lumbosacral junction. Dr. Rink noted that the lack of any significant benefit from sacroiliac joint injections suggested that Petitioner's pain was more related to the disc itself, and was discogenic pain. He had ruled out the possibility that Petitioner's pain was coming from the SI joint. (Px. 2, p. 22) Dr. Rink testified that he was leaning more toward disc involvement, and noted that injections to the facet joint line really didn't seem to help. (Px. 2, p. 22-23) Dr. Rink testified that at that point Petitioner remained unable to work. (Px. 2, p. 23)

Dr. Rink testified he next saw Petitioner August 10, 2016, after she had seen Dr. Zhou, a specialty doctor in physical medicine and rehabilitation. (Px. 2, p. 23-24) At that time Petitioner continued to complain of radiating pain to her right and left leg, with pain level 8/10, similar to baseline. Dr. Rink's restriction remained the same for Petitioner. (Px. 2, p. 24)

Dr. Rink testified he next saw Petitioner October 18, 2016, with complaints of increased low back pain with radiating bilateral leg pain. He testified that a recent EMG at that point showed moderate right L5 radiculopathy nerve irritation. At this time, Dr. Rink's impression was still aggravation of right lumbar disc disease and right radicular pain. He considered the right radicular pain consistent with Petitioner's complaints of the EMG findings. He testified that "[Petitioner] was still having prominent low back pain which...associated to aggravation of her disc herniation versus degenerative disc disease." Dr. Rink noted limited range of motion to increased back pain and reduced tenderness to palpation on that date and considered that Petitioner's restrictions would remain the same. (Px. 2, p. 24-25)

Dr. Rink testified that he saw Petitioner on November 8, 2016, and performed a right L4 transforaminal epidural steroid injection and a right L5 transforaminal epidural steroid injection, due to the persistence of radiating leg pain combined with findings on the EMG which demonstrated nerve irritation. Petitioner's restriction would have remained the same as of that visit. (Px. 2, p. 25-26)

Dr. Rink next saw Petitioner January 11, 2017. At that time he noted Petitioner saw very good initial relief of the right leg pain after the injection, but that her pain was recurring. Dr. Rink testified that he was still looking at trying to get Petitioner in to see a spine surgeon for an opinion as to whether she would be a surgical candidate, whether she had a surgical pathology or whether changes in her lumbar spine respond to a surgery, and whether other risk factors would preclude surgery. (Px. 2, p. 26-27) On that date, Dr. Rink continued to consider a spinal cord stimulator. Dr. Rink also testified that he noted, as of January 11, 2017, that Petitioner was up-to-date on urine and drug testing and also that he reviewed the Illinois Drug Monitoring site and

determined that there was no abnormal behavior. Dr. Rink testified that this was necessary because Petitioner was on long term opioid pain medication. (Px. 2, p. 27-28)

Dr. Rink testified that he next saw Petitioner March 15, 2017, for follow-up after she had seen a spine surgeon, one of whom performed spinal cord stimulators. He testified that spine surgeons did not believe that is where having surgically treatable condition, and that they had recommended trial spinal cord stimulators. Dr. Rink testified that fusions do not always work, and that with Petitioner's condition, it would be necessary to have multiple levels fused, increasing the probability of poor outcome. (Px. 2, p. 28-29)

Dr. Rink testified that as of March 15, 2017 he considered Petitioner's EMG findings to be compatible with a moderate L5 radiculopathy, and considered this to give some objective basis to Petitioner's complaints of pain. His restrictions for Petitioner would have remained the same as of March 15, 2017. (Px. 2, p. 29) As of this date, both Dr. Rink and another OSF physician were recommending spinal cord stimulator. (Px. 2, p. 29-30)

Dr. Rink testified that he again saw Petitioner June 7, 2017. He testified that on that date she was not reporting any change in her symptoms, with a pain level of 7/10, ranging between 5 and 9, which was consistent with her last several visits. At this point her restrictions were still the same, and his plan of care was still a spinal cord stimulator. (Px. 2, p. 30)

Dr. Rink testified he next saw Petitioner October 17, 2017. Petitioner had been suffering other unrelated medical issues. Relative to these, she had been prescribed a stronger pain medication. He testified that on this date, Petitioner's pain was still 7/10, and her restrictions remained the same. At this point, Dr. Rink and Petitioner were focusing more on dealing with pain rather than treating a new diagnosis. (Px. 2, p. 31-32)

Dr. Rink testified that assuming that on December 8, 2014, Petitioner was standing on a stairway when the stairway gave way beneath her, she began to fall backwards and grab the handrail to break her fall, and that she fell and twisted her back and immediately experienced pain in the low back radiating down her legs and lower extremities, it was his opinion, as it was in his first deposition, that this event aggravated a condition he diagnosed. (Px. 2, p. 32) The basis of his opinion was that although Petitioner had pre-existing disc changes, she had been able to work to that point, and therefore was able to tolerate the physical activity required for her job. However, after that injury her condition was worse, which persisted. (Px. 2, p. 32)

Dr. Rink testified that as of October 20, 2017 he was still recommending a spinal cord stimulator, which was necessary because of the aggravation of Petitioner's condition she suffered in December, 2014. Dr. Rink testified that a spinal cord stimulator was necessary because Petitioner had exhausted all conservative options, and there was not a surgery which would resolve Petitioner's issues or would even be recommended to help with the issues, and spinal cord stimulator was a remaining option to provide pain relief. Although it would not fix the problem, it would hopefully provide better long term management of pain. (Px. 2, p. 32-33)

On cross-examination, Dr. Rink testified that he believed Petitioner's aggravation of her condition was permanent because Petitioner's symptoms were consistently worse after the incident in December, 2014. (Px. 2, p. 34) Dr. Rink testified he was aware that Petitioner had suffered pre-existing degenerative disc disease, and was willing to assume she had had treatment for low back pain radiating into one or both legs prior to seeing him. He testified that with degenerative disc disease it was common to have such radicular symptoms, and that sometimes such symptoms would be present, go away, and return. (Px. 2, p.34-35) He testified that it was experience with Petitioner's condition after December, 2014, that symptoms had come and gone. (Px. 2, p. 35)

Dr. Rink testified that in his notes as of March 15, 2017, his indication of nerve root injury was correlating with decrease in the size of the disc herniation, which is not uncommon over time and that EMG findings were more reflective of a persistent nerve injury that appeared to be an ongoing compression of the nerve root. Although pressure had been taken off the nerve root by the diminishing size of the disc herniation, the nerve was still demonstrating injury, and had therefore undergone more of a chronic injury. (Px. 2, p. 36-37) Dr. Rink testified that although Petitioner had had some diagnosis of degenerative disc disease in 2008, her right leg symptoms were newer, and her left leg symptoms more long standing. He testified he would have a difficult time answering whether any evidence of right leg symptoms prior to 2014 would indicate nerve root damage prior to that date, since when he first saw her she wasn't complaining of any right leg symptoms. (Px. 2, p.38)

Dr. Rink testified the best case scenario with spinal cord stimulator was that the spinal cord stimulator would allow for the reduction of opioid pain medication which Petitioner was using on a regular basis, and would allow Petitioner to function better on a daily basis with less pain. He testified the worst case scenario for a spinal cord stimulator was that it was not effective. He testified that middle ground would be that it would allow her to be a little more functional but still use the same amount of pain medication, or that it would allow her to reduce her pain medication but not be more functional. (Px. 2, p. 39-40)

Dr. Rink testified that although his treatment records did not always document ongoing restrictions of Petitioner, this was because usually his office would print off a separate letter stating work restrictions. (Px. 2, p. 40) Dr. Rink testified that he had restricted Petitioner from working, and that he had not placed any restrictions on Petitioner's ability to lift and/or walk or any other specific limitations of that nature. (Px. 2, p. 40)

Also on cross-examination, Dr. Rink explained the mechanism of a spinal cord stimulator, in which wires are inserted in the back aspect of the spinal cord where the sensory nerves run, electrical impulses are given off that interfere with pain signals traveling up the spinal cord, and this usually lessens the severity or intensity of pain, changing the sensation of pain from more of a sharper stabbing pain to more of a dull ache or even a little vibratory sensation. Dr. Rink testified the benefit of the spinal cord stimulator is that it does not cause any permanent pain to the anatomy, so if it is ineffective it can be removed without permanent damage. He testified that although spinal cord stimulator is placed surgically, it is a minor surgery which can be done on an outpatient basis. (Px. 2, p. 41)

Dr. Rink was questioned about a purported study showing that spinal cord stimulators were relatively ineffective in workers' compensation patients. He testified that although he kept up with relevant literature, he was not familiar with that study, and that he had to look at the individual patient and determine what he believed would help her, based on her symptoms and needs. Although he was unable to guarantee an outcome, if a spinal cord stimulator did work for Petitioner, it was a nice option when she didn't have any other. (Px. 2, p. 43-44) Dr. Rink distinguished spinal cord stimulator from fusion surgery, testifying that although neither one always works, a spinal cord stimulator did not cause any permanent anatomic changes, and if it doesn't work it can be removed, whereas if a fusion didn't work, the patient could be worse off afterwards. (Px. 2, p.44-45)

On re-cross-examination, Dr. Rink testified that it remained his opinion that Petitioner's described work injury aggravated her condition of ill-being. Reviewing his note of the first time he saw Petitioner, February 20, 2014, in which Petitioner gave a history of injuring herself while at work December 8, 2014, falling at work sideways going down the stairs, grabbing a handrail to break her fall, and having some sort of twist to her body, after which time she felt something really swollen on her low back and has had problems with her low back ever since, and radiating pain inside the leg, Dr. Rink testified that if this history were accurate, that was the type of event that could aggravate the condition he had diagnosed. (Px. 2, p. 46)

Dr. Rink testified that assuming that prior to December 8, 2014 Petitioner had treatment to her back, but little if any physical therapy, and that she had been able to recover and return to her duties as a janitor, that history would support his opinion that the December 8, 2014 event aggravated her condition. (Px. 2, p. 46-47) Likewise, Dr. Rink testified that if prior to December 8, 2014 no physician had recommended an injection to Petitioner's lumbar spine, and that they did after December 8, 2014, that would also support his opinion that the event of December 8, 2014 was an aggravation of her condition. (Px. 2, p. 47) Dr. Rink likewise testified that the fact that Petitioner's symptoms continued and her findings continued from December 8, 2014 to present unabated whereas previously they had been intermittent and resolved, that would also support his position that Petitioner had suffered an aggravation. (Px. 2, p. 47) Finally, Dr. Rink testified that Petitioner's complaints of back pain never resolved, also supporting his opinion that her degenerative disc disease had been permanent aggravated. (Px. 2, p. 47-48)

Deposition of Dr. Joseph Williams, taken January 12, 2016

Section 12 examiner, Dr. Joseph Williams, was deposed on January 12, 2016, and again on August 20, 2019. The deposition of Dr. Joseph Williams taken on January 12, 2016, was entered into evidence at the time of arbitration as Respondent's exhibit 1.

Dr. Williams testified that he is a Board Certified orthopedic surgeon. Dr. Williams testified that any aggravation that Petitioner had suffered would be self-limited, meaning that it has a defined end point. (Rx. 1, pg. 17) Dr. Williams also testified that "my diagnosis, if I saw this lady…she is morbidly obese, depressed, anxiety, history of tobacco use, you know, history of gastric bypass and she has back pain. The percentage of those of what I just described that have back pain is probably close to 100%." (Rx. 1, pg. 18) Dr. Williams testified that "so she has

degenerative disc disease in her lumbar spine as a result of the strains from her morbid obesity and her tobacco use." (Rx. 1, pg. 18)

Dr. Williams testified that "if you have degenerative disc disease at multiple levels...there is people that have an acute exacerbation just waking up out of bed." (Rx. 1, pg. 19) Dr. Williams testified that "those people will present the same as the person that has multi-level lumbar degenerative disc disease that goes and picks up or strains themselves picking up a garbage can off of the floor. Those people will present the same way, or you know, having a slip on a stair." (Rx. 1, pg. 19) It was unclear from this testimony whether this later groups' conditions would be "self-limited" in the same way as Dr. Williams testified that Petitioner's condition was.

Dr. Williams testified that "patients that have used narcotics for a lengthy period of time will develop a dependency 100% of the time, and those patients will develop pain and symptoms to support their use of narcotic." (Rx. 1, pg. 26)

On cross-examination, Dr. Williams testified that he had not seen Petitioner since he examined her July 20, 2015, and that he had no opinion as to her current condition. (Rx. 1, pg. 27)

Dr. Williams testified that he was not sure that prescription by a physician of narcotic pain medication for a period of over 90 days was a breach of the standard of care, and testified that he was sure that reasonable doctors could be found to disagree about the necessity of narcotic medication greater than 90 days. He would not say that longer term prescription of narcotic medication was unreasonable, but would also not say that it was reasonable. (Rx. 1, pg. 29-30)

Dr. Williams testified that he charged something like $1,200.00 or $1,500.00 for a Section 12 examination, and he did not know what his office charged for a deposition. (Rx. 1, pg. 31)

Dr. Williams testified that in his examination of Petitioner he found her on time, cooperative, and did not state that she had any Waddell's signs or malingering or other such issues. (Rx. 1, pg. 32)

Dr. Williams testified that Petitioner had a precise date and identifiable time and place when her injury occurred, December 8, 2014. (Rx. 1, pg. 33)

Dr. Williams testified that when he examined Petitioner she told him she had an injury when she fell on the stairs, and she told him that she twisted when she fell. Dr. Williams testified that he agreed with Dr. Rink's diagnosis of degenerative disc disease, and agreed that the type of injury described could aggravate degenerative disc disease, as well as make an asymptomatic disc herniation or protrusion symptomatic. (Rx. 1, pg. 34-35)

Dr. Williams testified that he did not believe in the injury of sacroiliac joint strains since he had yet to diagnose it, and that he would argue that it is not a real diagnosis. (Rx. 1, pg. 35-36) Likewise, Dr. Williams testified that he believed that the accuracy of the Faber test was "zero." (Rx. 1, pg. 36-37)

Dr. Williams testified that an immediate onset of pain after a particular event can be indicative of a causal relationship, and that the fact the Petitioner had an onset of radicular pain down her left leg at the time her fall happened could be indicative of a causal relationship. (Rx. 1, pg. 37-38) Dr. Williams testified that Petitioner's complaints of low back pain and pain into her left lower extremity could be consistent with degenerative disc disease, and with disc herniation.or protrusion. (Rx. 1, pg. 37-38) Dr. Williams testified that the fact the Petitioner had an increase in pain after her injury could indicate that some type of aggravation had occurred. (Rx. 1, pg. 39)

Just as Dr. Williams did not agree that there was such an entity as sacroiliac joint strain, and that the Faber test had an accuracy of zero, he also testified that traction as a form of therapy "makes a lot of people wealthy, but it is not supported by any study necessarily in the lumbar spine." (Rx. 1, pg. 39)

Dr. Williams did, however, agree that the injections that Petitioner had received were reasonable. (Rx. 1, pg. 41)

Dr. Williams testified that as of a month before he saw Petitioner, he could not comment on her ability to work or not work because he had not seen her, and likewise could not comment on whether treatment she was provided was reasonable. (Rx. 1, pg. 41-42)

Dr. Williams testified that the history Petitioner gave at emergency room following her fall at work was consistent with the type of injury she described to him. (Rx. 1, pg. 42) Dr. Williams testified that her history and findings in the emergency room could or might support that her degenerative disc disease was aggravated at least at that point. (Rx. 1, pg. 43-44)

Dr. Williams testified that the findings by Dr. Rink when Dr. Rink saw Petitioner on February 20, 2015, could possibly support some type of restriction or work limitation, and could support that she had had an aggravation of her lumbar disc disease. (Rx. 1, pg. 45) Dr. Williams testified that Petitioner had given a consistent history of injury at her physical therapy evaluation on March 17, 2015, and that the physical therapist on that date noted decreased range of motion, decreased strength in the hip, decreased strength in knee extension, and positive straight leg raise, all of which could indicate some type of neurological deficit. (Rx. 1, pg. 46) Dr. Williams agreed that those types of findings might lead a reasonable physician to conclude that some restrictions were necessary. (Rx. 1, pg. 46) They can also support that Petitioner had suffered an aggravation of degenerative disc disease. (Rx. 1, pg. 46-47)

Likewise, Dr. Williams testified that Dr. Rink's examination findings on March 23, 2015, would be the sort of findings that could support the need for work restrictions, and would also support that some treatment would be reasonable. (Rx. 1, pg. 47)

Dr. Williams testified that on May 7, 2015, when Petitioner again saw Dr. Rink, Dr. Rinks' findings regarding Petitioner could support that restrictions were necessary, and some type of treatment was needed. Dr. Williams agreed that Dr. Rink's findings in examination of Petitioner on May 7, 2015 would support that there was some type of aggravation of degenerative disc disease. (Rx. 1, pg. 47-48)

Dr. Williams testified that he had reviewed certain prior medical records of Petitioner, including February 5, 2013, October 31, 2013, and August 13, 2014. Regarding the lack of positive findings on straight leg raise, decreased strength in the knees, hip, or Achilles, or quadriceps on the visits of February 5, 2013, and October 31, 2013, if those findings were present on a subsequent visit, it could support that some type of aggravation took place. (Rx. 1, pg. 49-50) As of August 13, 2014, reviewing the findings of Petitioner's visit on that date, Dr. Williams testified that it was fair to say that Petitioner had not been suffering an aggravation of her degenerative disc disease on that date. As with February 5, 2013, and October 31, 2013, Dr. Williams testified that the lack of abnormal findings on September 4, 2014 could support an aggravation of Petitioner's condition if those findings were positive at a later date. (Rx. 1, pg. 49-51)

On redirect examination, Dr. Williams testified that he had no opinions that Petitioner was malingering in any sense that he could ascertain. (Rx. 1, pg. 60)

On re-cross-examination, Dr. Williams testified that positive straight leg raise, decreased quadriceps reflex, decreased Achilles reflex, decreased hip extension, decreased range of motion, decreased knee extension, could also support an aggravation it could also support a diagnosis of aggravation of degenerative disc disease. (Rx. 1, pg. 63) He testified that it was also possible these could support the need for some type of work restriction or limitation in individuals related to sit, stand, lift or carry. He testified that the type of injury described to him by Petitioner, slipping on a step and twisting while falling, was the type of injury that could aggravate degenerative disc disease. (Rx. 1, pg. 63)

Deposition of Dr. Joseph Williams, taken August 20, 2019

The deposition of Dr. Joseph Williams taken on August 20, 2019, was entered into evidence at the time of arbitration as Respondent's exhibit 2.

Dr. Williams testified that his qualifications were consistent with those testified to on earlier deposition. (Rx. 2, pg. 7)

Dr. Williams testified that at the request of Respondent he had prepared an addendum to the Section 12 examination report he had prepared before his first deposition. Dr. Williams testified that although there was a recommendation by a Dr. Todd McCall for a spinal cord stimulator to treat some of Petitioner's symptomology, he believed that Petitioner did not require a spinal cord stimulator, because he believed that spinal cord stimulators were controversial, ineffective, and that patients in his practice often came to him to have them removed. (Rx. 2, pg. 13) Dr. Williams testified that particularly with people with Petitioner's comorbidities, spinal cord stimulation was unlikely to be successful. (Rx. 2, pg. 14)

On cross-examination, Dr. Williams testified that although he had indicated Petitioner was morbidly obese, technically she was not (Rx. 2, pg. 17), and that although he had indicated that Petitioner was on medication for depression, he did not know what medication she was receiving or what treatment, but simply believed that she was receiving some medication for depression.

(Rx. 2, pg. 18-20) Dr. Williams testified that although he had testified previously that Petitioner was addicted to Xanax, and could suffer seizures if she stopped taking it, he had no idea how much Xanax she was taking. (Rx. 2, pg. 18-20, 26-28) Dr. Williams agreed that he had not reviewed any records indicating Petitioner was addicted to narcotics. (Rx. 2, pg. 20)

Dr. Williams testified that his opinions regarding spinal cord stimulators were general opinions about the usefulness or appropriateness of spinal cord stimulators rather than specific opinions as relate to Petitioner. (Rx. 2, pg. 21) In general, Dr. Williams believed that spinal cord stimulator was not the most effective treatment modality for pain, but he testified that he is aware that licensed physicians in the State of Illinois do implant spinal cord stimulators, and he testified that he did not believe that implantation of spinal cord stimulators was a deviation of the applicable medical standard of care. (Rx. 2, pg. 21-22) Regarding prescription of narcotic medication, Dr. Williams likewise testified that he was not of the opinion that any physician deviated from the standard of care in treatment of Petitioner. (Rx. 2, pg. 22)

On cross-examination Dr. Williams agreed that in 2016 Petitioner had an EMG showing moderate right L5 radiculopathy and nerve root irritation. (Rx. 2, pg. 24)

On cross-examination Dr. Williams testified that Petitioner would possibly benefit from injections in her back. (Rx. 2, pg. 25)

CONCLUSIONS OF LAW

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

An employee's injury is compensable under the Act only if it "arises out of" and "in the course of" the employment. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (1st. Dist. 2006); *O'Fallon School District No. 90 v. Industrial Comm'n*, 313 Ill. App. 3d 413, 416 (2000); 820 ILCS 305/2. Both elements must be present to justify compensation. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 105 (2006). A claimant bears the burden of proving by a preponderance of the evidence that his or her injury arose out of and in the course of the employment. *Baldwin v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 472, 477 (2011); *First Cash Financial Services*, 367 Ill. App. 3d at 105.

A Claimant's injury "arises out of" employment if it "had its origin in some risk connected with, or incidental to, employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc. vs. Industrial Commission*, 207 Ill. 2d 193, 203-04 (2003).

The phrase "in the course of" refers to the time, place, and circumstances of the injury. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 162 (1st Dist., 2000).

The Arbitrator notes that it is well settled that "the risk of tripping on a defect at the employer's premises, falling on uneven or slippery ground at the work site, or performing some work-related task which contributes to the risk of falling" are risks to which the general public would not be exposed. *First Cash Financial v. Industrial Comm'n,* 367 Ill. App. 3d 102, 106 (2006). *See also Brais v. Illinois Workers' Comp. Comm'n*, 2014 IL App (3d) 120820WC (collecting cases).

In this case, the undisputed testimony is that in the course of sweeping stairs, which was a job duty of Petitioner which required her to descend the stairs sideways using a broom, at her work site, Petitioner encountered and was caused to fall by a broken stair tread. Pursuant to *First Cash Financial,* Petitioner's fall arose out of and in the course of her employment.

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

With regard to the issue of whether Petitioner's current condition of ill-being is causally connected to the injury, a permanent aggravation of Petitioner's pre-existing back condition, the Arbitrator finds that the testimony of Petitioner's treating pain management physician, Dr. Christopher Rink, is more credible than that of Respondent's Section 12 examining physician Dr. Joseph Williams. The opinion of Dr. Rink, that on December 8, 2014, Petitioner's work accident caused a permanent aggravation of her back condition, is supported by the fact that Petitioner was able to work prior to that date, that Petitioner was unable to work afterwards, and that Petitioner suffered a sudden rather than a gradual onset of her current pain level, which has continued unabated and has not resolved. The Arbitrator further notes that Petitioner's medical records strongly support a sudden and long-lasting worsening of Petitioner's condition on December 8, 2014.

The Arbitrator additionally notes that Respondent's Section 12 examining physician Dr. Joseph Williams did agree that there was support for a finding of aggravation of degenerative disc disease, and that the type of injury described by Petitioner could aggravate degenerative disc disease. Petitioner's current conditions of ill-being are causally related to her work accidents.

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

The Arbitrator finds that the medical services that were provided to Petitioner were reasonable and necessary. The Arbitrator finds that support for these services was consistent among and agreed upon by Plaintiff's numerous treating physicians, and that the need for these services was credibly and reasonably testified to by Petitioner's treating pain management physician, Dr. Christopher Rink. The Arbitrator notes that at some points of Dr. Rink's care and treatment of Petitioner, Dr. Rink referred Petitioner for second or supplementary opinions by other specialists, and that Dr. Rink's treatment of Petitioner was consistent with these various treatment recommendations.

The Arbitrator further notes that Respondent's Section 12 examining physician Dr. Joseph Williams agreed that injections which were given to Petitioner were reasonable, and that Dr. Williams could not comment on whether some other treatment was reasonable.

The Arbitrator finds that Respondent has **not** paid all appropriate charges for all reasonable and necessary medical services. These charges are set forth in Petitioner's Exhibit 18 and shall be paid by Respondent.

K. What temporary benefits are in dispute?

The Arbitrator finds that as a result of Petitioner's December 8, 2014, work injury, she has been unable to work since that date. The Arbitrator further finds that Respondent has paid no benefits for Temporary Total Disability. The Arbitrator finds that Temporary Total Disability benefits for the period from December 10, 2014, through the date of arbitration are in dispute, are owing, and are unpaid. Respondent shall pay Petitioner temporary total disability benefits of $410.00/week for 250 weeks, commencing December 10, 2014, through September 25, 2019, as provided in Section 8(b) of the Act.

O. **Other: Prospective medical to include spinal cord stimulator**

With regard to the issue of whether Petitioner's current condition of ill-being requires prospective medical care, to include a spinal cord stimulator, the Arbitrator finds that the testimony of Petitioner's treating pain management physician, Dr. Christopher Rink, is more credible than that of Respondent's Section 12 examining physician Dr. Joseph Williams. The opinion of Dr. Rink, supported also by the opinion of consulting physician Todd McCall at Illinois Neurological Institute, is that the next reasonable step for Petitioner is treatment with spinal cord stimulator. Petitioner has exhausted more conservative treatment options, and because of the risks and permanency of spinal fusion, it is appropriate to attempt treatment with spinal cord stimulator.

The Arbitrator notes that although there is no evidence that Petitioner has ever exceeded the prescribed dosage of any medication or taken any medication in any way other than as recommended by her physicians, she has nevertheless experienced and testified to significant problems resulting from her physicians' attempts to control her intractable pain. The Arbitrator finds that this also supports that it is appropriate to attempt treatment with spinal cord stimulator.

Respondent shall pay prospective medical treatment for Petitioner's aggravation of her back condition, including but not limited to a spinal cord stimulator.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC000743
Case Name	WARE, JACLYN v. ILLINOIS STATE UNIVERSITY/
Consolidated Cases	
Proceeding Type	Remand 19b
Decision Type	Commission Decision
Commission Decision Number	21IWCC0235
Number of Pages of Decision	13
Decision Issued By	Barbara Flores, Commissioner

Petitioner Attorney	William Trimble
Respondent Attorney	Aaron Wright, Louis Laugges

DATE FILED: 5/12/2021

/s/ Barbara Flores, 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 McLEAN)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jaclyn Ware,

Petitioner,

vs. NO: 16 WC 743

Illinois State University/State of Illinois,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under section 19(b) of the Act having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, temporary total disability, medical expenses, prospective medical care, 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 further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327 (1980).

The Decision of the Arbitrator delineates the facts of the case in detail. As relevant to the issues on review, the Commission writes additionally to address the issues of accident, causal connection, and medical expenses.

A. Accident

The record confirms that Petitioner had a preexisting degenerative lumbar condition, but nonetheless worked full duty for Respondent for four years despite her condition. Then, on August 19, 2014, Petitioner testified that she was vacuuming at work and, at one point, had to

vacuum under a table. She testified that she developed back pain at home that evening. By the next morning, she was unable to get out of bed due to back pain and called off work. The medical records corroborate Petitioner's reported increase in symptoms. On August 27, 2014, Petitioner saw Dr. Jani and complained of left low back pain which was severely irritated and worse than usual due to vacuuming. Dr. Jani prescribed pain medication and an MRI. By September 4, 2014, Petitioner informed her primary care physician, Dr. Naseer, of similar complaints. In the interim, Petitioner experienced intermittent back pain, but was able to "get by." The recommended MRI was performed on September 8, 2014 and revealed focal thickening of nerve roots of the cauda equina at L3-L4 with multilevel degenerative changes.

In the Decision, the Arbitrator found that "…the August 19, 2014 accident caused an aggravation of Petitioner's pre-existing back condition, although Petitioner subsequently recovered and was able to return to work." The Commission agrees, and finds that the totality of evidence supports an affirmance of the Arbitrator's finding of accident when analyzed under *McAllister*. *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124828.

B. Causal Connection

The Commission modifies the Decision of the Arbitrator with respect to the issue of causal connection. In order to obtain compensation under the Act, a claimant must prove that some act or phase of her employment was a causative factor in her ensuing injuries. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005).

The Arbitrator found that Petitioner's current condition of ill-being was not causally related to the accident at work. Rather, the Arbitrator found that Petitioner's condition was causally related to a subsequent claimed accident sustained at work on December 8, 2014. The later claim is the subject of a separate arbitration decision issued in Case No. 15 WC 5939.

The record reflects that on the same evening of the accident, Petitioner noticed increased back pain, which continued overnight, causing her to call off work the next day. Eight days after the accident, on August 27, 2014, Petitioner sought medical care for her back pain which had become severely irritated as a result. Petitioner was prescribed pain medication and an MRI was recommended. The MRI was later performed on September 8, 2014 after a follow up visit confirmed her increased symptoms.

Thus, the medical records confirm a change in Petitioner's lumbar condition necessitating immediate treatment that continued until September 8, 2014 when Petitioner underwent an MRI. While Petitioner only took one day off work, she required medical treatment as a result of her accident through September 8, 2014. Accordingly, after considering the record as a whole, the Commission concludes that Petitioner established a causal connection between her injury and her condition of ill-being that terminated as of the September 8, 2014 MRI date.

C. Medical Expenses

In contemplation of the above-analyzed causation issue, the Commission also modifies the award of medical expenses to include payment of the reasonable and necessary treatment

related to Petitioner's lumbar condition from August 19, 2014 through September 8, 2014 pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

All else is affirmed and adopted.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner's lumbar condition is causally connected to the August 19, 2014 accident through September 8, 2014.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay Petitioner's reasonable and necessary medical expenses related to her lumbar condition from August 19, 2014 through September 8, 2014, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given credit for all medical benefits related to this accident that have been paid, and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, pursuant to section 8(j) of the Act. Respondent shall be given a credit for $7,750.89 for medical bills that have been paid by Petitioner's group health insurance as provided in Petitioner's Exhibit 18 and shall hold Petitioner harmless from any claim by any insurer who has paid for these medical bills which are causally related to the August 19, 2014 accident.

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 the Respondent pay to Petitioner interest under section 19(n) of the Act, if any.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on December 11, 2019 is hereby affirmed as modified herein.

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

MAY 12, 2021

/s/*Barbara N. Flores*
Barbara N. Flores

o: 4/1/21
BNF/wde
45

/s/*Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0235
NOTICE OF ARBITRATOR DECISION

WARE, JACLYN Case# **16WC000743**
Employee/Petitioner

ST OF IL/ILLINOIS STATE UNIVERSITY
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:

0564 WILLIAMS & SWEE LTD
WILLIAM D TRIMBLE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0988 ASSISTANT ATTORNEY GENERAL
LOIS LUAGGES
500 S SECOND ST
SPRINGFIELD, IL 62706

0903 ILLINOIS STATE UNIVERSITY
1320 ENVIRONMT'L HEALTH SAFETY
NORMAL, IL 61790

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

DEC 11 2019

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

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jaclyn Ware
Employee/Petitioner

v.

State of Illinois/Illinois State University
Employer/Respondent

Case # **16** WC **000743**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* and *Petition for Immediate Hearing Under Section 19(B)* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Bloomington**, on **9/25/19**. 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**

FINDINGS

On **8/19/14**, 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 $**31,980.00**; the average weekly wage was $**615.00**.

On the date of accident, Petitioner was **35** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.0**.

Respondent is entitled to a credit of $**7,750.89** under Section 8(j) of the Act.

ORDER

Based on the above the Arbitrator finds that the August 19, 2014 accident caused an aggravation of Petitioner's pre-existing back condition, although Petitioner subsequently recovered and was able to return to work.

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $883.04 to Advocate Bromenn Medical Center, $2,067.00 to Fort Jesse Imaging, $5,536.20 to OSF St. Joseph Medical Center, $13,182.14 to OSF St. James Medical Center, $452.00 to Heartland Emergency Specialists, and $3,880.70 to OSF Medical Group, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall hold Petitioner safe and harmless from any and all claims by any providers of the services for which the Respondent is receiving credit as provided in Section 8(j) of the Act. Respondent shall be given a credit for $7,750.89 for medical bills that have been paid by Petitioner's group health insurance as provided in Petitioner's exhibit 18 and shall hold Petitioner safe and harmless from any claim by any insurer who has paid for these medical bills.

Respondent shall hold Petitioner harmless from any and all claims by the Illinois Department of Public Aid for the services OSF St. James Medical Center and OSF Medical Group.

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

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

Signature of Arbitrator

December 6, 2019
Date

ICArbDec p. 2

DEC 11 2019

FINDINGS OF FACTS

The Arbitrator notes that this case, which alleges an August 19, 2014 temporary aggravation of Petitioner's pre-existing back condition, was heard on 19(b) along with Case 15 WC 05939, a case alleging a permanent aggravation of that same back condition from a fall on a broken step while Petitioner was sweeping stairs on December 8, 2014.

The Arbitrator refers to testimony and evidence discussed at length in the Findings of Facts for 15 WC 05939.

CONCLUSIONS OF LAW

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

An employee's injury is compensable under the Act only if it "arises out of" and "in the course of" the employment. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (1st. Dist. 2006); *O'Fallon School District No. 90 v. Industrial Comm'n*, 313 Ill. App. 3d 413, 416 (2000); 820 ILCS 305/2. Both elements must be present to justify compensation. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 105 (2006). A claimant bears the burden of proving by a preponderance of the evidence that his or her injury arose out of and in the course of the employment. *Baldwin v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 472, 477 (2011); *First Cash Financial Services*, 367 Ill. App. 3d at 105.

A Claimant's injury "arises out of" employment if it "had its origin in some risk connected with, or incidental to, employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc. vs. Industrial Commission*, 207 Ill. 2d 193, 203-04 (2003).

The phrase "in the course of" refers to the time, place, and circumstances of the injury. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 162 (1st Dist., 2000).

In this case, the undisputed testimony is that in the course of vacuuming with a heavy vacuum sweeper, in awkward positions including under tables, which was a job duty of Petitioner, at her work site, Petitioner's pre-existing back condition was caused to worsen, necessitating medical treatment including an MRI and pain medications, and causing her to miss a day of work, arose out of and in the course of her employment.

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

The Arbitrator finds that Petitioner was able to return to work after one day missed, and that she continued to work until she was injured by a fall on stairs at work on December 8, 2014. The Arbitrator finds that Petitioner's current condition of ill-being is related to that work injury of December 8, 2014, which is the subject of Cause 15 WC 05939.

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

The Arbitrator finds that the medical services that were provided to Petitioner relative to this aggravation, *to wit* physician visits with Dr. Jyotir Jani, an MRI and medications, were reasonable and necessary.

The Arbitrator finds that Respondent has **not** paid all appropriate charges for all reasonable and necessary medical services. These charges are set forth in Petitioner's Exhibit 18 and shall be paid by Respondent.

K. What temporary benefits are in dispute?

The Arbitrator finds that as a result of Petitioner's August 19, 2014, work injury, she missed one day of work.

O. **Other: Prospective medical to include spinal cord stimulator**

With regard to the issue of whether Petitioner's current condition of ill-being requires prospective medical care, to include a spinal cord stimulator, the Arbitrator finds that although Petitioner requires prospective medical care, including but not limited to spinal cord stimulator, this is as a result of the December 8, 2014, aggravation of her back condition, as addressed in the Arbitrator's Opinion in Case 15 WC 05939.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC011032
Case Name	WALSH,STEPHEN J v. AUSTIN TYLER CONST. CO
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0236
Number of Pages of Decision	23
Decision Issued By	Thomas Tyrrell, Commissioner

Petitioner Attorney	Thomas Cowgill
Respondent Attorney	Kenneth Smith

DATE FILED: 5/12/2021

/s/ Thomas Tyrrell, Commissioner

Signature

21IWCC0236

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stephen J. Walsh,

Petitioner,

vs. NO: 15 WC 11032

Austin Tyler Const. Co.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, temporary total disability and nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator, as set forth herein, and otherwise affirms and adopts, said decision being attached hereto and made a part hereof.

The Commission modifies the Arbitrator's decision to show that Petitioner was temporarily totally disabled from 10/19/14 through 12/2/14 and from 5/19/16 through 7/2/17 (not 6/23/17), for a period of 65 weeks. The Commission notes that while Dr. Kelikian released Petitioner to return to medium duty work per the FCE in an office note dated 6/23/17, the release itself indicates that he could return to work on 7/3/17. (PX9E). Furthermore, the Commission notes that at the commencement of trial the parties agreed there was no dispute that Petitioner was entitled to TTD from 10/19/14 through 12/2/14 and from 5/19/16 through 7/2/17 [T.5-6], which was also the period stipulated to by the parties in the Request for Hearing form admitted at Arb.Ex.1.

Finally, the Commission corrects the first page of the Arbitrator's decision to show that the case was actually tried in New Lenox (not Ottawa) on 1/11/19 and 1/15/19 (not 8/24/18 and 9/17/18).

All else otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 3/7/19 is hereby modified, as set forth herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $982.67 per week for a period of 65 weeks, from 10/19/14 through 12/2/14 and from 5/19/16 through 7/2/17, 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 $735.37 per week for a period of 50.1 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused permanent partial loss of use of 30% loss of use of the left foot.

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; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $37,000.00. 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.

/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

WALSH, STEPHEN J
Employee/Petitioner

Case# **15WC011032**

AUSTIN TYLER CONST CO
Employer/Respondent

On 3/7/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.46% 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:

2687 COWGILL & CERNUGEL LAW OFFICE
THOMAS E COWGILL
1000 ESSINGTON RD SUITE 108
JOLIET, IL 60435

0532 HOLECEK & ASSOCIATES
KENNETH F SMITH
PO BOX 64093
ST PAUL, MN 55164

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Stephen J. Walsh
Employee/Petitioner

v.

Austin Tyler Const. Co.
Employer/Respondent

Case # **15** WC **11032**

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 **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Ottawa**, on **August 24, 2018** and proofs were closed on **September 17, 2018**. After reviewing all of the evidence presented, the undersigned Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On October 18, 2014, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $76,648.00; the average weekly wage was $1,474.00.

On the date of accident, Petitioner was 46 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 $63,733.17 for TTD, $0 for TPD, $0 for maintenance, and $39,866.75, for other benefits (i.e., medical bills paid by the workers' compensation insurance carrier), for a total credit of $103,599.92.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $982.67/week for 63 & 5/7th weeks, commencing October 19, 2014 through December 2, 2014 and commencing on May 19, 2016 through June 23, 2017, as provided in Section 8(b) of the Act. Respondent shall receive a credit for temporary total disability payments made in the amount of $63,733.17. *See* AX1.

Permanent Partial Disability

As explained in the Arbitration Decision Addendum, based on the factors delineated in Section 8.1b of the Act and the record taken as a whole, Respondent shall pay Petitioner permanent partial disability benefits of $735.37/week for 50.1 weeks, because the injuries sustained caused the 30% loss of use of left foot (ankle), 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

March 7, 2019
Date

MAR 7 - 2019

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Stephen J. Walsh
Employee/Petitioner

v.

Austin Tyler Const. Co.
Employer/Respondent

Case # **15** WC **11032**

Consolidated cases: **N/A**

FINDINGS OF FACT

A hearing was held in the above-captioned case. The issues in dispute in this case include causal connection, Petitioner's entitlement to temporary total disability benefits commencing on October 19, 2014 through December 2, 2014 and commencing on May 19, 2016 through October 31, 2017, and the nature and extent of the injury. Arbitrator's Exhibit[1] ("AX") 1. The parties have stipulated to all other issues. AX1.

Background

Stephen J. Walsh (Petitioner) testified that he worked for Austin Tyler Const. Co. (Respondent) on October 18, 2014. Prior to that time, Petitioner had graduated from Plainfield High School in 1985. He then took a couple courses at Joliet Junior College. Petitioner's work experience since high school includes work in the grocery business for several years and ultimately construction work, particularly driving dump trucks as of April of 1995. Petitioner bought his own semi-truck and worked for a broker for a few short months at T & T Transport, which would find him jobs and broker out his services. Petitioner then went to work for Gallagher Asphalt in January of 1996 and became a member of the Teamsters Local 179. He worked for Gallagher Asphalt until November of 2011 when he was let go from the position.

Petitioner testified that he did not work for about a year and a half and then returned to work for Respondent around July of 2013. He also testified that he no longer had his own truck as of approximately November of 2005. Petitioner testified that he began working for Respondent as a company driver. As of the fall of 2018, Petitioner explained that Bill (Mr. Krizmanic) would typically schedule him for 6:30 or 6:35 a.m., which varied every day. Mr. Krizmanic would have recorded message with all the drivers' start times. Drivers would call into a phone number and press a certain digit to access a voicemail box and wait to hear his name and would then know what time to show up to work the following day. Petitioner testified that shortly after his surgery in 2016, Respondent began texting this information.

Petitioner explained that there was a procedure that he ordinarily followed, and which he followed on October 18, 2014, in order to get his truck ready to go on the first job. He explained that he would check in with Mr. Krizmanic who would quickly give him his assignment. Petitioner would then grab some keys and start preparing the truck. He engaged in an inspection process that included checking fluids, motor oil, water, lights, and ensure that all 18 tires had the proper amount of air. Petitioner testified that this process also required him to climb into and out of the rig several times before he left to get his gloves and put his lunch box in the truck.

[1] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party.

Petitioner identified the specific truck that he drove, number 1102, for most of the year, including on the date of accident. PX14.

Once he completed the inspection, Petitioner would start preparing his paperwork including a daily timesheet and safety sheet. *See e.g.*, PX42. He testified that he did not know how many jobs he would do each day because it varied from load to load. Petitioner explained that if he did multiple loads, he would put in a job number on the sheet identifying what he was hauling in the lower corner. He testified that "surface" and "binder" are two different types of asphalt, "CA6" and "CA7" are two different types of stone from the quarry, "grindings" are asphalt grindings, and "PG" is a larger rock from the quarry.

To load asphalt, Petitioner testified that he had to get inside the trailer of the dump truck with a small bottle and pour a slight amount of diesel fuel to lubricate the bowl-shaped interior of the trailer. Petitioner explained that asphalt does not stick to diesel fuel, and the lubrication must be significant. *See* PX14-PX15. To apply the lubricant, Petitioner testified that he would put his left foot on the rear axle of the trailer, his right foot on the tire, and then pull himself up with his hands on the ladder. He explained that he then places his left foot on the small lower foot peg and slides his body over the side of the dump trailer to spray the lubricant in the bed of the trailer. Petitioner testified that there is no other way to perform this task because there is a tailgate on the right side of the truck, so he must climb in on the left side.

October 18, 2014

On October 18, 2014, Petitioner testified that he was injured. He explained that he went to load asphalt, had checked the motor oil, and got in and started truck. Petitioner testified that he then came down from the truck several feet with his left foot on the top rail and came down wrong into a pothole. He explained that he experienced a severe amount of pain on the outside of his left ankle, but continued to load asphalt. Petitioner testified that this only required him to go to the parking lot, make a left turn and only drive maybe a few seconds and make another left turn before arriving at the asphalt plant. *See* PX18.

Petitioner testified that he could not lubricate the bed of the dump trailer on October 18, 2014 because he was in a severe amount of pain. Instead, he just drove through the automatic sprayer, but explained that it "does a very, very poor job," and that he did not ordinarily use the automatic sprayer for this reason. Petitioner explained that the automatic sprayer does not spray underneath the tarp and it is also on a timer and often shuts off before reaching the back end of the trailer. He testified that the whole trailer must have lubrication. If there is lubricant that does not reach all parts of the trailer Petitioner testified that his "day would be an absolute disaster[and he] would have a lot of shoveling to do." Petitioner testified that asphalt sticks to the cold, dry steel in the metal trailer, which must later be removed.

Once the load has been released by the dump truck, Petitioner testified that he would have to climb down from the truck and scrape all the remaining asphalt that is stuck to the "spread pan." Then, before Petitioner got to the job site, he would have to climb down from the truck and spray the back of the trailer with diesel fuel so that the asphalt hopefully did not stick quite as much. Petitioner testified that every time he dumped a load of asphalt, dirt or stone, he had to clean off the back end of the trailer. He also testified that when he accepted grindings, which would have totaled several thousand times throughout his employment, he had to climb in and out of the truck. *See* PX33. Petitioner testified that he experienced extreme pain while climbing up and down from the truck. On cross-examination, Petitioner testified that Respondent had "absolutely" no policies prohibiting drivers from going into the trailer.

Medical Treatment

On the date of accident, Petitioner presented to the Quick Care department of Meridian Medical Associates, where he saw Dr. Serna, who referred him for x-rays of the left ankle. X-ray taken on October 18, 2014 demonstrated "marked swelling" over the lateral malleolus but no fracture. Dr. Serna diagnosed a left ankle sprain. He returned to see Dr. Hickombottom on October 20, 2014, complaining of ankle pain of 9 out of 10. He was diagnosed with a grade II ankle sprain and referred for an ankle MRI. That same day Petitioner underwent an MRI of his left ankle which indicated superficial swelling around the ankle and a partial tear of the peroneous longus tendon. Hickombottom noted that Petitioner's ankle swelling prevented him from detecting a dorsalis pedis pulse. He kept Petitioner off work and ordered physical therapy. PX4.

Petitioner returned to see Dr. Hickombottom on October 31, 2014, reporting ankle pain of 7-8 out of 10. The doctor noted marked decrease in range of motion with inversion, eversion and dorsiflexion. He diagnosed Petitioner with a second-degree ankle sprain and partial tear of the peroneous longus tendon. He was kept off work. He returned to Hickombottom on 11/14/2014 reporting a pain level of 5 out of 10 and indicating the physical therapy was "very beneficial." Dr. Hickombottom noted that his range of motion was improved and maintained the same diagnoses. He kept him off work because, according to the medical note, the employer had not indicated that light duty work was available. PX4.

Petitioner returned on December 1, 2014, reporting very little improvement and pain of 6 out of 10. Hickombottom noted pain and weakness on inversion and eversion and kept him off work due to no light duty being offered by the employer. Diagnosis remained the same. Hickombottom referred him to an orthopedist, Dr. Dorning. Petitioner saw Dorning on December 4, 2014, complaining of continued pain in the ankle and the left knee. Dr. Dorning ordered an MRI of the knee and diagnosed him with a left ankle strain. The physician kept Petitioner off work, although he had already (at his request) been laid off from the light duty work that Austin Tyler had arranged for him. MRI taken of the left knee was unremarkable except for "minimally increased joint fluid." In the meantime, on December 14, 2014 the physical therapist issued a report that indicated that Petitioner had "improved greatly in therapy" and that active range of motion was normal except for dorsiflexion and inversion. PX4.

Work Restrictions

Petitioner testified that he returned to work in December of 2014 with duties other than driving the truck. He explained that he was placed in a cold, dry mechanics office doing paperwork. Petitioner testified that he had a conversation with Gary Shumal (Mr. Shumal), Respondent's owner, and Mr. Krizmanic concerning continuing to perform this type of office work. Petitioner had done this before when the season was ending, and he explained that Mr. Krizmanic would instruct drivers to apply for unemployment on those occasions. During this conversation in 2014, Petitioner testified that he told Mr. Shumal that it was fairly obvious that he was doing pointless paperwork, which he was sure cost Mr. Shumal quite a bit of money. So, Petitioner suggested that they could lay him off, which Respondent did.

On cross-examination, Petitioner acknowledged signing a letter declining a light duty job after working for Respondent for only one day. RX7. Petitioner acknowledged that he stated that he would rather collect unemployment, but explained that he did so because there was pointless paperwork.

Continued Medical Treatment

Petitioner returned to Meridian Medical Associates on December 23, 2014, where he saw Dr. Bailey. He told Bailey that his ankle was 50% to 60% improved and that he "took a lay off at work." Diagnosis was left peroneous longus injury and left peroneal tenosynovitis. Dr. Bailey referred him for 12 more sessions of physical therapy and restricted his activity to sedentary duty and minimal ambulation. The physical therapist issued a report on January 20, 2015, wherein Petitioner indicated a 65% improvement since starting therapy, but he still had pain with inversion. The therapist reported normal ROM other than inversion, normal strength and mild swelling. PX4.

Petitioner returned to Dr. Bailey on January 22, 2015, complaining of persistent ankle pain on inversion. Earlier that day Bailey had discussed Petitioner's case with the therapist, who felt that the patient had plateaued in his physical therapy. Dr. Bailey ordered another MRI scan. Follow-up MRI on January 27, 2015 demonstrated a split tear of the peroneal brevis tendon, partial tear of the peroneal longus tendon, and partial subluxation of the split peroneal brevis tendon. When Dr. Bailey reviewed the MRI findings with Petitioner on January 30, 2015, he also noted a superior peroneal retinaculum rupture. He recommended that Petitioner consider surgery to correct the tears. Petitioner told him that he did not want to consider surgery, but thought he was still making progress in therapy and would like to continue with it. On February 4, 2015, Dr. Bailey discussed Petitioner's treatment with Dr. Hickombottom and the therapist, and the agreed to try three more weeks of physical therapy. PX4.

On March 2, 2015, the therapist issued his report, indicating that Petitioner told him " he feels he is close to being done with physical therapy." Active range of motion was normal, except for 35degrees inversion on the left ankle as opposed to 50 degrees on the right. The therapist recommended discharge from PT. PX4.

Petitioner returned to Dr. Bailey on March 24, 2015, requesting that he return to work full duty. Bailey's physical exam disclosed normal ROM except for limitation of inversion. However, Petitioner did request "quantification of the amount of tearing present to his peroneal retinaculum," and he requested the approximate cost of surgery. PX4.

Return to Work

In the spring of 2015, Petitioner returned to work for Respondent. He testified that he felt a terrible amount of pain while engaged in all his work activities including climbing in and out of the truck and trailer, using the clutch up to 500 times per day, etc. Petitioner testified that he typically went in and out of the truck 50-100 times per day, in and out of the trailer 2-10 times per day and shoveling 500 to 2000 pounds of remnant materials out from the trailer. He explained that his left ankle would swell up daily and worsen every day. Petitioner testified that it was all a tremendous amount of pressure on the left ankle.

Petitioner testified that he asked Mr. Krizmanic several times if he could drive an automatic transmission truck. He testified that he drove an automatic maybe a handful of days while they rented an automatic transmission truck. Petitioner testified that he was not under medical treatment in 2015. After the season in 2015, Petitioner was laid off. Petitioner acknowledged that he worked the entire construction season in 2015 from March 2015 to December 2015. He then returned at the beginning of the season of 2016 and testified that his ankle was even worse and getting worse every day. Petitioner also acknowledged that his employment was not terminated in 2016 after he went to get additional treatment.

Continued Medical Treatment

Petitioner testified that he was referred to Dr. Kelikian. The medical records reflect that Petitioner saw Dr. Kelikian for the first time on February 22, 2016. He diagnosed Petitioner with a left peroneal tendon tear. He recommended surgery with peroneal tendon repair and retinacular repair. Petitioner saw him again on May 9, 2016 for a pre-op physical, and then submitted to surgery on May 19, 2016. At the surgery, Dr. Kelikian performed the repairs and deepened the pereosteum groove. PX5-PX6.

Petitioner returned for a post-op visit on June 3, 2016. He was placed in a short walking cast and crutches were ordered. On his next visit on July 1, 2016, he was referred to physical therapy. He was evaluated by the therapist at Brightmore Physical Therapy on July 7, 2016. He next returned to Kelikian on August 5, 2016, at which point he could weight bear with a Sweda brace. Dr. Kelikian noted calf swelling at that visit and ordered venous imaging to rule out a blood clot in the lower leg. The next visit on September 15, 2016 was unremarkable except that examination revealed a clicking on dorsiflexion. On October 18, 2016, Brightmore's therapist noted that Petitioner made "very little improvement overall." He was complaining of numbness and tingling intermittently throughout the foot and ankle. PX5.

On November 10, 2016, the therapist reported that "patient continues to have swelling and redness in ankle/foot. ROM good despite swelling. Strength limited by pain...Patient has made no significant progress since his return to PT." On the next visit to Dr. Kelikian on November 11, 2016, he complained of " lateral discomfort" of the foot and Kelikian ordered " NO work uses clutch on truck." He further ordered an ultrasound scan to check on whether there were recurrent peroneal tears. The ultrasound performed on December 15, 2016 disclosed that "the peroneal retinaculum is scar remodeled and thickened, but is intact." There was mild tendinosis of the peroneus longus and peroneus brevis tendons and the anterior talofibular ligament was mildly attenuated but intact. PX5.

On January 16, 2017, Dr. Kelikian referred him to physical therapy and allowed weight bearing with a shoe. He also referred him for a functional capacity evaluation. Petitioner appeared for the functional capacity evaluation on February 28, 2017, but the evaluation was aborted because his blood pressure was too high for the test to proceed (BP 172/101). The functional capacity evaluation was ultimately performed on June 23, 2017. PX5; PX7.

In the interim, on March 6, 2017, Petitioner presented to Dr. Snydersmith at Physicians Immediate Care. Snydersmith took his blood pressure and did an EXG. He diagnosed Walsh with essential hypertension and a right bundle-branch block. He released him to see a cardiologist. PX12.

Petitioner returned on June 23, 2017; having undergone a functional capacity evaluation. Dr. Kelikian issued work restrictions which stated "RTW per FCE medium not heavy duty photos job site reviewed." Petitioner returned on November 6, 2017 and Dr. Kelikian noted that his "restrictions were not followed." There was no further indication of follow-up for further medical care. PX5.

Petitioner testified that before his 2017 functional capacity evaluation, his left ankle had not gotten any better. Petitioner testified that he was in an extreme amount of pain after the evaluation, having given 100 percent effort, and it took him three weeks to recover.

On November 2, 2017, Petitioner returned to Dr. Snydersmith, complaining of increased ankle pain, swelling, and loss of feeling. Dr. Snydersmith directed Petitioner to follow up with his orthopedic surgeon and, at Petitioner's request, issued a duty restriction slip specifying no climbing or heavy lifting for two days. PX9.

Petitioner acknowledged that he has not returned for further treatment since November of 2017.

Work Restrictions

Petitioner offered documents reflecting text messages dated September 12, 2017 and October 10, 2017 sent to his cell phone saying that he was off work. PX39-PX40. Petitioner testified that he attempted to return to work for Respondent in the fall of 2017 on or about November 1, 2017 as soon as he received permanent work restrictions. Petitioner testified that he took photographs of his foot before and after work, and that he experienced a severe amount of pain that day. He testified that he dry-hauled asphalt chips from the quarry to the plant and his duties required him to get in and out of the cab of the truck. Petitioner did not get into the bed of the trailer. Petitioner testified that his ankle "blew up" and he sought medical attention after work. He returned to work the following day doing paperwork and did not otherwise return to work for Respondent.

Deposition Testimony – Dr. Kelikian

Petitioner called Armen Kelikian, M.D. (Dr. Kelikian) as a witness and he gave testimony at an evidence deposition. PX28. He is board certified in orthopedics specializing in feet and ankles. *Id.* Dr. Kelikian gave testimony regarding his treatment of Petitioner's left ankle condition. *See generally, Id.* He opined that the accident caused Petitioner's ankle condition, and that "it was a permanent condition, but it was surgically repaired". He was asked about his 12/15/16 notation of "scar remodeling" and he stated that "we had to surgically cut his retinaculum and tighten it up again like a hernia, so there's going to be a scar deep and it looks good and it's stable and he's not popping out of the socket." *Id.*, at 17-18.

On cross-examination, Dr. Kelikian stated that "the only thing that was bothering [Petitioner] was swelling. It was swollen like an inch more... he could wear a compression stocking to kind of abate that." PX28 at 22. When questioned about the simulated work around a truck that was performed as part of Petitioner's functional capacity evaluation, and Dr. Kelikian pointed out the fact that for simulating the clutch the evaluation is marked "avoid." *Id.*, at 26. Although it was the only FCE restriction he saw was operating a clutch, Dr. Kelikian "did put a climbing limitation on him based on his symptoms." *Id.*, at 28. Dr. Kelikian was presented with the Teamsters job description, and he agreed that Petitioner could handle the duties described in that description, but he did not "see the thing about the clutch[.]" *Id.*, at 31. In further testifying about the job description, Dr. Kelikian stated, if Petitioner "brought this into my office, I'd say, 'Hey, you know, other than you're able to climb based on the FCE and there's no clutch- there's nothing mentioned about a clutch here, you only have to lift ten pounds.' I'd say that would be okay." *Id.*, at 34.

Donald Kinsella

Petitioner called Donald Kinsella (Mr. Kinsella) as a witness. He is employed as a local real estate developer consultant and had previously engaged in the business of driving trucks, particularly construction related dump trucks. Mr. Kinsella testified that he has owned 10 semi-trucks and has hired thousands of trucking companies for local development areas. He testified that he has approximately 35 years of experience driving dump trucks. *See* PX14.

Mr. Kinsella testified that he had previously contracted with Respondent to complete several jobs for him. He explained that in 2008 Respondent did a large sewer and water extension on a six-acre piece of commercial piece of property among other jobs between 2007 and 2011. Mr. Kinsella testified that where he hired Respondent, he was able to observe the drivers of those rigs when they were doing their work. He testified that they would accept or deposit loads of asphalt, stone, or dirt. Mr. Kinsella testified that the drivers "would get out of the trucks. They would have to back up to where they were going to dump and we would inspect what they were dumping, their procedures at that time, how noisy they were, how much dirt they were using or leaving behind and the procedures they used to clean and do, deliver what they had to do." After a load was delivered, Mr. Kinsella testified that drivers "were responsible for cleaning the truck, cleaning the back of the trailer, making sure there are no debris or spoils on top of the trailers or their spread pans and their tailgates were working correctly so no debris were left illegally on the road or endangering anybody within that area." He testified that drivers did have to get into the actual bed of the dump truck.

On April 30, 2018, Mr. Kinsella testified that he saw some of Respondent's trucks on Route 52 and 59 on a construction site from the Anderson family near his home. He testified that he observed the driver cleaning the back of his trailer of dirt material or spoils on the corner with a shovel in the back of his truck.

On cross-examination, Mr. Kinsella testified that he has not supervised any job site where Respondent has been since 2011. He also testified that he never supervised Petitioner in his employment for Respondent. Mr. Kinsella acknowledged that he has known Petitioner since his early 20s and is a close friend.

William Krizmanic

Respondent called William Krizmanic (Mr. Krizmanic) as a witness. He is currently employed by Respondent and has been since 2006, a company that performs roadwork, underground work, and construction, as its Superintendent. In this position, he supervises various employees including truck drivers and, specifically, semi drivers. He was Petitioner's supervisor in October of 2014.

Mr. Krizmanic testified that semi drivers haul various materials, depending on the job, including asphalt, stone, dirt, gravel, broken concrete, and grindings. Approximately 80% is asphalt. He reviewed a job description for a truck driver. Petitioner's position with Respondent at the time of his accident was a semi driver. He could not recall if the job description was in effect in October of 2014 or through 2016.

Mr. Krizmanic testified Petitioner's job duties as a driver did not require him to climb into the back of the truck at the beginning of his shift and clean out the trailer portion of his truck. He explained that a driver did not have to get in the truck to see inside. When there was debris
inside the truck at the beginning of a shift, Petitioner needed to inform him of it and he would have a laborer or shop person take care of it. Mr. Krizmanic testified that truck drivers were not allowed to climb into the trailer of the truck to clean it out because it was unsafe. He also explained that Respondent has company rules against it, which were posted on the key box where drivers grab their keys every morning.

Mr. Krizmanic also testified that he has not seen Mr. Kinsella at any job sites at which Respondent has worked in the last five years. He testified that Mr. Kinsella has not supervised any of Respondent's employees during his time with Respondent since 2006. Only Mr. Krizmanic or the foreman would supervise employees. He testified that it is possible for others to see people in the back of trucks, but it would be laborers not drivers.

Mr. Krizmanic reviewed Respondent's Exhibit 10, which shows a truck driver, Josh Kramer, spraying diesel fluid on his tailgate. He explained that it requires the driver to use a little one-gallon spray bottle. Mr. Krizmanic also agreed that there is a 10-pound lifting restriction for drivers.

Mr. Krizmanic testified that Respondent currently has about 10 trucks that require the driver to operate a clutch. When Petitioner tried to return back to work in November of 2017, he worked one day and was returned to a truck that was automatic. Mr. Krizmanic testified that Petitioner sent him work restrictions in June or July of 2017 via text message on November 2, 2017. *See* RX9. Mr. Krizmanic did not recall Petitioner faxing his restrictions or calling him.

Mr. Krizmanic testified that Petitioner returned to Respondent and worked full time during the 2015 construction season. Mr. Krizmanic testified that Petitioner did not complain that he was unable to do his job. He testified that Petitioner did not call in sick, report being unable to operate a clutch, or report any difficulty getting in and out of the cab of his truck.

On cross-examination, Mr. Krizmanic did not recall who prepared the written rule regarding drivers being unable to get into the bed of the truck or when it was prepared or posted. He acknowledged that when drivers are on a job site they did have to shovel from time to time. However, Mr. Krizmanic testified that when a laborer is not on site to remove dirt or debris stuck in the back of the truck, the driver is supposed to call him and he will direct the driver where to go with the truck to have it removed.

Gary Shumal

Respondent called Gary Shumal (Mr. Shumal) as a witness. Mr. Shumal testified that he is employed by Respondent as President. He explained that Respondent is a heavy highway construction company employing approximately 130 employees including approximately 30 drivers per season hired through the union.

Mr. Shumal reviewed Respondent's Exhibit 2 and testified that it is a teamster's job description representing the job that Petitioner was hired to do or performed for Respondent. If Petitioner were to return to work for Respondent, the job description would be an accurate depiction of his job duties. Mr. Shumal also testified that the job description was in place in 2017 when Petitioner returned back to work.

Mr. Shumal testified that Petitioner would not have to climb in or onto the trailer of the truck to perform inspections or to clean out the truck as it was not allowed for safety regulations. He explained that he instituted this policy because of previous experiences with fellow drivers. Mr. Shumal reviewed Respondent's Exhibit 11, which is a photograph of the rules placed on the key box in the shop where the drivers get their keys to the trucks. It states that "[d]rivers are not permitted to climb in or near the trailer any time. No employee is allowed to use cell phone while operating a company vehicle." RX11. Mr. Shumal was unsure whether this rule was in place in 2017.

Mr. Shumal testified that Mr. Kinsella has never worked as a supervisor on Respondent's job sites. He did not recall Mr. Kinsella working on a Respondent job, but testified that Respondent did do work on a Lincoln cemetery site in 2010.

Mr. Shumal testified that Respondent hires people to clean out the trailers of cabs and trucks, either laborers or operators.

At some point in time in November of 2017, Mr. Shumal testified that Petitioner attempted to return back to work for one day. Mr. Shumal testified that when Petitioner returned to work in 2015, he worked the entire 2015 construction season. He also reviewed Respondent's Exhibit 5, a report which showed drivers' equipment usage and showed that Petitioner's assigned truck (Equipment No. 0910) did have a clutch. Mr. Shumal testified that Respondent did not have any automatic transmission trucks in 2015.

Mr. Shumal testified that when Petitioner returned to work in 2015 he never told him (Mr. Shumal) that he could not perform his job as a truck driver, or had difficulty performing his job as a truck driver in 2015.

Mr. Shumal testified that in the summer of 2017 text messages regarding being off work were sent by his computer to the drivers. He testified that the text messages from October and November of 2017 showing Petitioner off work were sent because Respondent was not notified that he was available to come back to work. Mr. Shumal was not aware of any permanent work restrictions sent by Petitioner to Respondent in June or July of 2017. He became aware of Petitioner's evaluation when Petitioner attempted to return back to work on November 2, 2017.

Mr. Shumal reviewed Respondent's Exhibit 9 and testified that Respondent can still offer or accommodate Petitioner's work restrictions to operate a truck without a clutch.

Respondent offered its Exhibit 10 with video footage of someone getting into a truck and driving, the pre-driving inspection, which Mr. Shumal testified that does not involve climbing up onto the trailer. Mr. Shumal testified that it was inaccurate that drivers had to lift or shovel 500 to 2000 pounds of asphalt as part of their job duties. He explained that if this was an issue he would have the driver park the truck and grab another truck. Moreover, Mr. Shumal testified that there was normally not 500 to 2000 pounds of asphalt remaining in the truck.

Mr. Shumal testified that if a driver has issues with the bed of his truck, he must call the supervisor and get directions on what to do per Respondent's policy. He testified that Respondent's current company policy was that a driver was not allowed to get into the bed of the truck.

On cross-examination, Mr. Shumal testified that Respondent's policy prohibiting employees from jumping from the cab or bed of a truck was in effect in 2015 through 2017. He was unsure whether it was in effect in 2014. Mr. Shumal testified that lubricant must be sprayed on the surface of the bed of the tucks before asphalt is deposited or it will stick. He testified that if there is an instance where a driver feels that his truck bed cannot be cleaned he needs to notify the superintendent. Drivers are not to get into the bed of the truck. Mr. Shumal testified that laborers can get into the truck beds because they get paid to shovel whereas drivers get paid to drive.

Mr. Shumal testified that he understood per Petitioner's physician, Dr. Kelikian, that Petitioner had no climbing restrictions, and he could lift up to 50 pounds per the results of his functional capacity evaluation. He maintained that Petitioner's job description fell within these restrictions and that Respondent could offer Petitioner such work.

Ronald Chester

Respondent called Ronald Chester (Mr. Chester) as a witness. Mr. Chester testified that he is currently employed by Respondent as a Driver and he works out of the Teamsters 179 union hall. He has been employed by Respondent for approximately five-and-a-half years.

Mr. Chester testified that during his employment with Respondent, there has been a policy prohibiting drivers from getting into the trailer of the trucks at all. He also testified that it is pretty much the industry standard regarding truck drivers that they do not climb into the trailers of their trucks. He also testified that there are signs posted all over places like quarries that drivers are not allowed out of the truck "period on their premises." Mr. Chester testified that this is a safety precaution.

Mr. Chester testified that he performs a daily inspection and those duties include checking oil, looking at all fluids, steering, checking belts, checking tires, making sure that the box is coupled correctly or outlines are hooked correctly. He testified that this inspection does not require him to climb the ladder on the trailer to see what is inside of the trailer. Mr. Chester explained that he can lift the box completely straight up, set the parking brakes, and walk through the yard and take a visual by looking straight up into the box. *See* PX31.

Mr. Chester estimated that he would get in and out of his truck approximately 2-10 times per day depending on the job. He testified that if for some reason there is some sediment in the truck after delivery, he would first inform his foreman and then would either go back to a job site where there is a piece of equipment that they are using to load the truck and have them scrape it out and remove it, or he would probably be directed to go and bring it back to the shop where there is equipment there or a laborer that would get inside there and remove it. Mr. Chester testified that there is no time when he must go into the trailer and shovel out asphalt.

Mr. Chester testified that he has seen the sign posted on the drivers' key box stating that absolutely no one is to get in, climb on or get into the trailers of the truck, and it also says there is no cell phone use.

Tina Wildrick

Respondent called Tina Wildrick (Ms. Wildrick) as a witness. She testified that she is employed by Respondent as the Office Manager and was so employed in 2014.

Ms. Wildrick testified that Petitioner returned to work for Respondent one day in December of 2014. At that time, Petitioner was doing timesheets. Ms. Wildrick testified that the following day Petitioner talked to Gary and said he would rather be on unemployment than have light duty work in the office.

Vocational Rehabilitation

At his attorney's request, Petitioner met with a vocational rehabilitation counselor, Kari Stafseth (Ms. Stafseth). PX1-PX2. Petitioner called Ms. Stafseth as a witness and she provided testimony at an evidence deposition. PX17.

Ms. Stafseth is certified as a vocation rehabilitation counselor in 2009 PX5 at 5; PX1. She interviewed Petitioner on August 25, 2017 and prepared an initial evaluation report and a rehabilitation plan. PX2-PX3. During the initial interview Petitioner recounted the circumstances of his injury, and he indicated that his work with Austin Tyler amounted to 50% driving and 50% laboring. He told her that the "laboring" part of his job amounted to "removing crud" and shoveling asphalt. He told her that driving for Austin Tyler required him to

exert 70 pounds of pressure on a clutch 500 times per day. He told her he could lift 20 pounds comfortably and 40 pounds "at one time." He had difficulty climbing stairs and worse difficulty descending. PX2; PX17.

In preparing her report, Ms. Stafseth reviewed medical records of Petitioner's treating physicians and his functional capacity evaluation. She noted that the FCE found that he could perform at the "medium" physical demand level and could climb stairs and ladders on an "occasional" basis. She noted the FCE's restriction on operating a clutch. She consulted the Department of Labor Guidelines which determine that "occasional" means up to a third of the working day. She considered Dr. Kelikian's return-to-work slip of June 23, 2017 where he specified medium duty work in accordance with the FCE and stated on the slip that the work at Austin Tyler was "heavy." She noted no formal education beyond high school and three credits at Joliet Junior college, and that he had no specialized skills beyond that of a driver. The only job experience she found beyond driving was work in the grocery trade out of high school up to and including assistant manager. She testified that during the interview, Petitioner had not been looking for work because" he was unsure at the time if Austin Tyler Construction was going to contact him regarding work and so he felt that he was in limbo " PX2; PX17.

Ms. Stafseth consulted the Dictionary of Occupational Titles and determined that a driver is considered to be under the "medium" demand level, while work done as a laborer would be considered under the "very heavy" demand level and work in the grocery trade would be considered under the "heavy" demand level. With respect to transferable skills, she noted that as of the interview Petitioner was approaching 50 years old, and "would be considered to be an individual approaching advanced age, which could impact his ability to adjust to other types of employment." Her opinion was that he did not have any transferable skills beyond driving in some capacity. She opined that he still had access to some driving positions and other positions such as packer, assembly work, shipping and receiving, and parts delivery driver. Her opinion was that Petitioner had lost access to his usual and customary job. PX2; PX17.

Ms. Stafseth's opinion was that Petitioner's wage-earning potential was between $13 and $17 per hour, based upon her consultation with the Department of Labor statistics for wages. She believed that he could undergo vocational testing, looking toward an assessment of his aptitudes, computer training, job search training and preparing for interviews. The end result would be assisted searching for work with "a goal of 40 to 60 contacts on a weekly basis." PX2; PX17.

Additional Information

Petitioner offered a variety of photographs into evidence. *See generally* Petitioner's Exhibits. He also offered video footage that he took of work being performed on a job site by Respondent on April 30, 2018. PX38.

Petitioner testified that he sought employment outside of Respondent by searching on Monster.com and Indeed.com. He ultimately secured employment at the Circle K in Plainfield, Illinois for about five weeks as a light duty cashier, which only required him to stand and ring up customers. However, after a few hours of standing his left ankle would definitely swell up and he felt pain. Petitioner also testified that at its very best he has about 30-40% percent loss of feeling in the front part of his foot. Thereafter, Petitioner found employment at several different places and ended up at Speedway gas station where he currently works. He testified that his duties are very similar, and he rings up customers. *See also* PX41 (Speedway paystubs).

Regarding his current condition of ill-being, Petitioner testified that he experiences swelling every single day. He has never had a day without swelling since the date of the accident. On the first date of the hearing, Petitioner requested to show his left ankle, which was more swollen than the right ankle on the outside portion.

In rebuttal testimony, Petitioner testified that a backhoe, is located at the sewer and water jobs. However, it cannot reach up into the corners of the box to scrape out all the debris and he maintained that it has to be shoveled out by hand. Petitioner also testified that when he worked for Respondent in November of 2017, there was no notice located on the key box prohibiting drivers from getting in the bed of the trailers.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at the hearing as follows:

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

In careful consideration of the record as a whole, including the testimony of Petitioner, six additional witnesses, two expert witnesses, medical records, and dozens of other exhibits including video footage, photographs, and employment policies and records, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the accident at work on October 18, 2014. Petitioner testified about his left ankle injury, which resulted from an undisputed accident.

Contemporaneous medical records from the date of the accident through December of 2014 corroborate that Petitioner sustained a second degree left ankle sprain and partial tear of the peroneous longus tendon. The last physical therapy note reflects that Petitioner had improved greatly in therapy. Petitioner returned to work for Respondent with restrictions that were accommodated. Then, at Petitioner's suggestion because he was performing "pointless paperwork" Respondent laid Petitioner off.

Petitioner worked the entirety of the construction season in 2015. He did not undergo any medical treatment during this period, and he was able to perform all the duties of his job, albeit with subjectively reported severe symptoms during which time he operated a truck with a clutch.

Petitioner then undertook additional medical treatment with Dr. Kelikian in February of 2016 ultimately resulting in a surgery consisting of peroneal tendon repair, retinacular repair, and deepening of the pereosteum groove. He underwent post-operative care and ultimately underwent a functional capacity evaluation. Petitioner was released back to work per the results of the valid evaluation within the job description understood by the physical therapist. He was evaluated thereafter by his treating physician, Dr. Kelikian, who imposed one work restriction preventing Petitioner from operating manual transmission trucks with a clutch.

Petitioner and the many witnesses at the hearing disagreed over the job requirements of a truck driver. The parties also submitted dozens of exhibits to refute claims of the inclusion or exclusion of certain duties of a driver. Specifically, whether Petitioner was required to or did: (1) climb into the bed of the trailer to shovel out hundreds of pounds-to-tons of debris including asphalt; (2) climb into the bed of the trailer many times to spray down the bed of the truck with diesel fuel to prevent asphalt from sticking; (3) climb in and out of the cab of the truck many times per day; and/or (4) drive a truck with a clutch.

Overall, Petitioner's testimony is not reliable. The testimony of his close friend, Mr. Kinsella, does little to buttress Petitioner's claim about his job duties given that he last observed any work on Respondent's job sites as a contractor, not an employee of Respondent, in 2011 per his own testimony. Moreover, the testimony of Respondent's owner and office manager, Petitioner's supervisor, and a current truck driver controvert Petitioner's testimony and insistence that drivers were required, as of the time of his permanent work restrictions post-FCE, to perform the disputed job duties. Petitioner's contention to this end are further controverted by the opinions of the evaluating physical therapist from a valid FCE based on his representations to that physical therapist as well as the opinions of his own physician and his chosen vocational rehabilitation expert to whom he explained these disputed job duties in detail.

Moreover, taking Petitioner's version of events as true, he asserts that his left ankle condition was so subjectively severe that he was barely able to perform the disputed job duties pre- or post-operatively, which are controverted by the job description created by his union hall, not Respondent. He also asserts that his subjectively severe left ankle condition worsened exponentially throughout his treatment, including during the 2015 construction season when he drove a truck with a clutch and during which time he sought no medical treatment for 11 months. Petitioner maintains that after his surgery his condition was subjectively without remedy. In contradiction, Petitioner's treating physician, Dr. Kelikian, testified that Petitioner could perform all the job duties that Petitioner described—including those disputed by Respondent—except for driving a manual transmission truck. Respondent offered the testimony of three witnesses and inventory documents to establish that it was able to accommodate the no-clutch restriction given that its truck fleet had transitioned to mostly automatic transmission by the time Petitioner was released by Dr. Kelikian in 2017.

Based on the foregoing, the Arbitrator finds that the medical evidence as a whole supports a causal connection finding between Petitioner's left ankle condition and his accident at work limited by his release back to work by Dr. Kelikian with one restriction of no-clutch driving that fell within Petitioner's job duties and that could be accommodated by Respondent.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to temporary total disability benefits and temporary partial disability benefits, the Arbitrator finds the following:

"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 MMI. *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 (*emphasis* added); *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996.

As explained more fully above, the Arbitrator finds that Petitioner has established a causal connection between his current condition of ill-being and accident at work. During this period, Petitioner was either placed off work by his physician, but he was not restricted from performing the full duties of his job with restrictions that Respondent could not or did not accommodate until after June 23, 2017 per Dr. Kelikian. Thus, the Arbitrator finds that Petitioner has established his entitlement to temporary total disability benefits from October 19, 2014 through December 2, 2014 and commencing on May 19, 2016 through June 23, 2017.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of the injury, the Arbitrator finds the following:

Section 8.1b of the Illinois Workers' Compensation Act ("Act") addresses the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b (LEXIS 2011. Specifically, Section 8.1b states:

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
>
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
>
> (i) the reported level of impairment pursuant to subsection (a);
> (ii) the occupation of the injured employee;
> (iii) the age of the employee at the time of the injury;
> (iv) the employee's future earning capacity; and
> (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.*

Considering these factors in light of the evidence submitted at the hearing, the Arbitrator addresses the factors delineated in the Act for determining permanent partial disability.

With regard to Subsection (i) of Section 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 Section 8.1b (b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a Driver with years of anticipated employment ahead of him. The Arbitrator therefore gives this factor greater weight.

With regard to Subsection (iii) of Section 8.1b (b), the Arbitrator notes the parties' stipulation that Petitioner was 46 years old at the time of accident. The Arbitrator therefore gives this factor greater weight.

With regard to Subsection (iv) of Section 8.1b (b), the Petitioner's future earning capacity, and Subsection (v) of Section8.1b (b), evidence of disability corroborated by treating medical records, the Arbitrator notes that no credible evidence was proffered regarding any loss Petitioner's future earning capacity as a result of this injury resulting in any loss of trade or wage differential loss. The Arbitrator notes that Petitioner has established that he sustained an injury resulting in extended conservative treatment with a proposed surgery followed by an 11-month gap in treatment during which time Petitioner returned to work for Respondent and was able to drive a truck with a clutch throughout the 2015 season prior to the time that he had surgery. Petitioner then undertook further medical treatment with Dr. Kelikian. He underwent surgery to the left ankle including peroneal tendon repair, retinacular repair, and deepening of the pereosteum groove. After post-operative care, Petitioner's symptoms continued required some treatment, but Petitioner obtained no medical after his last visit to Dr. Kelikian in November of 2017. Dr. Kelikian released Petitioner back to work with permanent restrictions that he testified fell within Petitioner's Teamster's job description with the exception of driving a truck with a clutch. Respondent established it could accommodate the restriction given that a majority of its truck fleet in 2017 was of automatic transmission trucks. Petitioner continued to experience severe subjective symptoms that are not corroborated by the findings of his physician, Dr. Kelikian, but also were not discounted as valid by Dr. Kelikian the only physician to evaluate Petitioner regarding the subjective nature of his symptoms at maximum medical improvement. No Section 12 examination was submitted into evidence. The Arbitrator therefore gives these factors greater weight.

Based on the above factors, and the totality of the record, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 30% loss of use of left foot pursuant to §8(e) of the Act.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC017294
Case Name	WILLIAMS,BRIDGETTE v. FORD MOTOR COMPANY
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0237
Number of Pages of Decision	15
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Adam Scholl
Respondent Attorney	Sean Peters

DATE FILED: 5/12/2021

/s/Maria Portela, Commissioner

Signature

21IWCC0237

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

BRIDGETTE WILLIAMS,

Petitioner,

vs. NO: 15 WC 17294

FORD MOTOR COMPANY,

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 and permanency 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 corrects the scrivener's error as outlined below.

We correct a scrivener's error in the body of the decision. Petitioner's initial visit to Dr. Salvador Fanto was April 21, 2015, and replaces wherein it was identified as April 21, 2014 in the second sentence of the first paragraph on page 2 of the Arbitrator's decision.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 18, 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $19,632.00. 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.

/s/ *Maria E. Portela*

/s/ *Thomas J. Tyrrell*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

WILLIAMS, BRIDGETTE
Employee/Petitioner

Case# **15WC017294**
16WC010900

FORD MOTOR COMPANY
Employer/Respondent

On 3/18/2019, 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 2.45% 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 & ASSOC LTD
ADAM J SCHOLL
101 W GRAND AVE SUITE 500
CHICAGO, IL 60654

0560 WIEDNER & McAULIFFE LTD
SEAN A PETERS
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
CORRECTED DECISION

BRIDGETTE WILLIAMS
Employee/Petitioner

v.

FORD MOTOR COMPANY
Employer/Respondent

Case # **15** WC **17294**

Consolidated cases: **16 WC 10900**

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 **December 10, 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 _____

FINDINGS

On **06-01-14**, 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 **$20,582.05**; the average weekly wage was **$661.38**.

On the date of accident, Petitioner was **32** 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 **$5,017.92** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$5,017.92**.

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

ORDER

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $440.92/week for 11-2/7 weeks, commencing 05-13-15 through 07-30-15, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $5,017.92 for temporary total disability benefits that have been paid.

Medical benefits
Respondent shall pay petitioner the reasonable and necessary medical services, pursuant to the medical fee schedule, of $8,520.00 as provided in Sections 8(a) and 8.2 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 10% loss of use of right hand and 3.5% loss of use the right arm pursuant to §8(e)(9) and §8(e)(10), respectively 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

03-15-19
Date

MAR 18 2019

Attachment to Arbitrator Decision
Bridgette Williams v. Ford Motor Company
IWCC# 15 WC 17294

FINDINGS OF FACT

On June 1, 2014, petitioner was working for the respondent on the auto assembly line. Her specific work station involved the installation of the IP assembly or the dashboard. Petitioner described that the IP assembly would be on a hoist and the petitioner's job was to maneuver the IP assembly in place in the vehicle. Once it was in place she used a torque gun to shoot bolts in order to fasten the assembly to the car. Petitioner described the gun as being two feet in length and weighing between 5-10 lbs. She held the gun with her right hand on top where the trigger was located and held the bottom of the gun with her left hand to keep it steady. Once she inserted two bolts, petitioner took a smaller gun and inserted three additional bolts. Petitioner stated that she performed the repetitive activity throughout her 10½ hour shift of which 600 to 650 cars would pass through the line.

Petitioner testified that on or about June 1, 2014, she experienced pain and numbness in her right hand extending up to her elbow and, to a lesser extent, in her left hand as well. On June 16, 2014, petitioner submitted an accident report to respondent complaining of pain in her right hand and blistering between her fingers. (PX6, p.62) Later in the year, on December 21, 2014, petitioner submitted a second incident report to respondent complaining of pain of her right wrist that ran up to her forearm and settled into the elbow. (Id at p.85) The incident report also mentioned left hand pain when she woke up from her sleep. (Id.)

Petitioner testified that the medical department ordered an EMG of her right hand. The EMG was performed on January 15, 2015. Petitioner provided a history to the neurologist, Eric Ericson, M.D. that she had sharp pains shooting from wrist to elbow. Dr. Ericson found electrophysiological findings consistent with mild median neuropathy of the right wrist and no evidence of right-sided ulnar neuropathy or cervical radiculopathy. (Id. at p. 122)

Respondent's company physician referred petitioner to John Kung, M.D. of Premier Orthopaedic and Hand Center. Petitioner reported bilateral hand pain with numbness and tingling with her right side worse than the left and pain shooting into the right elbow. (Id. at p.142) Dr. Kung diagnosed petitioner with right carpal tunnel syndrome. (Id.) Petitioner returned to Dr. Kung on March 16, 2015 complaining of right hand paresthesia and

right elbow lateral pain. Dr. Kung assessed petitioner with carpal tunnel syndrome and lateral epicondylitis. (Id. at p.139) Dr. Kung recommended a right carpal tunnel release and an injection to the elbow. (Id.)

Petitioner consulted with her personal physician at Family Christian Health Center. Her physician referred her to Dr. Salvador Fanto. (PX4, p.64-69) Petitioner's first visit with Dr. Fanto occurred on April 21, 2014. (PX4, p.50) Petitioner provided a history and related her subjective symptoms. Dr. Fanto agreed with the surgical recommendation of Dr. Kung. (Id.) On May 11, 2015, Dr. Fanto performed a right carpal tunnel release and administered an injection of cortisone to the right elbow epicondyle. (PX5, p.161) Petitioner was taken off of work following the surgery and underwent occupational therapy with Dr. Fanto's practice. (PX4) Dr. Fanto saw petitioner biweekly for follow-ups. At her visit with Dr. Fanto on July 28, 2015, petitioner reported tenderness about her right elbow. Dr. Fanto advised petitioner to finish occupational therapy and indicated that she could return to work light duty. (Id. at p.48)

On August 19, 2015, petitioner underwent a Section 12 medical exam with Dr. Charles Carroll. Petitioner reported that her numbness and tingling have resolved and that she was contemplating treatment for her right elbow. (RX1) Dr. Carroll performed a clinical examination and found evidence of resolving carpal tunnel syndrome. (Id.) It was his opinion that petitioner's right hand condition was related to her employment given her history of repetitive gripping, grasping and use of power tools. (Id.) Dr. Carroll had no opinion concerning the right elbow. (Id.) He recommended further work conditioning and observation of her elbow situation. (Id.) He stated she could work with a 5 lbs. restriction and recommended that she not be exposed to torque wrenches or vibratory tools. (Id.)

Petitioner continued to treat with Dr. Fanto and participated in occupational therapy. At her visit on September 24, 2015 with Dr. Fanto, petitioner reported pain of the elbow. Dr. Fanto prescribed an MRI of the elbow. (PX4, p.46) The MRI of the elbow was performed on October 16, 2015 at Ingalls Memorial Hospital. The radiologist's impression was that petitioner had a focal tear of the proximal common extensor tendon. (Id. at 23)

Petitioner sought further treatment for her right elbow with Dr. Edward Joy of Integrity Orthopedics. Her initial visit with Dr. Joy was on November 3, 2015. Petitioner described to Dr. Joy that she had aching, shooting, soreness and tightness of the elbow, which she attributed to pushing and pulling at work. (PX2, p.2) Dr. Joy assessed her with medial and lateral epicondylitis. (Id. at p.3) Dr. Joy recommended physical therapy. (Id.)

Petitioner continued to treat with Dr. Fanto concerning her hands. On November 5, 2015, she reported issues concerning her left hand. (PX4, p.44) Dr. Fanto ordered nerve conduction studies.

On December 15, 2015, petitioner returned to Dr. Joy. Again, Dr. Joy recommended physical therapy and set forth restrictions of no lifting, pushing, or pulling greater than 5 lbs. (PX2, p.4,5) Petitioner started therapy for her right elbow the following day with Stepping Stones Early Intervention. (PX3)

On January 30, 2016, petitioner filled out an accident report with respondent complaining of pain and stiffness of her left shoulder. She also explained how the operations of her job required her to use the torque gun with her left hand. (PX6, p.190) Respondent's medical department referred petitioner to Dr. Ericson for an EMG of the left hand. The EMG was performed on February 18, 2016. (PX6, p.199) The EMG revealed mild median neuropathy of the left wrist and no evidence of ulnar neuropathy. (PX6, p.200)

Dr. Joy saw petitioner on February 23, 2016 for the left elbow. On that visit, Dr. Joy administered an injection of Lidocaine and Kenalog. (PX2) Dr. Joy discontinued occupational therapy and released her from care without limitations. (Id.)

With regard to her left hand, petitioner returned to Dr. Fanto on March 2, 2016. Dr. Fanto reviewed the EMG results. Dr. Fanto restricted petitioner to 20 lbs. lifting with the left hand and no use of power tools. (PX4, p.18) On April 8, 2016, Dr. Fanto performed an injection to the left carpal tunnel. (Id. at p.42) Dr. Fanto in a typewritten note dated April 20, 2016 indicated that the injection provided only mild improvement. (Id. at p.8) It was opinion that petitioner required surgical treatment. (Id.)

On September 8, 2016, petitioner returned to Dr. Carroll for an independent medical exam. After performing a record review and conducting a clinical examination, Dr. Carroll concluded that petitioner had left carpal tunnel syndrome and that a carpal tunnel release was appropriate. (RX2) Dr. Carroll further opined that the diagnosis was related in part to her work activities. (Id.)
Dr. Fanto performed a carpal tunnel decompression on the left hand on November 14, 2016. Petitioner was off of work thereafter and participated in occupational therapy. Dr. Fanto permitted petitioner to return to work

light duty as of February 9, 2017. On April 12, 2017, Dr. Fanto permitted petitioner to return to work full duty. (PX7) Her final visit with Dr. Fanto occurred on May 3, 2017. (Id.)

Petitioner is currently work for respondent. She testified that she has not sought any further medical treatment for her right elbow or for her either hand since Dr. Fanto released her on May 3, 2017. She stated that the operations she currently performs do not involve the use of the larger torque guns and she now uses only small guns to shoot bolts. Petitioner noted that she still has intermittent issues with her hands and notices discomfort when in bed. She often takes Ibuprofen for her symptoms.

In support of the Arbitrator's Decision relating to *(C), Did an accident occur that arose out of an in the course of employment Petitioner's employment with Respondent*, the Arbitrator finds the following:

Petitioner's claim of injury is based on a repetitive trauma theory. It is her contention that she sustained injuries to her right hand and right elbow as a result of the repetitive activities that she performed as an assembly worker. Petitioner credibly testified that her job required her to use torque guns to insert screws into each vehicle that passed through her station. These tools varied in size and are well known to as vibratory tools.

When petitioner filled out her first accident report on June 16, 2014, she reported pain from shooting bolts into cars and trucks. She indicated that the area between her wrist and forearm was numb. (PX6, p.62) Petitioner continued to work and returned to respondent's medical clinic on or about December 21, 2014 complaining of wrist pain through her forearm extending to her elbow. (Id. at 85) Petitioner attributed her symptoms to the weekly wear and tear from installing the IP assembly.

The Arbitrator has considered petitioner's testimony and reviewed the incident reports as well as petitioner's medical histories and finds that petitioner did sustain a work-related injury that arose of out of and in the course of petitioner's employment with respondent.

In support of the Arbitrator's Decision relating to *(F) Is Petitioner's current condition of ill-being causally related to the injury*, the Arbitrator finds the following:

Respondent's physician, Dr. Charles Carroll, performed a clinical examination of petitioner and diagnosed petitioner with right carpal tunnel syndrome. His examination revealed discomfort of the lateral epicondyle. Dr. Carroll opined that the condition of the right hand might or could be related to petitioner's employment, which involved repetitive gripping, grasping and use of power tools. Dr. Carroll did not offer an opinion concerning the right elbow. (RX1) Based on Dr. Carroll's opinions, the Arbitrator finds that the diagnosis of right carpal syndrome was causally related to petitioner's repetitive work activities.

As to the right elbow, the incident reports of June 16, 2014 and December 21, 2014, submitted by petitioner, reflect a progression of petitioner's initial symptoms from her right hand and forearm to her elbow. Petitioner received treatment for her right elbow from both Dr. Fanto and Dr. Joy. Neither doctor provided an opinion as to causal relationship. However, "medical evidence is not an essential ingredient to support the conclusion of the * * * Commission that an industrial accident caused the [claimant's] disability." *International Harvester v. Industrial Comm'n*, 93 Ill.2d 59, 63, 66 Ill.Dec. 347, 442 N.E.2d 908, 911 (1982); see also *Pulliam Masonry v. Industrial Comm'n*, 77 Ill.2d 469, 471, 34 Ill.Dec. 162, 397 N.E.2d 834, 835 (1979) "It is not necessary to establish a causal connection by medical testimony. A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester*, 93 Ill.2d at 63–64, 66 Ill.Dec. 347, 442 N.E.2d at 911.

In this instance, there is no evidence that petitioner had elbow issues prior to working for respondent. Petitioner's initial symptoms concerned her right hand and progressed to the elbow. After she underwent surgery to the right hand and an injection to the right elbow, she continued to experience pain about the elbow. Dr. Fanto ordered an MRI, which revealed a focal tear of the proximal common extensor tendon. She subsequently initiated treatment with Dr. Edward Joy who diagnosed her with lateral and medial epicondylitis, which is often associated with repetitive work activities and use of vibratory tools.

Based on the chain of events, the Arbitrator finds that there exists a causal relationship between petitioner's right elbow diagnosis and her repetitive job activities. Petitioner is an assembly line worker.

In support of the Arbitrator's Decision relating to *(J) Were the medical services that were provided to petitioner reasonable and necessary? Has respondent paid all appropriate charges for all reasonable and necessary medical services?* the Arbitrator finds the following:

Petitioner introduced one single unpaid bill of Stepping Stones Early Intervention Inc. The medical bill, in the amount of $8,520.00, pertains to occupational therapy for right elbow prescribed by Dr. Joy. Petitioner received therapy from December 16, 2015 through February 18, 2016. Treatment provided consisted of electrical stimulation, ultrasound, therapeutic exercise and therapeutic activity.

Respondent had Khalid Yousuf, M.D. of Triune Health Group perform a utilization review of the therapy performed by Stepping Stones Early Intervention. He provided an opinion that occupational therapy beyond eight visits was not medically necessary because there was a lack of documented significant measurable improvements in pain score, strength or function. (RX3) It is noted that a utilization review provides an appeal process to the treating physician. The issue that exists is that Triune Health Group sent the non-certification letter to Dr. Fanto and not Dr. Joy who prescribed the therapy. Petitioner's physician was never given an opportunity to respond to the non-certification.

The Arbitrator has reviewed the medical bills of Stepping Stones Early Intervention, the corresponding medical records, and utilization review and finds that the medical services provided were reasonable and necessary to treat petitioner's lateral and medial epicondylitis. The Arbitrator directs respondent to pay to petitioner the medical charges of Stepping Stones Early Intervention in the amount of $8,520.00, subject to the Section 8.2 of the Act.

In support of the Arbitrator's Decision relating to *(L) What is the Nature and Extent of* the injuries? The Arbitrator finds the following:

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that an impairment rate was not submitted into evidence. Consequently, the Arbitrator give no weight to this fact.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes petitioner worked as an assembler on an assembly line. After undergoing surgery to her right hand and

conservative treatment for her right elbow, she was permitted to return to work full duty by her treating physician, Dr. Fanto. The Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 32 years old at the time of the accident. Because of her young age and the permanent disability from her injuries, 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 petitioner was able to return to work as an assembler and no longer operating the heavier torque gun. The Arbitrator therefore gives greater weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that petitioner credibly testified that she still has intermittent pain issues with right hand and elbow, which is aggravated by certain activities. She relies on NSAIDs for pain relief. The Arbitrator gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 10 % loss of use of the right hand and 3.5% loss of use of the right arm. Respondent shall pay to petitioner 27.855 weeks of permanent partial disability benefits.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC024669
Case Name	FLORES,MARICELA v. LABOR TEMPS INC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0238
Number of Pages of Decision	22
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Brian Hercule
Respondent Attorney	MALLORY ZIMET, ,

DATE FILED: 5/12/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARICELA FLORES,

Petitioner,

vs. NO: 15 WC 24669

LABOR TEMPS, INC.,

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 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 as to causation, medical expenses, total temporary disability benefits and the 7.5% person as a whole award to the right shoulder. However, the Commission modifies the award for the cervical spine from 5% person as a whole to a loss of 2.5% person as a whole.

Petitioner testified consistent with the medical records as to falling forward and landing on outstretched arms after running into a forklift/pallet on April 13, 2015. (T. 10) She presented to the clinic as directed by her employer on April 22, 2015. At that time, she was diagnosed with a shoulder/upper arm sprain and knee/leg sprain and placed on light duty. (Px1) Petitioner attended 4 follow up visits with the work clinic and remained on limited duty. (Px1)

In early July of 2015, Petitioner underwent an MRI of the right shoulder and an MRI of the thoracic spine. The right shoulder MRI showed mild rotator cuff tendonitis and/or bursitis

involving the distal supraspinatus tendon and the thoracic spine MRI was normal. (Px3) On July 7, 2015, Petitioner was seen by Dr. Barnabas and was diagnosed with 1) thoracic sprain/strain; 2) right shoulder tendinitis; 3) impingement syndrome. Dr. Barnabas wrote Petitioner an off work note at that time and had her undergo physical therapy. (Px3) At her follow up appointment on July 27, 2015, Dr. Barnabas noted that Petitioner was not improving and referred her to an orthopedic surgeon. He again kept her off work. (Px3) Petitioner underwent an MR Arthrogram of the right shoulder on August 10, 2015 to examine rotator cuff pathology which was normal. (Px3) When Petitioner presented to Dr. Barnabas on August 18, 2015, she was complaining of severe neck pain. Dr. Barnabas suspected cervicalgia and a cervical disc herniation and ordered a neck MRI. (Px3)

On August 20, 2015, Petitioner first saw Dr. Markarian and he noted her right shoulder and neck pain had not improved. (Px12) Dr. Markarian wanted to get an MR Arthrogram of the right shoulder to assess Petitioner for a labral tear and referred her to pain management for her neck. (Px12)

Also on August 20, 2015, Petitioner underwent the cervical spine MRI which was positive for annular disc bulges at C4-C5 and C5-C6. (Px3) On August 21, 2015, Dr. Barnabas felt that Petitioner's cervical complaints were out of proportion to the results of the MRI. However, he ordered an EMG to rule out other pathology as Petitioner had complaints of cervical radiculopathy with radiating tingling and numbness. (Px3)

On October 23, 2015, Petitioner presented to Dr. Vargas on referral from Dr. Barnabas for her ongoing neck pain with associated "upper extremity shooting radiation symptoms" and right shoulder pain. Dr. Vargas reviewed the MRI studies of the cervical spine and right shoulder and diagnosed Petitioner with 1) cervical discogenic pain syndrome; 2) cervical discogenic radiculopathy; 3) cervical facet syndrome; and 4) right shoulder pain. Dr. Vargas felt that the disc pathology on the MRI at the C4-C5 and C5-C6 levels were consistent with Petitioner's clinical findings of radiculopathy. Dr. Vargas also recommended EMG studies at that time and believed that based on the MRI studies, that Petitioner's right shoulder was best treated by an orthopedic surgeon. (Px3) Dr. Vargas began a course of epidural steroid injections in December of 2015. After the first two injections, Petitioner reported a 40-50% improvement in her symptoms, however regressed once resuming her work activities. (Px3, 1/26/16 note) On February 12, 2016 Dr. Vargas noted positive MRI and EMG findings of radiculopathy. Dr. Vargas recommended that based on the clinical and diagnostic findings of cervical discogenic radiculopathy, Petitioner should undergo a neurosurgical consultation. (Px3)

Petitioner underwent an independent medical examination with Dr. Butler on April 6, 2016, regarding her cervical spine. Dr. Butler found that the March 2016 MRI was completely normal. Dr. Butler opined that Petitioner's current complaints of pain in the cervical spine had no objective basis based on the history of work accident of April 13, 2015. Dr. Butler further opined that the EMG and cervical epidural steroid injections were not medically indicated, and that Petitioner had no objective basis for work restrictions and had reached maximum medical improvement as to her cervical spine. (Rx1)

On May 4, 2016, Petitioner underwent a consultation with neurosurgeon Dr. Erickson who noted the March 29, 2016 cervical spine MRI showed a small disc herniation at C6-C7. Dr. Erickson also noted an abnormal SSEP study indicating possible nerve compression from C4-C6. Petitioner was continued to express complaints of radiculopathy at that time. (Px7) Petitioner returned to Dr. Sclamberg in May and June of 2016 with continued complaints of her right shoulder. However, by June of 2016, Petitioner was pregnant and unable to take any medications. (Px3) A DSSEP done on Jun 26, 2017 was abnormal at C6 and C7 on the right. (Px10) Petitioner gave birth in January 2017. (T. 18)

Petitioner underwent follow up treatment with Dr. Markarian beginning in April of 2017 with complaints that nothing had resolved since her last visits with his office. He assessed Petitioner as having scapular dyskinesia, ordered physical therapy and a SpinalQ brace. (Px12) Just prior to reinitiating treatment, Petitioner underwent an independent medical examination with Dr. Bare who found her to be at maximum medical improvement and capable of working full duty. He did, however, causally connect her work accident to her current pain complaints despite his finding she could return to work full duty without restrictions. (Rx4)

Petitioner returned to Dr. Markarian after initiating use of the SpinalQ brace and physical therapy and reported significant improvement and was discharged at maximum medical improvement by January 15, 2018. (Px12)

The Commission finds that the Arbitrator's causation opinion is supported by the record. Petitioner's multiple treating physicians' opinions and the consistency of her complaints and treatment were more credible than the opinions of Respondent's Section 12 Examining physicians.

The Commission does not find Dr. Butler's opinion to be persuasive. The opinions of Drs. Wollen, Barnabas, Vargas, Markarian, and Sclamberg – all of whom note ongoing neck problems between April 22, 2015 and March of 2016, are more persuasive. Additionally, the MRI which is in evidence does note annular bulges. Based on the above, Dr. Butler's opinions contained in Rx1 are not persuasive as to the current condition of Petitioner's cervical spine and its causal connection to the April 13,2015 work accident. However, the Commission finds Petitioner's current condition as it relates to the cervical spine has resolved.

Q: As you sit here today, do you still have pain in your neck?
A: A little.
Q: Okay. On a scale of one to ten, one being practically no pain and ten being the worst pain ever, what is the level of pain that you have in your neck?
A: If I'm not moving my arm, the pain is a zero, but if my arm actually exercises a little movement, it's going to be around seven.
Q: Okay. Is that level seven pain in your shoulder or in your neck?
A: In the shoulder.
Q: Okay. Do you have neck pain as you sit here today?
A: The neck, no.
(T. 24-25)

Additionally, the Commission does not find Dr. Bare's opinions persuasive. First, his testimony was inconsistent. He found all of the medical treatment reasonable and necessary up to the time of his independent medical examination (Rx4, p.16) although he testified Petitioner should have reached maximum medical improvement by October of 2015. (Rx4, pp. 18-19) Additionally, at the time of Dr. Bare's independent medical examination, he noted Petitioner to have ongoing pain.

The Commission affirms the award of temporary total disability benefits and medical expenses. Benefits were properly terminated under 820 ILCS 305/12 when Petitioner failed to appear for the independent medical examination with Respondent's Section 12 examiner, Dr. Verma. Petitioner appeared for an independent medical examination with Dr. Bare on April 19, 2017 and did not pursue additional medical treatment until April 27, 2017 when she sought treatment with Dr. Markarian. Petitioner was not released at maximum medical improvement until January 15, 2018.

Further, the Commission affirms the Arbitrator's award of permanency of 7.5% loss of use of person as a whole as to the right shoulder but modifies the award regarding the cervical spine from 5% to 2.5% loss of use of a person as a whole. The Commission finds, however, that the Arbitrator should have applied the minimum PPD rate with one dependent at a rate of $253.00 instead of the $238.55 rate used by the Arbitrator.

In weighing the factors under Section 8.1.b(b) of the Act, the Commission finds:

i) No impairment rating was performed. This factor is given no weight;

ii) Petitioner was a laborer in packaging at the time of the accident. She is in the same occupation – albeit with a different employer. The Arbitrator gave this factor greater weight and the Commission affirms as Petitioner was able to return to the same work unrestricted as pre-injury;

iii) Petitioner was 27 at the time of the injury. The Arbitrator gave this factor some weight. The Commission agrees with this analysis as Petitioner has a substantial number of working years ahead of her;

iv) There was no evidence that Petitioner's wages were impacted. The Arbitrator gave this factor some weight. The Commission affirms this analysis as Petitioner had no reduction in wages from her accident;

v) The disability was corroborated by the medical records. Petitioner had no prior history of right shoulder or neck problems. Her radiographic exams and clinical presentation confirmed cervical radiculopathy as well as shoulder impingement. Petitioner was treated conservatively, and her condition appeared to improve with physical therapy and the use of the SpinalQ device. Petitioner continues to have shoulder pain approximately twice a week and takes over-the-counter Tylenol. However, Petitioner testified that she had no neck pain as of the time of the hearing on Arbitration. The Commission gives this factor greater weight given the significant length of treatment – albeit conservative – as well as Petitioner's ongoing complaints of weekly pain to her right shoulder.

Finally, under the "Findings of Fact" portion of the Arbitrator's decision, the Commission strikes the third and fourth sentences of the second paragraph, and adds the

following: "Petitioner attended physical therapy on June 12, 2015 but did not return for a scheduled recheck on June 22, 2015."

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $265.06 per week for a period of 47 4/7 weeks, from March 9, 2016 through May 16, 2016, and April 27, 2017 through January 15, 2018, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent is entitled to a credit of $16,409.40 for compensation paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $253.00 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 7.5% loss of use of the person as a whole as a result of the right shoulder injury and 2.5% loss of use of the person as a whole as a result of the cervical spine injury.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical expenses from Elgin Physical Health Center from 7/9/15-1/26/16, Windy City Medical Specialists from 8/15/15-1/14/16, Windy City RX from 8/5/15 and 11/20/15, Ashland Health from 7/30/15, Advanced Spine and Pain Specialists from 8/10/15-3/15/16, American Center for Spine and Neurosurgery from 3/23/16 and 5/4/16, Delaware Physicians from 4/4/16-10/9/17, Lake County Neuromonitoring from 3/29/16-6/26/17, Grandview Health Partners from 6/29/17-1/5/18, and BHS Matrix Medical Supply for 7/26/17 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner 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 $66,524.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

FLORES, MARICELA
Employee/Petitioner

Case# **15WC024669**

LABOR TEMPS INC
Employer/Respondent

On 2/11/2019, 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 2.44% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4239 LAW OFFICES OF JOHN S ELIASIK
BRIAN HERCULE
180 N LASALLE ST SUITE 3700
CHICAGO, IL 60601

5001 GAIDO & FINTZEN
GAIL BEMBNISTER
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)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Maricela Flores,
Employee/Petitioner

v.

Labor Temps, Inc.,
Employer/Respondent

Case # **15** WC **24669**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Chicago**, on **September 28, 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 _____

FINDINGS

On **April 13, 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 $**20,674.68**; the average weekly wage was $**397.59**.

On the date of accident, Petitioner was **27** 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 $**16,409.40** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

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

ORDER

The respondent shall pay reasonable and necessary medical services as listed in the attached Decision of Arbitrator Conclusions of Law and as provided in Sections 8(a) and 8.2 of the Act. All bills will be paid pursuant to the medical fee schedule.

The respondent shall pay the petitioner temporary total disability benefits from March 9, 2016, to May 16, 2016 – 9 6/7ths weeks, or $2,612.83; and, again from April 27, 2017, to January 15, 2018. The parties stipulated that the respondent is entitled to a credit of $16,409.40 for compensation paid.

The respondent shall pay the petitioner permanent partial disability benefits at a rate of $238.55 per week for 62.5 weeks, because she sustained 7.5% loss of use of the person as a whole under section 8(d) (2) as a result of her right arm injury and 5% loss of use of the person as whole under section 8(d) (2) of the Act as a result of her cervical spine injury.

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

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

Signature of Arbitrator

February 10, 2019
Date

FEB 1 1 2019

FINDINGS OF FACT

The petitioner testified that on April 13, 2015, she was employed by the respondent. While she was working, a forklift struck her and caused her to fall. She felt pain in her right shoulder and in her neck.

She presented to Physicians Immediate Care on April 22, 2015, complaining of pain bilaterally in her shoulders and knees. The petitioner was diagnosed with a sprain bilaterally to her shoulders and knees. She attended physical therapy, and her last visit at Physicians Immediate Care was scheduled for June 12, 2015. She did not return for that appointment. (PX1)

In early July 2015, the petitioner began treating with Dr. Ravi Barnabas at Herron Medical Group. She was diagnosed with thoracic sprain/strain, right shoulder tendonitis, and impingement syndrome. (PX3) She underwent MRI of her right shoulder on July 2, 2015. The impressions were as follows: rotator cuff appeared intact, mild rotator cuff tendonitis and/or bursitis involving the distal supraspinatus tendon, and the rest of the exam was unremarkable. (PX3) The petitioner underwent MRI of her thoracic spine on July 2, 2015, which was unremarkable. (PX3) On July 28, 2015, Dr. Barnabas referred her to an orthopedic surgeon for her shoulder.

On August 10, 2015, the petitioner received an injection to her right shoulder. She underwent MR arthrogram of the right shoulder. According to the radiologist, the impressions were of intact glenohumeral joint and no evidence for contrast extravasating from the glenohumeral joint into the subacromial or subdeltoid bursa to indicate a full-thickness tear. The AC joint and long head of biceps tendon were unremarkable. (PX3)

On August 20, 2015, the petitioner underwent MRI of her cervical spine. The impressions were as follows: at the C4-C5 and C5-C6 levels, there are 1-2 mm posterior annular disk bulges noted to indent the ventral surfaces of the thecal sac at these levels; the rest of the cervical spine appeared unremarkable. (PX3) On August 21, 2015, the petitioner returned to Dr. Barnabas. He noted that "this lady's MRI shows 1-2 mm disc but she is complaining which is out of proportion to the MRI." An EMG was recommended. (PX 13)

The petitioner then saw Dr. Markarian on August 20, 2015. He opined that the petitioner might have a labral tear and he ordered MRI of her right shoulder. On October 7, 2015, Dr. Markarian recommended physical therapy and a posture shirt and Spinal Q. On December 9, 2015, Dr. Markarian noted that the MRI arthrogram was normal – but, he recommended additional physical therapy and possible injection. (PX 13)

Dr. Barnabas referred the petitioner to Dr. Vargas. She reported to Dr. Vargas on October 23, 2015, and he took her off work. He diagnosed cervical discogenic pain syndrome, cervical discogenic radiculopathy, cervical facet syndrome, and right shoulder pain. He noted that "although the MRI findings are not that impressive to the reading radiologist, they certainly confirm disc pathology at the C4-C5 and C5-C6 level." Dr. Vargas ordered an EMG and referred the petitioner to an orthopedic surgeon for her shoulder. He recommended a series of cervical epidural steroid injections, which the petitioner received on December 11, 2015, January 14, 2016, and January 26, 2016. The petitioner reported no improvement following the last injection. She then was referred for neurosurgical consultation. (PX3)

On March 14, 2016, the petitioner was then seen by Dr. Sclamberg. (PX3) His assessment was right shoulder pain and impingement syndrome and he recommended right shoulder MRI. The petitioner underwent a right shoulder CT arthrogram on March 16, 2016. There was no evidence for full-thickness rotator cuff tendon tear and the glenohumeral joint appeared unremarkable. (PX3) At her follow-up visit on April 4, 2016, Dr. Sclamberg recommended right shoulder arthroscopy with subacromial decompression and possible rotator cuff repair. (PX3) However, the petitioner became pregnant during this time period, and she was unable to continue with treatment. June 27, 2016, was her last visit with Dr. Sclamberg, and his recommendations were unchanged. (PX3)

The petitioner saw Dr. Erickson on March 23, 2016, and he took her off work. He recommended MRI of the cervical spine. The petitioner returned on May 4, 2016, at which time Dr. Erickson found there was a small disc herniation at C6-C7. The petitioner did not return to Dr. Erickson. (PX7)

She again saw Dr. Markarian after this. He ordered additional physical therapy which the petitioner underwent. Dr. Markarian testified for the petitioner. He opined that no surgery was warranted for her right shoulder. Additionally, Dr. Markarian testified that he did not review the March 2016 MRI images of the right shoulder. (PX 13)

The petitioner testified that, following giving birth January 2, 2017, she was able to care for and lift her infant child. On cross-examination, she explained that she was careful not to lift him with her right arm and frequently had help from family in caring for him.

On July 30, 2017, the petitioner saw Dr. Kranzler for her cervical spine. She had another MRI of her cervical spine. Dr. Kranzler saw no abnormalities. A DSSEP on June 26, 2017, was abnormal at C6, and MRI of the cervical spine was recommended as well as ACDF at C5-6 and C6-7. Dr. Kranzler diagnosed cervical radiculopathy. It does not appear that there were any follow-ups regarding her cervical spine. (PX9) On January 5, 2018, the petitioner was released from care at maximum medical improvement with no restrictions as to her right shoulder. (PX 13)

Dr. Butler examined the petitioner under section 12 of the Act on April 6, 2016. He reviewed the March 29, 2016, MRI of the cervical spine and found it to be a normal study. There was no cord compression or stenosis that correlated with entire right arm numbness. There were no disc herniations at any level. Dr. Butler diagnosed cervical pain syndrome without objective abnormality. He opined that the petitioner's subjective complaints had no objective basis. There is no underlying condition affecting the cervical spine and no pre-existing or work-related issues. The EMG was not medically warranted, nor were the cervical epidural injections. No work restrictions were warranted; the petitioner was at maximum medical improvement; and, there was no evidence that would suggest any permanent impairment. (RX1)

The respondent set Section 12 evaluations with Dr. Verma regarding the right shoulder for June 6, 2016, and July 25, 2016, which the petitioner did not attend. Proper notice of the examinations was given. (RX8; RX 10) The petitioner did attend a Section 12 evaluation with Dr. Bare, a board certified orthopedic surgeon at Northwestern Medicine. Dr. Bare specializes in shoulder and knee injuries. Dr. Bare testified that he evaluated the petitioner on April 19, 2017. He reviewed the MRI images from April 2015, and from March 2016.

Dr. Bare testified that there was no evidence of scapular winging, no palpation of the biceps area, and no evidence of impingement. He diagnosed right shoulder myofascial pain. Dr. Bare testified that he based this on the two normal MRI images. Additionally, he testified that the petitioner's subjective complaints of pain in the base of the neck, all the way down the arm, are not indicative of shoulder pathology. Dr. Bare supported this opinion by the fact that the petitioner was provided a cortisone injection, which provided no relief. He testified that the petitioner's complaints could be causally related to the work incident – but, he opined that no further care was necessary regarding the shoulder. The petitioner was at a point of maximum medical improvement and could work without restrictions. Dr. Bare opined that no permanent impairment existed. He further testified that the petitioner reached a point of full duty work and maximum medical improvement as of mid-October 2015. (RX4)

The petitioner testified that she worked light duty until March 9, 2016. She now works in packaging five days per week eight hours per day. She earns $11.00 per hour. She testified that she does not feel any neck pain. She testified that if she is not moving her arm, her shoulder pain is 0 out of 10. If she moves her arm, the pain is 7 out of 10, which occurs approximately two times per week. She further testified that she takes Tylenol for pain.

CONCLUSIONS OF LAW

(F) In support of the Arbitrator's decision regarding whether the petitioner's current condition of ill being is causally related to her injury, the Arbitrator makes the following conclusions of law:

The petitioner's injuries to her cervical spine and right shoulder are causally related to her injury of April 13, 2015.

It is well established that the claimant bears the burden of proving each and every element of her case by a preponderance of the evidence. "Preponderance of the evidence is evidence which is of greater weight or more convincing than the evidence offered in opposition to it; it is evidence which, as a whole, shows that the fact to be proved is more probable than not." ***Central Rug & Carpet v. Industrial Commission,*** 838 N.E.2d 39 (1st Dist. 2005)

From the date of accident, the petitioner gave a consistent history of a forklift hitting her and causing her to fall forward on to her knees and extended hands. She treated at the respondent's occupational health clinic for neck and shoulder sprains. Both Dr. Butler and Dr. Bare agree that the petitioner had a work-related injury. They also acknowledge that she did not have any pre-existing condition that could have been the source of her pain. The petitioner treated conservatively for her neck. The main source of her symptoms and her subsequent treatment was her right shoulder. During her pregnancy, when she was not treating, the petitioner had continued complaints of right shoulder pain. Shortly after giving birth, she returned to Dr. Markarian who prescribed more treatment, and the petitioner had significant relief thereafter.

Based on all the foregoing testimony, medical records, reports, and doctors' depositions – the Arbitrator finds the petitioner's treaters more credible than section 12 examiners. Her current conditions of ill-being regarding her right shoulder and cervical spine are causally related to her injury of April 13, 2015.

In connection with the Arbitrator's decision regarding (G), what were the petitioner's earnings, the Arbitrator concludes as follows:

The only evidence of record regarding earnings is the respondent's wage statement (RX7) which shows that the petitioner worked 22 weeks of the 52 weeks preceding the date of the incident. The total gross income earned equaled $8,746.91. Therefore, the average weekly wage is $397.59.

In connection with the Arbitrator's decision regarding (J), were the medical services that were provided to the petitioner reasonable and necessary and has the respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator concludes as follows:

The petitioner claims that all medical services provided were reasonable and necessary. In support of this position, the petitioner argues that all her medical records from the first date of treatment until the time that she was released from care indicate that she suffered injuries to her neck and right shoulder. She testified consistently with these medical records.

All the treatment that she received was consistent with the petitioner having suffered injuries to her neck and right shoulder in the work-related accident of April 13, 2015. She testified, and her records indicate that she obtained significant relief from the treatment that she received. The petitioner treated with Dr. Vargas seeking relief from her cervical and right shoulder symptoms. When she did not improve, she sought treatment for her right shoulder with Dr. Sclamberg, and later with Dr. Markarian, and she obtained significant relief of her symptoms. Dr. Butler agreed that the petitioner's source of pain was likely from a work-related shoulder injury. Dr. Bare agreed that her medical treatment up to the date of his examination was reasonable and necessary. His opinion that her medical treatment after October 2015, did not provide the petitioner any additional improvement is not credible when weighed against the petitioner's treating records, treating providers, reports, and deposition transcripts.

The following medical bills were submitted into evidence:

- Physicians Immediate Care from April 22, 2015 to June 12, 2015. The respondent made payment and there is a zero balance. (PX6)
- Elgin Physical Health Center from July 9, 2015 – January 26, 2016. The balance is $8,648.00, pre-fee schedule. This is for physical therapy to the cervical spine and shoulder. The Arbitrator orders the respondent to pay, to the extent unpaid, the petitioner's medical bills from this provider (PX2) per the fee schedule.
- Windy City Medical Specialists from August 15, 2015 to January 14, 2016, totaling $19,860.00, pre-fee schedule. The Arbitrator orders the respondent to pay, to the extent unpaid, the petitioner's medical bills from this provider (PX4) per the fee schedule.
- Windy City RX from August 5, 2015 and November 20, 2015, totaling $1,410.20, pre-fee schedule. The Arbitrator orders the respondent to pay, to the extent unpaid, the petitioner's medical bills from this provider (PX4) per the fee schedule.
- Ashland Health from July 30, 2015, totaling $2,441.71, pre-fee schedule. There are no supporting medical records in relation to these medical bills. Therefore, the petitioner failed to prove that these medical services are causally related to the work injury.
- Advanced Spine and Pain Specialists from August 10, 2015 to March 15, 2016, totaling $1,970.00, pre-fee schedule. These medical services are for the injection to the right shoulder on August 10, 2015, and an additional MRI of the right shoulder on March 15, 2016. The Arbitrator orders the respondent to pay, to the extent unpaid, the medical bills of this provider (PX6) per the fee schedule.

- American Center for Spine and Neurosurgery, from March 23, 2016 and May 4, 2016, totaling $900.00, pre-fee schedule. The Arbitrator orders the respondent to pay the petitioner's medical bills from this provider (PX7) per the fee schedule.
- Delaware Physicians from April 4, 2016 to October 9, 2017, totaling $10,217.60, pre-fee schedule. There are no supporting medical records. Therefore, the petitioner failed to prove that these medical services are causally related to the work incident.
- Lake County Neuromonitoring from March 29, 2016 to June 26, 2017, totaling $3,000.00, pre-fee schedule. There are no medical records provided by the petitioner to decipher what services were rendered. As such, the petitioner failed to prove that these medical bills are causally related to a work injury.
- Grandview Health Partners from June 29, 2017 to January 5, 2018, totaling $16,486.38, pre-fee schedule. The Arbitrator orders the respondent to pay, to the extent unpaid, the medical bills of this provider (PX 10) per the fee schedule.
- BHS Matrix Medical Supply for July 26, 2017, totaling $1,287.67, pre-fee schedule. The Arbitrator orders the respondent to pay, to the extent unpaid, the medical bills of this provider (PX 11) per the fee schedule.

This is the total of medical bill exhibits of record either separately or contained within other medical record exhibits.

In connection with the Arbitrator's decision regarding (K), is the petitioner entitled to Temporary Total Disability benefits, the Arbitrator concludes as follows:

There are multiple issues regarding the issue of temporary total disability benefits. The timeframe in dispute is March 9, 2016, until January 15, 2018, when the petitioner was released from care at full duty. The petitioner testified that her work restrictions were accommodated until March 9, 2016. She was notified regarding a section 12 evaluation for May 17, 2016,

which she did not attend. She failed to appear for a section 12 examination on June 17, 2016. The petitioner did appear for section 12 evaluation with Dr. Bare on April 19, 2017. Dr. Bare placed her at maximum medical improvement with no restrictions.

The petitioner additionally testified that she became pregnant in April 2016, and her treatment was discontinued during this time. She gave birth on January 2, 2017. The petitioner resumed treatment with Dr. Markarian on April 27, 2017, at which time he restricted her from work until her release from care on January 15, 2018.

The Arbitrator finds that temporary total disability benefits are due the petitioner from March 9, 2016, to May 16, 2016 – 9 6/7ths weeks, or $2,612.83; and, again from April 27, 2017, to January 15, 2018. The parties stipulated that the respondent is entitled to a credit of $16,409.40 for compensation paid.

In connection with the Arbitrator's decision regarding (L), what is the nature and extent of the injuries, the Arbitrator concludes as follows:

Taking into account the Arbitrator's findings of the medical diagnosis of a right shoulder of right shoulder myofascial pain and pursuant to Section 8.1(b) of the Act, the Arbitrator addresses Petitioner's permanent partial disability as follows:

i. There is no AMA impairment rating provided by either party. As such, the Arbitrator gives no weight to this factor.

ii. The petitioner's occupation at the time of the accident was as a laborer in packaging. She is employed as a laborer, although by a different employer. Petitioner earns $11.00 per hour

for five days per week. The Arbitrator gives greater weight to the fact that the petitioner returned to her pre-injury employment without restriction.

iii. The petitioner was 27 years of age at the time of her accident. The Arbitrator gives some weight to this factor.

iv. The petitioner has no earnings diminution. Therefore, the Arbitrator gives some weight to this factor.

v. The petitioner testified she has pain to her shoulder twice a week and takes Tylenol for the pain. On her last examination date on January 15, 2018, she had full range of motion, good strength, and no subjective complaints of pain. Therefore, the Arbitrator gives some weight to this factor.

After analyzing the facts of this case using the factors enumerated in Section 8.1b of the Act, the Arbitrator finds that the petitioner sustained permanent partial disability to the extent of 7.5% loss of use of the person as a whole under section 8(d) (2) of the Act for her right shoulder; and 5% loss of use of the person as a whole under section 8(d) (2) of the Act for her cervical spine. This totals 62 weeks PPD at $238.55 or $14,909.63. The respondent is entitled to credit for compensation paid.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC012890
Case Name	SULLIVAN, ANDREA v. TARGET
Consolidated Cases	
Proceeding Type	Petition for Review - Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0239
Number of Pages of Decision	19
Decision Issued By	Barbara Flores, Commissioner

Petitioner Attorney	Brenton Schmitz
Respondent Attorney	Shawn Biery

DATE FILED: 5/13/2021

/s/Barbara Flores, 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

ANDREA SULLIVAN,

Petitioner,

vs. NO: 19 WC 12890

TARGET,

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, and temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator with the changes noted herein, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980).

The Commission briefly makes two additional observations relating to the claimed mechanism of injury and corresponding accident analysis. We have considered Petitioner's testimony that she wiped her boots on the carpet upon entering through the doors of the Target store, but that her boots were still wet upon entry to the store proper. We find that testimony does not affect our ultimate conclusion, given the evidence adduced about the general weather conditions and the tendency of snow on shopping carts brought into the store to melt onto the floor which is in the area where Petitioner fell.

The Commission is persuaded, as was the Arbitrator, that the period of time most relevant to the accident analysis is focused on evidence relating to the state of Petitioner and the tile floor just before she fell (*i.e.*, after traversing the entryway carpets) and at the time that she fell (*i.e.*, near shopping carts brought in from a snowing outside condition). We agree with the Arbitrator's conclusion that the evidence establishes that Petitioner slipped on melted snow/water that had accumulated from the shopping carts brought into the store based on the

entirety of the record. Petitioner's testimony, and her credibility, are not the sole bases on which the Commission finds ample evidence to support her version of events. Petitioner's co-worker, Ms. Chow, testified that she helped Petitioner up after the incident, and she was located approximately two tiles away from the shopping carts. She also sent an email stating that the tile was "definitely" wet whereas many months later she sent another email to a claims examiner and she could not "recall for sure" and stated that the tile was "probably" wet. The Commission affirms the finding of a compensable accident given the facts in this case.

In addition, the Commission observes that Petitioner slipped and fell on the floor while proceeding to the room where the store's time clock is located. Accordingly, Petitioner was exposed to a risk distinctly associated with her employment because at the time of the occurrence, she was performing acts that the employee might reasonably be expected to perform incident to his or her assigned duties. See *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124828, ¶ 46 (citing *Caterpillar Tractor v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989)). Moreover, "[w]here the claimant's injury was sustained as a result of the condition of the employer's premises, [our supreme] court has consistently approved an award of compensation." *Archer Daniels Midland Co. v. Industrial Comm'n*, 91 Ill. 2d 210, 216 (1990); see also *Dukich v. Illinois Workers' Comp. Comm'n*, 2017 IL App (2d) 160351WC, ¶ 40 (and cases cited therein); *Mores-Harvey v. Industrial Comm'n*, 345 Ill. App. 3d 1034, 1038 (2004) (and cases cited therein); *cf. Chicago Tribune Co. v. Industrial Comm'n*, 136 Ill. App. 3d 260, 264 (1985) (affirming award of benefits for claimant who was injured while walking through a gallery owned by the employer which claimant was required to traverse in order to get to her work station even though the gallery was open to the general public, and stating that "[i]t is difficult to see how the [employer] can escape liability by exposing the public to the same risks encountered by its employees").

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 on September 30, 2020 is hereby affirmed and adopted in all other respects with the changes stated herein.

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 expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

Bond for the removal of this cause to the Circuit Court is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 13, 2021

/s/*Barbara N. Flores*
Barbara N. Flores

o: 5/6/21
BNF/kcb
045

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

/s/*Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0239
NOTICE OF 19(b) ARBITRATOR DECISION

SULLIVAN, ANDREA Case# **19WC012890**

Employee/Petitioner

TARGET

Employer/Respondent

On 9/30/2020, 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 0.10% 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:

2553 McHARGUE & JONES LLC
MATTHEW JONES
123 W MADISON ST SUITE 1800
CHICAGO, IL 60602

2965 KEEFE CAMPBELL BIERY & ASSOC
SHAWN R BIERY
118 N CLINTON ST SUITE 300
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)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Andrea Sullivan
Employee/Petitioner

v.

Target
Employer/Respondent

Case # **19** WC **012890**

Consolidated cases: **NA**

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 **Deborah J. Baker**, Arbitrator of the Commission, in the city of **Chicago**, on **July 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 Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

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

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

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

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

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On the date of accident, **April 14, 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 $**14,352.00**; the average weekly wage was $**276.00**.

On the date of accident, Petitioner was **55** 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

Petitioner sustained a work-related accident on April 14, 2019, and Petitioner's current condition of ill-being to her lumbar spine is related to the April 14, 2019 accident.

Respondent shall pay Petitioner temporary total disability benefits of **$220.00** /week for the periods of **April 17, 2019 through April 18, 2019; and from April 22, 2019 through July 28, 2020** representing 66-4/7 weeks as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, as provided in Sections 8(a) and 8.2 of the Act, as follows: TOTAL REHAB $18,370.00; PREMIUM HEALTHCARE SOLUTIONS $2,700; PREMIUM HEALTHCARE SERVICES $9,790.98; METRO ANESTHESIA CONSULTANTS $4,808.91; G&U ORTHOPEDIC $225.00; AMITA HEALTH ABMG $349.00; IL ORTHOPEDIC NETWORK $18,168.31; MIDWEST SPECIALTY PHARMACY $10,183.19; AMITA ST ALEXIUS MEDICAL $15,989.10.

Respondent shall authorize and pay for a bilateral L5-S1 facet injection and associated care, as recommended and prescribed by Dr. Templin.

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

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

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

Signature of Arbitrator

September 28, 2020
Date

ICArbDec19(b)

SEP 30 2020

Andrea Sullivan v. Target
Case No. 19 WC 12890

FINDINGS OF FACT

TESTIMONY

Testimony of Andrea Sullivan

Petitioner testified that on April 14, 2019, she worked as a cashier for Respondent, Target. Petitioner testified she had been working for Target for about a year and a half as a cashier. (Tr. 8-9) Petitioner testified that on April 14, of 2019, she was scheduled to work from 12:00 noon to 6:30 p.m., which was her usual shift on Sundays. (Tr. 9) Petitioner testified that it was snowing with heavy flakes on April 14, 2019 and she recalled it had been snowing all day.

Petitioner testified she arrived at work that day after a neighbor drove her and dropped her off. (Tr.11) Petitioner testified the neighbor dropped her at the front door in Target's parking lot at about 11:56 a.m. Petitioner testified when she arrived at Target, there was no snow accumulated on the pathway towards the door. (Tr. 10) Petitioner testified that around the same time that she was dropped off at work that day, there was snow accumulation in the area and there was a lot of snow on the road. (Tr. 10) Petitioner testified she believed the accumulation was more than a couple of inches. (Tr. 11)

Petitioner reviewed Petitioner's (group) Exhibit 10 which were photographs of target and the area. Petitioner looked at a photograph marked as Petitioner's Exhibit No. 10A and testified that it showed a photo of the outside doors and the sidewalk leading up to Target. Petitioner testified the edge of the walkway was visible in the picture, and that area was where she had been dropped off. Petitioner testified that, apart from weather conditions, the picture accurately depicted the condition this area was in on April 14, 2019. (Tr. 11-13) Petitioner testified that when she arrived that morning, there was not a lot of snow accumulation on the walkway because the salt that they had put down had melted it. (Tr. 13)

Petitioner testified she walked across the walkway depicted in Petitioner's Exhibit No. 10B and came to the first set of automatic doors at the entrance of Target. (Tr. 13) Petitioner testified that Petitioner's Exhibit No. 10B showed the carpet from the first set of automatic doors (outside doors) going into the second set of automatic doors which led into the store. (Tr. 13) Petitioner testified she walked across that carpet into the store that morning and then went through the second set of automatic doors. (Tr. 14) Petitioner testified when she walked through the second set of automatic doors, she had occasion to wipe off her shoes, which is what the carpet is there for. (Tr. 14) Petitioner testified that after walking through the second set of doors, she entered the Target store. (Tr. 14-15)

Petitioner testified that Petitioner's Exhibit No. 10C showed what she saw after walking through the second set of automatic doors that led into the store. (Tr. 15) Petitioner testified that the black space in the photograph was carpet as well, which was made of the same material as the carpet on the other side of the door. (Tr. 15) Petitioner testified that Petitioner's Exhibit No. 10C was an accurate depiction of how the carpet was laid out on the morning of April 14th. (Tr. 15) Petitioner testified that she walked across the carpet as she entered the store and on the other side of the carpet, was linoleum or tile flooring and that flooring. (Tr. 15-16) Petitioner testified that the flooring was the same in the picture as it was on April 14th. (Tr. 16)

Petitioner testified that Petitioner's Exhibit No. 10D showed the area to the right of what was depicted in the photo marked as Petitioner's Exhibit No. 10C. (Tr. 16) Petitioner testified that Petitioner's Exhibit No. 10D showed the tile floors and shopping carts as well as cash registers on the left side. (Tr. 16) Petitioner also testified that if you walked further down the flooring, you would see Guest Services and the employee check-in room where the time clock is. (Tr. 16-17) Petitioner testified the area where the carts were located is known as the "cart corral," however there were usually two rows of carts. (Tr. 17) Petitioner testified that on April 14, 2019 the store was laid out slightly differently as the carts were on the tile area and they would have been "pushed up more." (Tr. 17) Petitioner testified there are always two rows of carts and when she arrived on April 14, the rows of carts extended onto the tile flooring. (Tr. 18) Petitioner marked Petitioner's Exhibit No. 10D with an "X" showing how far the rows of carts would have extended when she arrived to work on April 14, 2019. (Tr. 19)

Petitioner testified someone collects the carts in the parking lot and brings them into the store. (Tr. 20) Petitioner testified that the store opened at 7:00 a.m., and by the time she arrived around 11:50 a.m. on April 14, 2019, there would have been carts coming in and out throughout the day for almost five hours. Petitioner testified that the entrance that she walked through was the general store entrance. (Tr. 20) Petitioner testified all employees entered the store through this general entrance, on either side of the doors, and that there was not a specific employee entrance. (Tr. 21-22) Petitioner testified that was the pathway she would always take to come and go. (Tr. 22) In reference to Petitioner's Exhibit No. 10D, Petitioner testified that the employee area was to the right behind Guest Services. (Tr. 22)

Petitioner testified that on April 14, 2019, she was wearing rubber duck boots that she described as "a rubber sole duck boot that laces up" above her ankle and has tread on the bottom. Petitioner brought the boots with her to the July 28, 2020 arbitration hearing. (Tr. 22-23) Petitioner testified further that on the morning of April 14, 2019, when she exited her neighbor's vehicle, she walked across the sidewalk to get to the door of the store and she was sure her shoes got wet during that walk, but the sidewalk had salt on it, so it might have been a little wet there. (Tr. 23-24) Petitioner testified that she did not believe there would have been any snow stuck to her shoes by the time she got to the carpeting. (Tr. 24-25)

Petitioner testified she wiped her shoes on the way into the store and walked across the two different areas of carpet before she got to the tile floor. (Tr. 24) Petitioner testified she did not notice if her shoes were wet when she got to the tile floor. When asked whether her shoes were wet, Petitioner testified that they were. When asked if her shoes were wet after she got off the carpet, Petitioner testified that her shoes were not wet. (Tr. 24-25) Petitioner testified her pants and clothes did not get wet when she walked in and she was dry as far as clothing goes. (Tr. 25)

Petitioner testified when she was walking into the store after getting off the carpet, she walked in front of the carts, and then was on the ground. (Tr. 25) Petitioner testified she slipped and went straight down, landing on her knees. Petitioner testified she did not trip over anything and felt her shoes slip. (Tr. 26)

Petitioner reviewed Petitioner's Exhibit No. 10D in which she had marked how far out those carts came previously with an X, and she marked with a circle where she had physically

fallen just at the outer edge of the carts. (Tr. 26) Petitioner testified when she fell she had pain on her knees, pain in her back, and pain in her right front thigh muscle. Petitioner testified her whole back felt like it had its own heartbeat. Petitioner testified it was pounding in her lower to middle back. (Tr. 27) Petitioner testified that nobody immediately came to her rescue and she did stay down for a minute. (Tr. 27) Petitioner testified her coworker Sara Chow helped her get up, asked if she was okay, and then Petitioner punched in for work. (Tr. 28) Petitioner testified after punching in, she called the manager on duty named Rafa and he came to the lockers to discuss the accident and they did not complete a report at that time because Rafa wanted to wait and see if Petitioner just had bruising. (Tr. 29)

Petitioner testified she arrived that morning in her Target uniform, which was a red shirt and blue jeans. Petitioner testified that at some point while discussing with Rafa, she noted her clothing was wet with water on the knees on the front part of her pants. (Tr. 29-30) Petitioner testified her clothes were not wet when she walked in and she did not see a puddle when she slipped. Petitioner testified she did happen to have an opportunity to look down as to what she slipped on but "whatever water was there was on me now." (Tr. 30) Petitioner testified she would draw an inference that she slipped on melted snow from the carts because it was snowing heavily and when Target is busy, the carts are pushed in as far as they go so guests would be able to take one and go. (Tr. 31-32) Petitioner testified she may have noticed snow kind of accumulates off those carts in that area but it is not something she would be focused on although she knew that it happened. (Tr. 33) Petitioner testified there was not a wet floor sign there when she arrived that morning. Petitioner testified she later noticed a wet floor sign at the other entrance and cart attendants with towels were drying the carts down. (Tr. 33)

Petitioner testified she did work her shift that day and was in pain throughout the day, in her back, thigh, and both knees however she did finish her six-hour shift. (Tr. 34) Petitioner testified she had pain in the right upper thigh and she felt pain at the end of her shift, pain when she awoke the next morning in her back, however, her knees were okay the next morning. (Tr. 35)

Petitioner testified she worked the next day and, on that day, tried to fill out a report with the store manager, Carol, however a report was not completed because Carol told Petitioner that she was not punched in on the time clock so there wasn't an incident. (Tr. 35-37) Petitioner testified finally a claim was started and she sought medical treatment. (Tr. 36)

Petitioner testified that she treated at AMITA on April 17, 2019 and she was placed off work for two days until her follow-up appointment. (Tr. 36-37). Petitioner also testified they gave her a prescription for muscle relaxants, which she took however they did not help. Petitioner testified she felt terrible. (Tr. 37) Petitioner testified she went back to work after those two days were up, and still was in pain so she ultimately went to the emergency room at St. Alexius AMITA on April 22, 2019. (Tr. 38) Petitioner testified she knew that something had to be wrong, that this pain was lasting too long, it was persistent, and it just could not have been bruising. Petitioner testified that she had no new incident or accident in those couple of days before going to the ER. (Tr. 38)

Petitioner testified she underwent a low back CT scan, and was injected with medication as well. Petitioner testified they recommended she stay off work as well so that was the last time she actually worked at Target. (Tr. 39) Petitioner followed up with a doctor of her choosing, Dr. Mohiuddin, on May 7, 2019. (Tr. 39) Petitioner testified Dr. Mohiuddin recommended an MRI of her lower back and dispensed medication as well as recommended physical therapy. Petitioner underwent physical therapy at Total Rehab and Dr. Mohiuddin took her completely off work at that time. (Tr. 40) Petitioner also underwent MRI on May 20, 2019. (Tr. 40) Petitioner testified that in that initial month of medications and physical therapy, the pain did not go away. (Tr. 41)

Petitioner testified Dr. Chunduri performed an injection to lower back on August 22, 2019 and that injection did not help. Petitioner testified he performed a different kind of injection to the lower back on September 5, 2019 and that injection also did not help. (Tr. 42) Petitioner testified Dr. Chunduri referred her to a spine surgeon for a consult, Dr. Cary Templin, and she saw Dr. Templin for the first time on October 4, 2019. Petitioner testified she was still having stabbing pain at that time. (Tr. 42) Dr. Templin recommended flexion and extension x-rays be done and those were performed October 18, 2019. On November 15th of 2019, Dr. Templin recommended one more type of injection however she has not undergone that injection. (Tr. 42-43) Petitioner testified she had also discussed surgery however currently Dr. Templin was just recommending the injection and Petitioner was essentially waiting for approval of that injection. (Tr. 43)

Petitioner testified that as of the date of the arbitration hearing, she still had pain in her back and was no better than when it started. Petitioner testified that she desired to undergo additional care and the injection recommended by Dr. Templin. (Tr. 45) Petitioner testified she went back to the emergency room at St. Alexius on July 29, 2019, because she was not getting any better and she was in massive pain. (Tr. 46) Petitioner testified that she has not worked since April 22, 2019. Petitioner testified that prior to April 14, 2019, she never had any injuries or accidents involving her lower back. (Tr. 47)

On cross examination, Petitioner testified that the history contained in the April 17, 2019 record from AMITA sounded correct. (Tr. 48-49) Petitioner further testified she did not remember if she provided the history noted in the MRI report dated May 21, 2019 of "Patient states she fell at work at Target on floor dated April 14, 2019. Patient does not remember how she fell other than she could not get up." Petitioner testified she had no reason to disagree that the MRI person probably wrote down what she told them. (Tr. 49) Petitioner testified there was not a wet floor sign when she first walked into work. (Tr. 50) Petitioner testified when her neighbor picked her up, she walked to the car across the sidewalk and driveway. (Tr. 51) Petitioner followed up to testify she did not walk through any standing snow that morning because her neighbor had shoveled it.

February 27, 2020 Deposition Testimony of Sarah Chow

At trial, Respondent offered a transcript of the testimony of Petitioner's coworker, Sara Chow. Ms. Chow worked for Target for three years. Rx1 at 7. Ms. Chow testified that she knew Petitioner and that she and Petitioner had a friendly relationship as coworkers. Id. at 8. Ms. Chow testified that she saw Petitioner come into work on April 14, 2019. She testified that Petitioner

was walking in and fell straight down onto her knees on the tile in front of the cart corral. Id. at 9-10. She testified that the carts were on the carpet. Id. at 13. Ms. Chow testified that she saw Petitioner actually fall . Id. at 12. Ms. Chow testified that she went over to help Petitioner stand up. Id. at 13. She stated that Petitioner looked scared and that she didn't think Petitioner would have gotten up if she had not gone over to check on Petitioner. Id.

Ms. Chow testified that on July 1, 2019, she sent an email to Petitioner that stated:

> "I was standing at guest service, waiting in line to do a return, and I saw Andrea walk in. I was about so [sic] say hello to her as she came in, but next thing I knew she was on her knees on the ground. It had snowed that day, so the tile was definitely wet. I sped over there to help her up and she looked terrified. I helped her stand up as other people walked by without even looking at her, and she limped the rest of her way to the time clock. There were no wet floor signs in sight."

Ms. Chow testified further that she also sent an email to David Hoffman, a claims examiner for Respondent's insurance company, on December 29, 2019, which stated:

> "It was the end of my shift and I was standing at guest service, waiting in line to do a return, and I saw Andrea walk in. I was about so [sic] say hello to her as she came in, but next thing I knew she was on her knees on the ground. It had snowed that day, so the tile was probably wet, but I can't recall for sure. I sped over there to help her up and she looked terrified. I helped her stand up as other people walked by without even looking at her, and she limped the rest of her way to the time clock. There were no wet floor signs in sight. I left shortly after." Id. at 18.

When asked about the emails, Ms. Chow testified that "I don't actually remember it being wet. I wasn't looking at it, really. I was just focusing on her, so I don't recall whether it was wet or not." Id. Ms. Chow testified that it was snowing that day. Id. In regards to protocol for putting out wet floor signs, Ms. Chow testified that "whenever team members see that there's . . . hazardous days when it's snowing or raining, we typically put [wet floor signs] out." Id. at 21.

MEDICAL RECORDS

Petitioner sought medical treatment on April 17, 2019, at AMITA Health in Hanover Park. At that time, Petitioner reported that she fell at work on April 14, 2019 while she was going to clock in for work. She reported that she fell on the tile floor and landed on her knees. Petitioner reported that she was experiencing back spasms, right thigh spasms, and "rug burns" on her bilateral knees. A physical examination was performed, which showed tenderness to the lumbar spine and a negative straight leg test. An x-ray of Petitioner's lumbar spine was also taken, which indicated mild degenerative joint disease. Petitioner was recommended to use pain medication as needed and was told to present to the Emergency Department if her symptoms were to worsen. Petitioner was also recommended to remain off of work for two days.

Following that visit, Petitioner attempted to return to work on April 20, 2019. Ultimately Petitioner went to the Emergency Department at St. Alexius on April 22, 2019. At that time, Petitioner reported significant lower back pain that radiated into her left leg. A CT of her lumbar spine revealed disc bulging extending out left laterally at L3-4 and circumferentially at L4-5. This resulted in moderate stenosis at the L5-S1 level. It was recommended that Petitioner continue taking pain medication and follow up with an orthopedic surgeon for her lower back. The Emergency Department physician also recommended that Petitioner remain off of work until reevaluation.

Petitioner sought treatment with Dr. Shoeb Mohiuddin at Illinois Orthopedic Network on May 7, 2019. At that time, Petitioner reported that she was walking into work in April when it was snowing and slipped and fell forward onto her knees. She reported that her knee pain had improved over the past three weeks, but that she continues to have lower back pain that severely limited her ambulation and range of motion. A physical examination was performed, which showed tenderness through her lumbar spine with 5 degrees of lumbar extension and 25 degrees of lumbar flexion. Dr. Mohiuddin recommended that she continue taking her pain medication and obtain an MRI of her lumbar spine. He also recommended that Petitioner begin a course of physical therapy. Dr. Mohiuddin recommended that Petitioner remain off of work at that time.

Petitioner underwent the lumbar spine MRI at Premium Healthcare Services on May 20, 2019. The radiologist found a 3mm diffuse disc protrusion with effacement of the thecal sac at L2-3 and a 3mm diffuse disc protrusion with annular tear effacing the thecal sac with left neuroforaminal narrowing at L3-4. At L4-5, the radiologist noted a 4-5mm diffuse disc protrusion with annular tear effacing the thecal sac with disc material and facet hypertrophy causing bilateral neuroforaminal narrowing that effaces the left and right L4 exiting nerve roots. At l5-S1, the radiologist noted a 3-4 mm disc protrusion with left preponderance effacing the thecal thecal sac with facet hypertrophy causing narrowing of the left neural foramen that effaces the left L5 exiting nerve root.

Petitioner next followed up with Dr. Krishna Chunduri, a board-certified pain physician, on May 29, 2019. At that time, Petitioner indicated that she was continuing to have lower back pain, despite having recently undergone a course of physical therapy. Dr. Chunduri reviewed Petitioner's lumbar spine MRI and found a 3mm disk protrusion with mild left foraminal narrowing at L3-4, a 4-5 mm disk protrusion with facet hypertrophy resulting in bilateral foraminal narrowing at L4-5, and 3-4mm disk protrusion with left-sided foraminal narrowing at L5-S1. At that time, Dr. Chunduri recommended that Petitioner use lidocaine patches and continue taking her pain medication and muscle relaxants. Dr. Chunduri recommended that Petitioner remain off of work at that time.

Petitioner followed up with Dr. Chunduri on June 12, 2019. At that time, Petitioner reported ongoing lower back pain. On physical examination, Petitioner elicited lumbar flexion of 30 degrees and zero degrees of lumbar extension. Petitioner also elicited lumbar tenderness to palpation, which was greatest on the left from L4-S1. At that time, Dr. Chunduri opined that her pain likely stemmed from her facet joints. Therefore, he recommended a left L4-5 and L5-S1 diagnostic medial branch block. He also recommended that she continue with physical therapy and continue taking her pain medications.

On July 29, 2019, Petitioner presented to St. Alexius Medical Center Emergency Department due to her ongoing back pain. A physical examination was performed at that time, which revealed tenderness and spasm along the left rhomboid muscle structure. Petitioner was subsequently diagnosed with a thoracic myofascial strain. Petitioner was provided with pain medication and was recommended to follow up with an orthopedic surgeon.

Petitioner underwent the left L4-5 and L5-S1 diagnostic medial branch blocks on August 22, 2019 with Dr. Chunduri. There were no complications to that procedure.

Petitioner's lower back pain persisted, so she followed up with Dr. Chunduri on August 29, 2019. Petitioner reported that she did not have any pain relief from the medial branch blocks. Due to Petitioner's response to the medial branch blocks, Dr. Chunduri opined that her pain was likely not due to her facet joints, but rather her disc herniations indicated on the lumbar spine MRI. As such, he recommended that Petitioner undergo an epidural steroid injection. Dr. Chunduri noted that Petitioner should see an orthopedic surgeon if the injection proved unsuccessful.

The lumbar epidural steroid injection was performed on September 5, 2019 by Dr. Chunduri at Illinois Orthopedic Network. There were no complications to that procedure.

Petitioner followed up with Dr. Chunduri on September 23, 2019. Petitioner reported that she did not have any pain relief from the lumbar epidural injection. Therefore, Dr. Chunduri opined that Petitioner was likely experiencing discogenic pain, and that she should follow up with an orthopedic surgeon.

Petitioner saw Dr. Cary Templin, an orthopedic spine surgeon, on October 4, 2019 at Illinois Orthopedic Network. At that time, she reported that she was at work when she stepped off a carpet onto a wet floor and subsequently slipped and fell. Dr. Templin performed a physical examination, which revealed lumbar flexion of 50 degrees and lumbar extension of 5 degrees. Dr. Templin also reviewed Petitioner's lumbar spine MRI and noted disc protrusion at L3-4 and L4-5 causing some foraminal and extraforaminal stenosis. Dr. Templin specifically noted that there was evidence of instability within the facet joints of L5-S1 with evidence of effusion. As a result, he recommended that she undergo a course of standing x-rays in flexion and extension centered at L5-S1 in order to determine whether or not instability is present. He also recommended that she undergo a L5-S1 bilateral facet injection to see if that provides any temporary relief. Petitioner remained off of work at that time pursuant to Dr. Templin's recommendation.

Petitioner followed up with Dr. Templin on November 15, 2019. At that time, Dr. Templin had an opportunity to review the lateral, flexion, and extension x-rays of Petitioner's lumbar spine. He opined that the x-rays clearly showed spondylolisthesis at L5-S1 that is at least 4 mm on the lateral view. As a result, he recommended that Petitioner undergo a facet injection to confirm the cause of her pain.

Petitioner consistently followed up with Dr. Chunduri from December 20, 2019 through present for pain management. During that time, Petitioner continued to complain of severe lower

back pain and had unchanged findings on physical examination. Currently, Petitioner is currently awaiting authorization for the bilateral L5-S1 facet injection.

CONCLUSIONS OF LAW

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

Under the Illinois Workers' Compensation Act ("Act"), in order for a claimant to be entitled to workers' compensation benefits, the injury must "aris[e] out of" and occur "in the course of" the claimant's employment. 820 ILCS 305/1(d) (West 2014). Case law interpreting the Act makes it clear that both elements must be present at the time of the accidental injury in order to justify compensation. *Orsini*, 117 Ill. 2d at 44-45; *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483, 546 N.E.2d 603, 137 Ill. Dec. 658 (1989); *Free King Oil Co. v. Industrial Comm'n*, 62 Ill. 2d 293, 294, 342 N.E.2d 1 (1976). Therefore, in order to obtain compensation under the Act, a claimant bears the burden of proving by a preponderance of the evidence two elements: (1) that the injury occurred in the course of claimant's employment; and (2) that the injury arose out of claimant's employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003).

"In The Course Of"

"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. 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).

Under certain circumstances, accidental injuries sustained on the employer's premises within a *reasonable time* before or after work arise "in the course of" employment. *Archer Daniels Midland Co. v. Industrial Com.*, 91 Ill. 2d 210, 215 (1982). Further, where the claimant's injury was sustained as a result of the condition of the employer's premises, this court has consistently approved an award of compensation. *Archer Daniels*, 91 Ill. 2d at 216; *see also Hiram Walker & Sons, Inc. v. Industrial Comm'n.*, 41 Ill. 2d 429 (1968); *Carr v. Industrial Comm'n.*, 26 Ill. 2d 347 (1962). If the employer allows both its employees and members of the general public to use the [entrance] and contemplates that its employees will enter and exit the building through this [entrance] and use the accompanying walkway, a hazardous condition on the walkway that causes a claimant's injury is compensable. *Archer Daniels Midland*, 91 Ill. 2d at 216; *Mores-Harvey*, 345 Ill. App. 3d at 1040; *Suter*, 2013 IL App (4th) 130049WC, ¶ 40. *The hazardous condition of the employer's premises renders the risk of injury incidental to employment without having to prove that she was exposed to the risk of that hazard to a greater extent than are members of the general public. Archer Daniels Midland*, 91 Ill. 2d at 216; *Mores-Harvey*, 345 Ill. App. 3d at 1040; *Suter*, 2013 IL App (4th) 130049WC, ¶ 40. (Emphasis added).

Here, Petitioner testified that she arrived at work only four minutes before she was scheduled to work. Certainly, being four minutes early for work clearly falls within the holding of a "reasonable time" set forth in *Archer Daniels*. Further, Petitioner credibly and persuasively testified that she slipped on melted snow/water that had accumulated from the shopping carts that were brought in from outside and parked on the tile floor. The Arbitrator finds it significant that Ms. Chow, Petitioner's coworker, initially stated in an email to Petitioner that "[i]t had snowed that day, so the tile was *definitely* wet," but then changed her statement in an email to a claims examiner for Respondent's insurance company and said that "[i]t had snowed that day, so the tile was *probably* wet, but I can't recall for sure." The Arbitrator finds that Ms. Chow's statement approximately two-and-a-half months after the April 14, 2019 injury was more reliable and credible than her statement to the claims examiner approximately eight months after the April 14, 2019 date of injury. Accordingly, the Arbitrator finds that Petitioner's injury occurred in the course of her employment with Respondent.

"Arising Out Of"

To satisfy the "arising out of" requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro*, 207 Ill. 2d at 203 (citing *Caterpillar Tractor*, 129 Ill. 2d at 58); *see also Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002) ("An injury 'arises out of' one's employment if it originates from a risk connected with, or incidental to, the employment, involving a causal connection between the employment and the accidental injury."). A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties. *Orsini*, 117 Ill. 2d at 45. To determine whether a claimant's injury arose out of his or her employment, it is necessary to categorize the risks to which the claimant was exposed. *Dukich v. Illinois Workers' Compensation Comm'n*, 2017 IL App (2d) 160351WC, ¶ 31.

Generally, all risks to which a claimant may be exposed fall within one of three categories. *See Steak 'n Shake v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3d) 150500WC, ¶ 34. The three categories of risks recognized by the case law are: "(1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics." *First Cash Financial Services*, 367 Ill. App. 3d at 105. The first category of risks involves risks that are distinctly associated with employment. Examples of employment-related risks include "tripping on a defect at the employer's premises, falling on uneven or slippery ground at the work site, or performing some work-related task which contributes to the risk of falling. A risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing: (1) acts he or she was instructed to perform by the employer; (2) acts that he or she had a common-law or statutory duty to perform; or (3) *acts that the employee might reasonably be expected to perform incident to his or her assigned duties. Caterpillar Tractor*, 129 Ill. 2d at 58; *see also McAllister v. Ill. Workers' Comp. Comm'n*, 2020 IL 124848, ¶¶ 36-40.

The Arbitrator finds that Petitioner's lower back injury arose out of an employment-related risk because the evidence establishes that at the time of the injury on April 14, 2019, Petitioner's injury was caused by a risk distinctly associated with her employment as a cashier

for Respondent. The act of walking into work using the only entrance that Respondent's employees use to report to work and then slipping on accumulated melted snow/water on the tile floor in the general path that she was required to take to punch in for work, were risks incident to her employment because these acts are those that the Respondent might reasonably expect Petitioner to perform to report to work as a cashier in the winter.

Further, the melted snow from the shopping carts constituted a hazardous condition. *See also*, *University of Illinois v. Industrial Commission,* 365 Ill.App.3d 906 (1st Dist. 2006), finding that a thin metal strip constituted a hazardous condition; *see also Mores-Harvey*, 345 Ill. App. 3d at 1040, finding that ice accumulation in a parking lot constituted a hazardous condition; *Litchfield Healthcare Center v. Industrial Commission*, 349 Ill.App.3d 486 (5th Dist. 2004), finding that a one and one-quarter inch walkway deviation constituted a hazardous condition. In case[s] of unexplained falls it is the province of the Commission to draw inferences from the facts. *Sears, Roebuck Co. v. Industrial Com.* (1980), 78 Ill.2d 231.

This contention that the melted snow from the shopping carts constitutes a hazardous condition is further evidenced by the fact that both Petitioner and Ms. Chow testified that a wet floor sign was put out following her fall. It is further evidenced by Petitioner's credible testimony indicating that it was heavily snowing that morning and the shopping carts were brought inside the store throughout the morning and onto the tile from the parking lot. Ms. Chow specifically and credibly testified regarding Respondent's wet floor sign protocol and described it as "whenever team members see that there's . . . *hazardous* days when it's snowing or raining, we typically put [wet floor signs] out." (Emphasis added).

Irrespective of the clear hazardous conditions, Illinois courts have held that slip and falls are compensable when the accident occurs on Respondent's premises and are not idiopathic. See *Chicago Tribune Company v. Industrial Commission*, 136 Ill. App.3d 260 (1985) (noting that "from the evidence the Commission could have drawn the inference that there might have been ice and water on the floor, although this was denied by the security officer."). Id. at 263. Accordingly, even if Petitioner could not precisely delineate what she slipped on or the source of the hazard condition, the holding in *Chicago Tribune* represents that the Arbitrator can draw inferences regarding the substance of the hazardous condition and the source of the hazardous condition. Moreover, the evidence shows that the unsafe condition was not brought forth by Petitioner herself. Petitioner testified that her boots had tread and that they were dry after she stepped off the carpet. She testified that she wiped her feet on the carpet before stepping onto the tile. This testimony was unrebutted. Based on the above, the Arbitrator finds that Petitioner's April 14, 2019, injury arose out of Petitioner's employment with Respondent.

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

The Arbitrator finds that the Petitioner's current condition of ill-being relative to her lumbar spine is causally connected to her work-related accident on April 14, 2019. This is based on the credible testimony of the Petitioner, as well as the credible and persuasive opinions of Dr. Templin and Dr. Chunduri. This is also based on the correlation between Petitioner's subjective complaints, physical examination findings, and diagnostic findings. This is further substantiated by the Petitioner's unrebutted testimony indicating that she never had any prior lower back pain

prior to the accident at issue and that she experienced severe and persistent back pain following the accident at issue.

Dr. Chunduri and Dr. Mohiuddin both credibly state that Petitioner sustained a work-related injury on April 14, 2019. Furthermore, Petitioner's symptoms, the physical examination findings, and the radiological findings correlate with the diagnosis of L5-S1 spondylolisthesis with facet arthropathy. First, Petitioner complained of severe lower back pain since the date of the accident. Additionally, none of the injections performed at the other spinal levels provided Petitioner any pain relief. Secondly, Petitioner consistently elicited a severely limited range of motion to her lumbar spine, along with tenderness to palpation to the lumbar spine. Thirdly, Dr. Templin specifically noted that there was evidence of instability within the facet joints of L5-S1 with evidence of effusion on Petitioner's May 20, 2019 lumbar spine MRI. This diagnosis was confirmed by the lateral, flexion, and extension x-rays ordered by Dr. Templin.

The Arbitrator notes and emphasizes that Petitioner testified that she never had any prior back issues prior to the accident in questions. The Arbitrator further emphasizes that Petitioner persistently reported severe pain relative to her lower back from the date of the accident up to the date of trial. There was no evidence provided at trial to indicate that Petitioner was symptomatic prior to the accident at issue or that she suffered any intervening injuries relative to her lower back. The Arbitrator further notes and emphasizes that Respondent has not presented any medical testimony or medical opinions regarding the causation of Petitioner's injury.

As such, the Arbitrator finds that the Petitioner's current condition of ill-being to her lumbar spine is causally connected to the work-related accident on April 14, 2019.

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 of accident and causal connection Respondent is required to pay the below listed (and listed on the Request For Hearing Form) reasonable and necessary medical bills pursuant to section 8(a) and section 8.2 of the Workers' Compensation Act:

- Total Rehab
- Premium Healthcare Solutions
- Premium Healthcare Services
- Metro Anesthesia Consultants
- G&U Orthopedic
- AMITA Health
- IL Orthopedic Network
- Midwest Specialty Pharmacy
- AMITA St. Alexius Medical

K. Is Petitioner entitled to any prospective medical care?

Based on the above findings of accident and causal connection, Respondent is required to authorize and pay for prospective care in the form of bilateral L5-S1 injections as recommended by Dr. Templin and reasonable follow-up care recommended by Dr. Templin, Dr. Chunduri, and Dr. Mohiuddin. The Arbitrator notes and emphasizes that Respondent has not presented any utilization reviews or medical opinions regarding the reasonableness and necessity of Petitioner's medical treatment.

L. What temporary (temporary total disability) benefits are in dispute?

The Arbitrator has found in Petitioner's favor on the issues of accident and causal connection. The Arbitrator finds that Petitioner is entitled to TTD benefits from April 17, 2019 through April 18, 2019; and from April 22, 2019 through July 28, 2020, the date of the arbitration hearing. Petitioner was taken off work pursuant to her doctors' recommendations throughout her entire course of treatment relating to her April 14, 2019 work accident. The Arbitrator finds that restrictions set forth by Petitioner's treating physicians were credible and accurate. Additionally, Petitioner was never released to light duty status relative to her cervical spine condition.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC010871
Case Name	DENNIS, DIANA v. NORTHERN ILLINOIS UNIVERSITY
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0240
Number of Pages of Decision	17
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Stephanie Seibold
Respondent Attorney	Drew Dierkes

DATE FILED: 5/13/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DIANA DENNIS,

Petitioner,

vs. NO: 18 WC 10871

NORTHERN ILLINOIS UNIVERSITY,

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, causation, occupational disease, medical expenses, TTD, and PPD 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 Arbitrator found that Petitioner did not sustain her burden of proving that she sustained a compensable accident through her exposure to mold, failed to prove that such exposure resulted in her alleged occupational disease of Chronic Inflammatory Response Syndrome, and denied compensation. During the arbitration hearing, the Arbitrator rejected several of Petitioner's exhibits, including lab tests concerning the presence of mold in Petitioner's residence/work place, statements of co-workers, and an environmental report issued after an inspection by a third party. The Arbitrator found these exhibits constituted inadmissible hearsay and/or did not have proper foundation. We agree with the Arbitrator that the statements of co-workers were inadmissible hearsay and the authors were not called to testify to either identify or authenticate the statements. Likewise, the environmental study was hearsay and the author was not called to identify or authenticate that report. Therefore, these pieces of evidence were inadmissible and properly rejected by the Arbitrator.

On the other hand, the Commission finds that the lab tests should have been admitted into evidence because they were relied upon by Petitioner's treating doctor to arrive at his diagnosis of Chronic Inflammatory Response Syndrome. Nevertheless, the Arbitrator allowed doctors to testify about the tests in terms of how it affected their conclusions about Petitioner's alleged medical condition and possible causes for that condition. Effectively, the contents of the lab tests were presented through the testimony and treating records of Petitioner's treating doctor. Therefore, the lab tests themselves would be given little weight, the admission of the lab tests would not have changed the outcome of the arbitration, and any error in rejecting the exhibits was harmless. With that caveat, the Decision of the Arbitrator is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated March 25, 2020 is hereby changed as noted above and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Commission finds Petitioner did not sustain her burden of proving an accident that arose out of and in the course of her employment.

IT IS FURTHER ORDERED BY THE COMMISSION that the Commission finds Petitioner did not sustain her burden of proving that her alleged condition of ill-being was causally related to a compensable accident.

IT IS FURTHER ORDERED BY THE COMMISSION that compensation is denied.

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

MAY 13, 2021

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

/s/*Barbara N. Flores*
Barbara N. Flores

DLS/dw
O-3/18/21
46

/s/*Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0240

DENNIS, DIANA
Employee/Petitioner

Case# **18WC010871**

NORTHERN ILLINOIS UNIVERSITY
Employer/Respondent

On 3/25/2020, 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 0.80% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2489 BLACK & JONES ATTY AT LAW
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ROCKFORD, IL 61101

6212 ASSISTANT ATTORNEY GENERAL
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0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

MAR 25 2020

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

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPAGE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Diana Dennis
Employee/Petitioner

v.

Northern Illinois University
Employer/Respondent

Case # **18** WC 10871

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 **December 9, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

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

On this date, Petitioner ***did 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.

ORDER

The Arbitrator finds that Petitioner did not sustain an accident that arose out of and in the course of employment. The Arbitrator further finds that Petitioner's condition of ill being is not related to an accident in the course of her employment. As such, no benefits are awarded.

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

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

Signature of Arbitrator

3/24/20
Date

MAR 25 2020

Procedural History

This matter was tried on December 9, 2019. Petitioner asserts that she was exposed to mold toxins exacerbating her underline Chronic Inflammatory Response Syndrome (CIRS) condition. The issues in dispute are: (1) whether Petitioner sustained an accidental injury or was last exposed to an occupational disease that arouse out of and in the course of employment; (2) whether Petitioner's current condition of ill-being is causally connected to her injury or exposure; (3) whether Respondent is liable for unpaid medical bills; (6) whether Petitioner is entitled to TTD and TPD benefits; and the nature and extent of the injury. (Arb. Ex. #1).

Findings of Fact

A. Testimony of Diana Dennis

Petitioner Diana Dennis (hereafter referred to as "Petitioner") testified that on March 5, 2018 she was working as a Conference Coordinator for Northern Illinois University (hereafter referred to as "Respondent") at the Lorado Taft Campus in Oregon, Illinois. Petitioner testified that she worked for Respondent for 11 years. Petitioner testified she required to live on campus and had done so for 10 years. The Lorado Taft Campus is located in a rural, wooded area. Petitioner testified her job duties consisted of booking and hosting conference events and, on occasion, she would perform campus security and she would also have to be on-call which required her to remain in her residence or office.

Petitioner testified that she observed water damage and mold in the building she lived. Petitioner testified she originally noticed it in the building entry way and her bedroom ceiling. Petitioner testified that it looked like "splotchy black patches". Petitioner testified that she believed it was mold because it became worse over time. Petitioner testified the air conditioning/heating unit smelled when it was used. Petitioner testified Respondent cleaned her residence but not the air conditioning/heating unit.

Petitioner testified she worked in other buildings with water damage. Petitioner testified that there was water damage in the main office, where she worked, and in two meeting rooms and the dining room. Petitioner testified it smelt musty.

Petitioner testified in June 2014, she presented to the University of Wisconsin complaining of severe fatigue, swelling, numbness in arm, paralysis, migraines, flushing of chest, inflammation, weight gain, and high blood pressure. Petitioner also sought treatment at the Mayo Clinic for the same symptoms. Over 10 days, Petitioner saw four doctors at the Mayo Clinic who had no answers

for her symptoms. Petitioner saw multiple endocrinologists and was, at one point, diagnosed with pheochromocytoma. Petitioner saw neurologists and infectious disease doctors, but her symptoms became more severe.

Petitioner testified she also went to the Rocky Mountain Cancer Center in Colorado and had surgery on her left adrenal gland. Petitioner testified she remained in Colorado for approximately three weeks following the surgery. Petitioner testified her symptoms improved but within three months after returning to Illinois her symptoms returned.

Petitioner testified that she went to see Dr. Whitcomb, an internal/family medicine doctor, who initially diagnosed Cushing Disease and referred her to Dr. Findling. Petitioner testified Dr. Findling believed she had Cushing Disease, but he could not confirm it. Dr. Findling referred Petitioner to a neurologist.

Petitioner testified that she returned to Dr. Whitcomb on March 5, 2018. Petitioner testified that she discussed the possibility of mold exposure. Petitioner testified prior to returning to Dr. Whitcomb she saw a holistic doctor who told her that she had metal and mold in her blood. Petitioner testified that Dr. Whitcomb had her collect dust samples from her home and mail the samples to a lab for testing. Petitioner testified Dr. Whitcomb told her the sample results were the high and he recommended moving out of the residence and he issued work restriction of not being in an environment with mold or water damage.

Petitioner testified that she took the restrictions to Respondent and she was relocated to a different building on campus. Petitioner testified she moved off campus on June 24, 2018 taking a medical leave of absence. Petitioner testified she had no communication with anyone from Respondent after moving off campus. Petitioner testified she resigned in April 2019.

Petitioner testified that she was diagnosed with a Chronic Immune Disorder that made her hyper-sensitive to mold exposure and prone to relapses. Petitioner testified she would get better for a few days when off campus, but the symptoms would reappear after returning to the campus. Petitioner testified she noticed symptoms in 2008 when first moving onto campus but the symptoms did not impact her until 2014. Petitioner testified to being diagnosed with hypoglycemia which symptoms included blood sugar drops, sweaty palms, and shaky hands. Petitioner testified she had those symptoms from 2008-2010, but those symptoms resolved, and she hasn't taken medication for hypoglycemia for at least 10 years.

Petitioner testified she started working for UPS after leaving employment with Respondent. Petitioner testified she worked an overnight shift from 10:00 p.m. until 4:00 a.m. and earned $13/hour. Petitioner testified she stopped working for UPS on November 23, 2019. Petitioner testified she could perform any job duty when feeling good, but she needs to avoid environments with water damage.

B. Petitioner's Medical Treatment

On June 4, 2014, Petitioner presented to the emergency room at UW Health. (PX 1). Petitioner reported a history of hypertension and that she had woke up with a migraine headache and had "waves of crying." *Id.* Petitioner's blood pressure was 179/115 and her blood glucose was 60. *Id.* Patient was asymptomatic upon evaluation and discharged. *Id.*

Beginning June 20, 2014, Petitioner was evaluated at the Mayo Clinic by the general internal medicine, endocrinology, women's health, and neurology departments. (PX 2). Petitioner reported a history of migraines in her early twenties. *Id.* The Arbitrator notes Petitioner's birthdate of March 26, 1974, which would place the onset of migraines in the mid-to-late 1990s. Petitioner reported developing low blood sugars at the age of 27. *Id.* The Arbitrator notes that this would be approximately 2001. In 2001, Petitioner reported episodes of weakness, shakiness, sweating, feeling clammy, light headedness and feeling as though she would pass out. *Id.* In 2003, Petitioner reported two episodes of losing consciousness, both after having alcohol. *Id.* Petitioner presented to the Mayo Clinic with complaints of numbness, flushing, sweating, bloating, high blood pressure spikes, irregular menstrual cycles, fatigue, headaches/migraines, and anxiety. *Id.* Multiple tests were conducted, but all tests were normal. *Id.* Petitioner was instructed to follow up with her primary care provider for management of her symptoms. *Id.*

On March 4, 2015, Petitioner saw Lori Seaborne, PA of UW Health Breast Center after a referral by Dr. Robert Gellar regarding a left axillary mass. (PX 1). Petitioner noted a complex history of hypoglycemia, weight gain, hypertension, flushing, numbness and paralysis of the extremities. *Id.* Petitioner reported first having symptoms up to 15 years ago. *Id.* A mammogram was taken which was normal. *Id.*

Petitioner was admitted to FHN Memorial Hospital on April 6, 2015 with flushing, shaking, and extreme hypertension. (PX 3). Dr. Geller believed Petitioner had a right endocrine tumor and recommended transferring her to a hospital with an endocrinologist. *Id.* Petitioner was transferred to UW Hospital. (PX 1). Petitioner reported that the episodes had been occurring for

the last ten years. *Id.* The tumor detection returned a normal study without evidence for somatostatin receptor positive neuroendocrine tumor. *Id.*

On April 15, 2015, Petitioner presented to Dr. Joseph Dillon, an endocrinologist at University of Iowa Hospital. (PX 4). Petitioner reported having no medical complaints until about 15 years ago when she developed hypoglycemia and abdominal bloating. *Id.* Petitioner noted it had accelerated over the last few years and dated it to March 29, 2014 when she drank some alcohol and woke up feeling like she had been beaten with a baseball bat. *Id.* Petitioner also reported having cats and being allergic to cats. *Id.* Petitioner noted having an anaphylactic type reaction with cats, but she was unwilling to give up her cats. *Id.* An MRI of the brain was found to be unremarkable. *Id.* Tumor imaging noted a focal uptake in the left adrenal gland is suspicious for an adrenal lesion, such as pheochromocytoma. *Id.*

On June 1, 2015, Petitioner saw Dr. Rup Sanju, a neurologist at University of Iowa Hospital for seizure like episodes. *Id.* Dr. Sanju recommended inpatient video EEG monitoring. *Id.* On June 4, 2015, Petitioner presented to the emergency room at University of Iowa Hospital for dizziness and swelling. *Id.* Chest x-rays were normal and she was discharged. *Id.* An MRI of the abdomen was taken on June 9, 2015 which showed normal adrenals. *Id.* On June 10, 2015, Petitioner returned to Dr. Dillon who diagnosed dyspnea and swelling. *Id.* Dr. Dillon recommended Petitioner follow up after testing, however she did not return to Dr. Dillon. *Id.*

On November 18, 2015, Petitioner saw Dr. Eric Liu of Rocky Mountain Cancer Center with complaints of multiple endocrine symptoms. (PX 5). Dr. Liu diagnosed Petitioner with diffuse endocrine carcinoid syndrome. *Id.* Adrenal sampling was performed which showed the left adrenal ten times more than the right. *Id.* Petitioner had the left adrenal removed in January 2016. *Id.* Petitioner followed up with Dr. Liu on January 26, 2016 and reported that she was feeling pretty well. *Id.*

On May 9, 2016, Petitioner presented to Dr. Anthony Rogerson of Monroe Clinic for consideration of head and neck symptoms. (PX 7). Petitioner noted problems with tenderness and a lump in her neck as well as ear and eye drainage. *Id.* The physical exam showed no finding in the head or neck. *Id.*

On October 4, 2016, Petitioner presented to Dr. John Whitcomb of Brookfield Longevity and Health. (PX 8). Petitioner reported her symptoms returned two months after the surgery. *Id.*

Dr. Whitcomb performed no physical exam. *Id.* Dr. Whitcomb referred Petitioner to Dr. James Findling. *Id.* The Arbitrator notes that Dr. Findling's records were not submitted into evidence.

Petitioner returned to Dr. Whitcomb on March 5, 2018 reporting that, she believed, her environment was causing her issues. *Id.* Dr. Whitcomb's noted no abnormalities in his objective findings. *Id.* Dr. Whitcomb recommended an environmental mold index ("ERMI") test. *Id.* Petitioner followed up with Dr. Whitcomb on April 24, 2018. *Id.* At that time, Dr. Whitcomb noted no abnormalities in his objective findings, but he noted that the lab results were positive for "17-2-52B (mold)." *Id.* Dr. Whitcomb diagnosed Petitioner with Systematic Inflammatory Response Syndrome. *Id.* On June 25, 2018, Dr. Whitcomb issued an off work note with restrictions of not being on the Lorado Taft Campus. (PX 11).

C. Testimony of Dr. John Whitcomb

Dr. Whitcomb is a physician practicing functional medicine. (PX 15, 4). Dr. Whitcomb is board certified by the American Board of Medical Specialties in Internal Medicine and Emergency Medicine. *Id.* at 5. Dr. Whitcomb is also board certified in Anti-Aging and Functional Medicine, which is not accepted by the American Board. *Id.*

Dr. Whitcomb testified that he completed Shoemaker's training program in inflammatory response syndrome. *Id.* Dr. Whitcomb testified that Dr. Shoemaker discovered and delineated the issues of Chronic Inflammatory Response Syndrome ("CIRS"). *Id.* at 6. Dr. Whitcomb testified that the training consists of reading all of Dr. Shoemaker's books, answering a questionnaire, an oral exam, and writing two papers. *Id.* at 9-10. Dr. Whitcomb testified that only about 75 doctors have completed the Shoemaker training program. *Id.* at 9. Dr. Whitcomb testified the Mayo Clinic says there is no such thing as CIRS. *Id.* at 11. Dr. Whitcomb also testified that CIRS is not widely accepted in the field of medicine. *Id.* at 97. Dr. Whitcomb testified that the accountability office states that the exact cause of CIRS is not delineated. *Id.* at 90. Dr. Whitcomb further testified that there is quite a bit of criticism about the diagnoses and treatment of CIRS as developed by Dr. Shoemaker. *Id.* at 101. Dr. Whitcomb testified that, he believes, CIRS will be accepted in the field of medicine within the next 10 years. *Id.*

Dr. Whitcomb testified that Dr. Shoemaker identified 25-35 subjective symptoms related to CIRS and if you have 11 of those symptoms there is a 90% chance that you have CIRS and if you have 15 of the symptoms there is a 95% chance that you have CIRS. *Id.* at 8. Dr. Whitcomb testified the 35-symptom list, created by Dr. Shoemaker, is a screening tool. Dr. Whitcomb

testified he did not use the symptom list to diagnose Petitioner but, he believes, Petitioner had many of the symptoms on the list. *Id.* at 49.

Dr. Whitcomb testified he first saw Petitioner on October 4, 2016. Dr. Whitcomb testified that Petitioner had a lot of subjective complaints that were "bizarre". *Id.* at 16-17. Dr. Whitcomb initially interpreted Petitioner's symptoms as adrenal disease and he referred Petitioner to Dr. James Findling. *Id.* at 19. Dr. Findling determined she did not have adrenal disease. *Id.* at 20. Dr. Whitcomb testified Petitioner returned to him on March 5, 2018 and, at that time, she had gotten a C4a test, on her own, which showed the highest levels he had ever seen. *Id.* at 22-23. Dr. Whitcomb testified the C4a test is one of the markers of the innate immune system firing off causing trouble spastically and one of the cardinal markers of how sick somebody is from mold. *Id.* at 22.

Dr. Whitcomb testified that Petitioner told him about the environment she was living in on campus and she showed him photographs of the campus. *Id.* at 24. Dr. Whitcomb advised Petitioner to do an ERMI test, developed by Dr. Shoemaker, which involved collecting dust bunnies and sending them to a lab. *Id.* at 26-29. The ERMI test is an environmental relative mold index from which you could extract a HERTSMI test. *Id* at 26. The HERTSI test is a refined ERMI test which identifies proteins from five molds which affect humans. HERTSM means Health Effects Roster of Toxin Microgens. Dr. Whitcomb testified the test is performed by taking a swiffer cloth and wiping it on ten places in the home. Dr. Whitcomb testified the first time you test, it will be high because the mold proteins had been accumulating for years. Dr. Whitcomb testified that you want to clean the house before taking the test, so you are getting the recent stuff and not the old stuff. *Id.* at 28. Dr. Whitcomb testified that Petitioner collected the samples for the ERMI test herself and sent them to the labs. *Id.* at 87. Dr. Whitcomb testified the ERMI and HERTSMI scores for Petitioner's home and the Taft campus were both extraordinarily high. *Id.* at 29.[1]

Dr. Whitcomb testified Dr. Shoemaker found that 25% of the population are modestly sensitive to breathing proteins. Dr. Whitcomb testified proteins are the handoffs to mold toxins. *Id.* at 40. Dr. Whitcomb testified CIRS is not caused by a single toxin, it's an immune response to a range of toxins. Dr. Whitcomb testified that it's an auto-immunological disease happening in

[1] The tests from Safestart Environmental and Labcorp, as contained in PX 20, 21, and 22, were found to be inadmissible at trial.

the context of a vulnerable immune system. *Id.* at 90. Dr. Whitcomb testified that CIRS is a big problem and its' a wonderful gift from nature in North America because of rain and snow which causes things get wet and damp. *Id.* at 63.

Dr. Whitcomb opined that Petitioner fell in the modestly sensitive category of CIRS. *Id.* at 42. Dr. Whitcomb opined the ERMI test score showed that Petitioner was exposed to an extremely water damaged building which was a very dangerous toxic building. *Id.* at 54. Dr. Whitcomb further opined that Petitioner's symptoms were related to the exposure of toxins. *Id.* at 58-59.

Dr. Whitcomb testified that Petitioner falls within that 25% of the population moderately sensitive to having CIRS. Dr. Whitcomb testified that the 25% of the population being affected was based on literature from Dr. Shoemaker, he but did not know of studies as to how the percentage was derived. *Id.* at 81-82.

Dr. Whitcomb opined that Petitioner's symptoms were caused by being inside the water damaged buildings. *Id.* at 91. Dr. Whitcomb opined that if Petitioner were to continue to live on the Taft campus, she would have ongoing symptoms. *Id.* at 53. Dr. Whitcomb also opined that her repeated exposure has made her more susceptible to re-exposure. *Id.* at 61.

D. Testimony of Dave Scharenberg

Dave Scharenberg testified that he has been employed by Respondent for 12 years. Mr. Scharenberg testified that, for the past four years, he has been the Associate Director of Environmental Health and Safety. Mr. Scharenberg's job duties include overseeing pest control and the Indoor Air Quality Program. Mr. Scharenberg testified that he is certified as an Indoor Environmentalist and he receives continuing education through webinars and other courses.

Mr. Scharenberg testified that he was notified of a potential issue with the Lorado Taft Campus in February 2018. Mr. Scharenberg visited the campus on February 7, 2018 for a preliminary visit. At the time, Mr. Scharenberg testified he did not notice any odor of mold, but the inspection revealed further investigation was warranted.

Mr. Scharenberg returned on February 26, 2018, after the apartment was vacant, and, at that time, he still did not detect an odor of mold. Mr. Scharenberg testified that previously suspect areas for potential damage were found to be dry with no evidence of leakage or condensation. Mr. Scharenberg testified the moisture meter did not find moisture, so he did not open the walls. Mr. Scharenberg noted potential mold growth above the upper shelf in a pantry, but no apparent visible mold growth was found anywhere else.

Mr. Scharenberg conducted a third visit on March 26, 2018. Mr. Scharenberg took several air quality measurements. Mr. Scharenberg testified all measurements were within the recommended limits of the ANSI/ASHRAE Standard. Mr. Scharenberg testified that he did not specifically test for mold, because mold is ubiquitous, especially in a wooded area like the Lorado Taft Campus.

Mr. Scharenberg recommended the apartment be professionally cleaned, filters on window air conditioning units should be replaced, roof and gutter damage repaired, and reinsulate the attic area. Mr. Scharenberg testified that all of his recommendations were completed.

Conclusion 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).

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

To recover benefits under the Act, a claimant bears the burden of proving by a preponderance of the evidence that his injury "arose out of" and "in the course of" his employment. 820 *ILCS* 305/1(d) (West 2014). Both elements must be present to justify compensation. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill.App.3d 102, 105, 853 N.E.2d. 799, 803 (2006).

The requirement that the injury "arise out" of the employment concerns the origin or cause of the claimant's injury. *Sisbro, Inc. v. Industrial Comm'n*, 2017 Ill. 2d. 193, 203. 797 N.E.2d 665, 672 (2003). The occurrence of an accident at the claimant's workplace does not automatically establish that the injury "arose out of" the claimant's employment. *Parro v. Industrial Comm'n*, 167 Ill. 2d 385, 393, 212 N.E.2d 882, 885 (1995). Rather, "[T]he "arising out of" component is primarily concerned with causal connection and is satisfied when the claimant has "shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury" *Sisbro*, 207 Ill. 2d at 203. Liability "cannot rest on imagination, speculation or conjecture, but must be based solely upon the facts contained in the record." *Caterpillar Tractor Co. v. Indus. Comm'n*, 129 Ill. 2d 52, 61, 541 N.E.2d 665, 668 (1989).

The Arbitrator finds that Petitioner failed to prove by the preponderance of the evidence that she suffered an accidental injury or was last exposed to an occupational disease that arose out of her employment. Dr. Whitcomb testified that Petitioner suffers from CIRS which is a condition not widely accepted in the field of medicine. Dr. Whitcomb testified that mold toxins, lime disease and 50 other things are all sources of these toxins, mold being the most common. (PX 15, pg. 40). Dr. Whitcomb testified that he relied upon the ERMI test results for determining the presence of mold. Petitioner took the samples, for the ERMI test, and submitted them to the lab. At trial, the lab reports were found to be inadmissible.

Petitioner testified she saw areas of discoloration and her residence and other parts of the campus smelled musty. The Arbitrator finds that Petitioner's testimony does not sufficiently support the presence of mold. The Arbitrator disregards Dr. Whitcomb's opinions regarding the presence of mold. The Arbitrator finds that Dr. Whitcomb's opinions were based upon test results found to be admissible. Despite the basis for the inadmissibility of the test results, the Arbitrator further finds the ERMI and/or HERTSM tests unreliable. Petitioner collected the samples. There was no testimony regarding the proper protocols for obtaining the samples. There was no evidence elicited regarding the number of samples taken, the location of the areas sampled, whether the sample locations were proper places to secure samples, whether the protocols for obtaining samples were followed and the chain of custody for securing the samples. The Arbitrator notes that Petitioner did not testify she took the samples near the locations she saw discoloration. Petitioner did testify to the number of samples taken from which building or whether the areas of the sample were cleaned prior to taking the sample. Dr. Whitcomb testified that ten samples should be taken, and the samples should be taken after cleaning the area because you want to make sure you are getting recent samples. (PX 15, pg. 28). Petitioner did not testify that she cleaned the areas prior to taking the samples. As such, the Arbitrator finds the opinions of Dr. Whitcomb regarding the existence of mold and the levels Petitioner was exposed to be based upon surmise or conjecture. It is axiomatic that the weight accorded an expert opinion is measured by the facts supporting it and the reasons given for it; and expert opinion cannot be based on guess, surmise or conjecture. *Wilfert v. Retirement Board*, 318 Ill.App.3d 507, 514-15 (First Dist. 2000).

Dave Scharenberg conducted an environmental analysis and found that all measurements were within the recommended limits of ANSI/ASHRAE Standard. (RX 2). Suspected areas of

leakage were checked with a moisture meter, which showed they were dry with no evidence of leakage or condensation. *Id.*

With respect to issue "F", whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

When a worker's physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment. *Sisbro v. Indust. Com'n*, 207 Ill.2d 193, 205 (2003). Workers need only prove that some act or phase of employment was a causative factor in her ensuing injuries. *Land and Lakes Co. v. Indust. Com'n*, 359 Ill.App.3d 582, 592 (2005). The work-related task need not even be the sole or principal causative factor of the injury, as long the work is a causative factor. See *Sisbro*, 207 Ill.2d at 205.

The Arbitrator finds that Petitioner failed to prove by the preponderance of the evidence that her current condition of ill-being is causally related to injury.

The Arbitrator notes that Petitioner's medical records show that she was experiencing symptoms prior to working for Respondent. Petitioner started living on campus in 2008 but she reported having migraines in her early twenties. (PX 2). Petitioner also reported episodes of weakness, shakiness, sweating, feeling clammy, light headedness and feeling as though she would pass out in 2003. *Id.* Petitioner noted experiencing anaphylactic type reaction to cats. (PX 4). The Arbitrator notes that Dr. Whitcomb testified that CIRS is not a widely accepted diagnosis within the medical field and that there is quite a bit of criticism about the diagnoses and treatment of CIRS. Dr. Whitcomb also testified that the accountability office states the exact cause of CIRS is not delineated. Based upon CIRS not being a widely accepted diagnosis within the medical field and the Arbitrator's prior finding regarding Dr. Whitcomb's diagnosis of mold exposure and the level of exposure being based upon conjecture and speculation, the Arbitrator does not find the opinions of Dr. Whitcomb to be reliable.

The Arbitrator finds that the remaining issues are moot and need not be addressed based upon the above stated findings.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC008897
Case Name	CONNER, BILLIE v. WALMART SUPERCENTER
Consolidated Cases	
Proceeding Type	Remand – Petition for Review under 19b
Decision Type	Commission Decision
Commission Decision Number	21IWCC0241
Number of Pages of Decision	20
Decision Issued By	Barbara Flores, Commissioner DISSENT Included

Petitioner Attorney	Brad Badgley
Respondent Attorney	BRANDY JOHNSON

DATE FILED: 5/13/2021

/s/ Barbara Flores, 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

Billie Conner,

Petitioner,

vs. NO: 19 WC 8897

Walmart Supercenter,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under section 19(b) of the Act having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary disability, medical expenses, prospective medical care, and 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, with the changes made below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327 (1980).

While affirming and adopting the Decision of the Arbitrator, the Commission writes additionally on the issue of temporary total disability credit and, specifically, whether any overpayment credit is due to the Respondent or whether Petitioner has been underpaid. At the time of the arbitration, the parties stipulated to Petitioner's earnings, average weekly wage, and the amount of TTD benefits paid by Respondent to Petitioner in the amount of $16,280.19. However, the Arbitrator issued a decision indicating that "[b]y agreement of counsel, and with the approval of the Arbitrator, ruling on these issues [of alleged overpayment of temporary total disability benefits and underpayment of TAD benefits] are preserved for hearing at a later date." On review, the parties confirm this agreement that the determination whether the credited TTD amount is an overpayment, and whether Petitioner's earnings via temporary alternative duty amounts to an underpayment of TTD, will be determined at a hearing on remand.

Thus, the Commission makes no ruling whether the stipulated TTD credit was an overpayment or whether the wages earned by Petitioner while working in temporary alternative duty might represent an underpayment as such determinations including any award of future benefits, if any, and the application of corresponding credits will be addressed at a future hearing on remand.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 3, 2020, is hereby affirmed and adopted, with the changes noted above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to credit in the amount of $16,280.19 for temporary total disability benefits paid.

IT IS FURTHER ORDERED BY THE COMMISSION that ruling on the alleged overpayment of temporary total disability benefits and alleged underpayment of temporary alternative duty benefits shall be preserved for determination at the appropriate future hearing.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 13, 2021

/s/*Barbara N. Flores*
Barbara N. Flores

o: 3/18/21
BNF/wde
45

/s/*Marc Parker*
Marc Parker

DISSENT

I respectfully dissent from the Decision of the majority. I would have found that Petitioner failed to meet her burden of proving entitlement to medical expenses, as well as prospective medical care, after June 17, 2019.

Dr. John Wood, Petitioner's treating doctor, opined that Petitioner had returned to her pre-accident baseline on June 17, 2019. At that time, Dr. Wood indicated that Petitioner's remaining pain was related to her preexisting degenerative condition. As such, I would have found that any treatment after June 17, 2019 was unrelated to Petitioner's work accident and instead related to the natural progression of her underlying preexisting medical conditions.

Moreover, Dr. Wood opined that patellofemoral surgery only presented a 50% chance of improving Petitioner's condition. After finding that Petitioner had returned to her baseline, Dr. Wood offered surgery in response to Petitioner's pain complaints, although he admitted that he was not certain a cartilage defect did in fact exist. Dr. Christopher Rothrock, Respondent's Section 12 examiner, also believed that any arthroscopic procedure had a 50% chance of providing no relief and a 50% chance of worsening Petitioner's condition. The right knee arthroscopic surgery was also not certified as medically necessary by Respondent's utilization review doctor, Dr. Peter Garcia. All the consulted doctors were essentially in agreement as to the low likelihood of success from the potential surgery.

For these reasons, I would have denied the prospective right knee surgery as well as Petitioner's medical expenses after June 17, 2019, at which point she had returned to baseline for her work-related injury.

DLS/met
46

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

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

21IWCC0241

CONNER, BILLIE
Employee/Petitioner

Case# **19WC008897**

WALMART STORES INC
Employer/Respondent

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

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

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

0375 SAM C MITCHELL & ASSOCIATES
BRAD BADGLEY
26 PUBLIC SQ
BELLEVILLE, IL 62220

4610 EARLY & MIRANDA PC
BRANDY L JOHNSON
1740 INNOVATION DR
CARBONDALE, IL 62903

ASTATE 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)

BILLIE CONNER
Employee/Petitioner

v.

WALMART STORES, INC.
Employer/Respondent

Case # 19 WC 008897

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 **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **June 11, 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. X Other **Alleged overpayment of temporary total disability benefits and underpayment of TAD benefits**

FINDINGS

On the date of accident, **2/23/19**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**21,696.00**; the average weekly wage was $**469.61**.

On the date of accident, Petitioner was **55** 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 $**N/A** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $ **N/A**

Respondent is entitled to a credit of $**6,186.38** under Section 8(j) of the Act.

ORDER

Respondent shall pay the reasonable and necessary medical services, pursuant to the medical fee schedule of $1,420.99 to Carbondale Memorial Hospital; $222.00 to SIH Family Medicine; $78.00 to Cape Radiology; $3,729.00 to Orthopaedic Institute of Southern Illinois/Dr. John Wood and $4,628.00 to NovaCare – Total: $10,077.99 as provided in Section 8(a) and Section 8.2 of the Act.

Respondent shall be given a credit of $6,186.38 for medical benefits which have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize and pay for prospective medical care and treatment, including but not limited to surgery, consisting of arthroscopic surgery as recommended by Dr. John B. Wood.

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

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

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

Edward Lee

Signature of Arbitrator, Edward Lee

7/30/20

Date

AUG 3 - 2020

FINDINGS OF FACTS

The above matter was originally arbitrated on December 17, 2019 before the Honorable Michael Nowak. At that time, proofs were closed and the Arbitrator gave the parties fourteen (14) days from the date of that hearing to file their respective proposed decisions. Unfortunately, following that hearing, Arbitrator Nowak fell ill. Said illness and complications therefrom resulted in his passing on June 5, 2020. Unfortunately, due his illness, he was unable to file a decision.

Petitioner was given the option of having the file forwarded to Chicago, with an Arbitrator assigned to issue a decision based on the record, or in the alternative, have the matter retried. Petitioner requested a new trial. It took place on Thursday, June 11, 2020 before Arbitrator Edward Lee. Petitioner and Respondent, at that time, resubmitted their exhibits, a transcript of the previous proceeding and brief testimony from Petitioner who confirmed ongoing problems with her right knee, absence of medical treatment in the interim, and her desire to proceed with the surgical procedure recommended by Dr. Wood. The Arbitrator's Findings of Facts and Conclusions of Law follows.

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment by the Respondent on February 23, 2019. According to the Application, Petitioner was injured during the course of her employment, sustaining an injury to her right knee (Arb. Ex. #2). This case was tried in a l9(b) proceeding and Petitioner sought an order for

payment of outstanding medical bills, as well as prospective medical treatment. The prospective medical treatment sought by Petitioner was a surgery consisting of arthroscopy to treat patellofemoral chondromalacia. Petitioner and Respondent stipulated that Petitioner sustained a work injury on February 23, 2019, but Respondent disputed liability on the basis of causal relationship. (Arb. Ex. #1).

Petitioner was employed by the Respondent for approximately two (2) years as a manager.

On February 23, 2019, she sustained an injury when she tripped over a mat, landing directly onto her right knee. Petitioner initially sought treatment at SIH Memorial Hospital of Carbondale Emergency Room. She provided a history of tripping and falling on a rug while at work at Wal-Mart, complaining of pain in the right knee. (Pet. Ex. #2, 0104)

A physical examination at that time reflected tenderness, swelling and ecchymosis. (Pet. Ex. #2, 0105).

She was then seen by her family practitioner, Alicia Markley, PA-C, on February 25, 2019. She was complaining of right knee pain. She stated she was walking at work when she tripped and fell on a rug. She stated that she fell forward and hit her right knee on the ground. She was also sore across the shoulders from trying to catch herself. She was seen in Carbondale ER, the same night. She was x-rayed and referred to an orthopaedic surgeon, Dr. John B. Wood. She previously had seen Dr. Wood for right knee pain associated with an incident at work on April 12, 2018. Ex. #3, 0124).

She remained under Dr. Wood's care between March 18, 2019 and August 1, 2019. Respondent had Petitioner examined by Dr. Christopher Rothrock, on July 29, 2019, pursuant to Section 12.

Respondent also submitted her claim for Utilization Review on September 4, 2019.

Petitioner confirmed at arbitration that she was off work from February 25 through March 24, 2019. She returned to work on a light duty basis between March 24 and July 5, 2019 at which time she was terminated for reasons unrelated to this claim.

Petitioner has not worked since that time. As of the date of arbitration, she indicated that she continued to complain of constant right knee pain which keeps her awake at night.

On August 1, 2019, Dr. John B. Wood discussed proceeding with an arthroscopic procedure which she wishes to undergo.

Dr. John B. Wood testified by evidence deposition on October l7, 2019. He is a board certified orthopaedic surgeon with the Southern Illinois Orthopaedic Group in Herrin, Illinois. He has been in practice for 25 years.

Petitioner was a patient of his originally between May 24, 2018 and February 6, 2019, associated with an accident at work injuring her right knee. The doctor diagnosed a patellar contusion which was treated conservatively with therapy, medication and injections. She was off work on light duty while treating.

The doctor's final office note of February 6, 2019 reflected that Petitioner had done well and was back at work full duty with no restrictions. She did have some occasional discomfort at night. He suggested that she probably would have some achy discomfort on a permanent basis with extended sitting, squatting or kneeling. He told her to return as needed. She was not symptom free, however, returned to her baseline. (Pet. Ex. #1, 0007 – 0009).

Following her return to work on February 23, 2019, she tripped and fell over a mat directly onto her right knee. On this occasion, she was under Dr. Wood's care from March 1, 2019 through August 1, 2019. She complained of immediate pain in the knee which she described as burning, aching and worse with physical activity. The doctor's physical examination identified patellofemoral tenderness and kneecap tenderness. An April 2, 2019 MRI suggested intrasubstance degeneration of the posterior horn of the medial meniscus, mild tendinopathy involving the patellar tendon, some subcutaneous edema anterior to the patella suggesting an impact injury, as well as a small cyst. The doctor believed there was no change from the previous MRI other than the subcutaneous edema which suggested a relatively recent injury. (Pet. Ex. 1, 0010 – 0011).

Petitioner was placed on light duty, underwent an injection and physical therapy at NovaCare and returned to work with restrictions. The doctor's diagnosis was a patellar contusion. As part of that diagnosis, the doctor believed Petitioner suffered from loose cartilage fragments floating around in the knee. Dr. Wood stated when there is an impact type injury, it causes blistering and peeling of the cartilage. (Pet. Ex. #1, 0016, 3308 – 0040). Because of her failure to respond to conservative treatment, he recommended an arthroscopic procedure to look for fragments on the underside of the patella. He did not encourage Petitioner to have the procedure in light of the fact that only 50% of the patients show some improvement and 5% were worse. Nevertheless, he believed this procedure was reasonable given her August l, 2019 clinical condition. The doctor's diagnosis was a patellar contusion which included a degenerative component consisting of possible loose bodies under the patella which was caused or aggravated by her work accident of February 23, 2019. Additionally,

she was not at maximum medical improvement and wished to proceed with surgery. (Pet. Ex. #l, 0012- 0016)

On cross-examination, opposing counsel pointed out that the doctor's diagnosis from the prior accident was the same. Further, Petitioner was never asymptomatic. Additionally, her weight and other daily activities of living could aggravate her condition. Finally, the doctor was not optimistic that he would achieve a good result. (Pet. Ex. #l, 0029 – 0031; 0036 – 0037).

Dr. Christopher Rothrock testified by evidence deposition on November 5, 2019. He is a board certified orthopaedic surgeon who examined Petitioner at the request of Respondent on July 29, 2019.

Following a medical records review, including diagnostic studies and a physical examination, it was his opinion that Petitioner sustained a bruised knee on February 23, 2019. She further suffered from patellofemoral chondromalacia and degenerative changes within the medial meniscus.

He believed her treatment was appropriate. However, she would reach maximum medical improvement after an additional four weeks of physical therapy followed by an FCE. He stated that he would not recommend additional cortisone injections, viscosupplementation injections or right knee arthroscopic procedure.

It was his testimony that any arthroscoopic procedure had a 50% chance of providing no relief and 50% chance of worsening her condition. (Resp. Ex. #2, Pgs. 19 – 22).

On cross examination, the doctor acknowledged that he regularly performs Section 12 examinations for Employers, Insurance Carriers and Third Party Administrators. In 2019, he had done 20 examinations to date, approximately two per month. He had given a total of five depositions associated with those examinations. He received $2,000.00 per examination and $1,500.00 per deposition. (Resp. Ex. #2, Pg. 23)

The doctor acknowledged that Petitioner was credible. She was not experiencing any significant pain or discomfort prior to her work injury of February 23, 2019. Additionally, an MRI taken on April 2, 2019, showed swelling which was traumatic in nature. Additionally, her physical examination was positive from a subjective standpoint. (Resp. Ex. #1, pg. 17)

He indicated that the performance of an arthroscopic procedure, in terms of prospective treatment, would not rise to a standard of care issue.

Finally, he acknowledged that he did not address the issue of aggravation of a pre-existing condition in his report or deposition testimony. (Resp. Ex. #, Pgs. 30-31).

Dr. Peter Garcia testified by evidence deposition on November 11, 2019. The doctor testified that he did not certify the right knee arthroscopic procedure recommended by Dr. Wood on the basis that it did not meet the Official Disability Guidelines based upon a normal MRI and a normal physical examination from an objective standpoint.

On cross-examination, the doctor acknowledged that he is part owner of Medical Equation Inc., since on or about its founding in 1996, and works closely with insurance carriers, employers and third party

administrators with their worker's compensation liability claim solutions. Further, MEI regularly performs examinations and provides expert witness testimony for those same entities.

He indicated that he performed approximately 20-30 URs per week and gives approximately five depositions per month associated with the UR's. He is not compensated directly for the utilization reviews and depositions, however, he is through ownership in the corporation.

The report marked as Exhibit 2 was not what he reviewed in terms of his deposition.

That report was a summary used to generate a report which he did not see. The report was signed electronically. His actual signature is illegible.

He did not know whether he or his group was certified by the State of Illinois and acknowledged that ODG Guidelines were created by an entity funded by the insurance industry.

He acknowledged that the focus of MEI is to provide medical assessments and treatment plans to meet primarily the needs of adjusters versus claimants and attorneys.

Further, with respect to his utilization review, he attempted to contact Dr. Wood by phone. Dr. Wood returned his call twice, however, he prepared his review without speaking with the doctor.

He acknowledged that treating a physician is in the best position to assess the care and treatment a patient needs.

Further, the ODG is only a guideline and does not constitute a standard of care.

CONCLUSIONS OF LAW

In regard to disputed issue (F) the Arbitrator makes the following Conclusion of Law:

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the accident of February 23, 2019.

In support of this conclusion, the Court notes the following:

There is no dispute that Petitioner suffered a work related accident on February 23, 2019 when she tripped over a mat, landing directly onto her right knee.

Petitioner had suffered a previous injury to her right knee on April 12, 2018, which was diagnosed as a patellar contusion. She treated conservatively. She was released at maximum medical improvement on February 6, 2019. While not symptom free, she had returned to her baseline as of that date.

Following her fall on February 23, 2019, an MRI, on April 2, 2019, showed pre-existing degenerative changes in her right knee, but also subcutaneous edema anterior to the patella, suggesting an impact injury. Additionally, an examination in the emergency room exhibited swelling and ecchymosis and tenderness in Petitioner's right knee. Dr. Wood further testified that Petitioner's symptoms had worsened since her fall. Based on the foregoing, Dr. Wood testified that Petitioner's patellar contusion was caused by the accident of February 23, 2019 and the degenerative changes associated therewith were aggravated by the accident.

Further, because of her failure to improve he offered an arthroscopic procedure which would not cure her condition, but indicated there was a 50% chance it would improve her condition and a 5% chance it would worsen her condition.

Finally, he believed that the procedure was reasonable and necessary, given her clinical condition as of August 1, 2019.

Respondent's Section 12 examiner, Dr. Christopher Rothrock, testified that there was a 50% chance an arthroscopic procedure would provide no relief and a 50% chance that the procedure would worsen her condition. Further, that treatment was related to the degenerative condition of her patellar chondromalacia, not to the patellar contusion. The doctor testified further that the performance of the arthroscopic procedure would not rise to a standard of care issue as a choice of treatment.

He did not address the issue of aggravation of a pre-existing condition in his report or his deposition testimony.

Dr. Garcia based his non-certification on the fact that Petitioner's April 2, 2019 MRI was normal. He clearly ignored the findings which suggested a recent impact injury. He also ignored the emergency room records findings of tenderness, swelling and ecchymosis.

Further, he did not discuss his conclusions with Dr. Wood before preparing his report. Finally, he acknowledged that Petitioner's treating physician is in the best position to assess the care and treatment a patient needs.

Considering that Dr. Rothrock believed Petitioner was credible when she indicated that she was not experiencing any significant pain or dysfunction of her right knee prior to the accident of February 23, 2019,

her MRI taken on April 2, 2019 objectively reflected swelling which was recent and traumatic in nature and finally, her emergency room physical examination was positive from an objective standpoint, the Arbitrator finds that the opinions of Dr. Wood are more persuasive than Dr. Rothrock and Dr. Garcia in regard to causality, reasonableness and necessity of prospective medical treatment.

In regard to disputed issue (J), the Arbitrator makes the following Conclusion of Law:

The Arbitrator concludes that all the medical treatment provided to the Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay the reasonable and necessary medical services identified in Petitioner's medical work-up attached to the Stipulation Sheet, as provided in 8(a) and 8.2 of the Act, subject to the fee schedule and any credits to which Respondent would be entitled by reason of group payments pursuant to Section 8(j).

In regard to disputed issue (K), the Arbitrator makes the following Conclusions of Law:

Based upon the Arbitrator's Conclusion of Law in disputed (F), the Arbitrator concludes that Petitioner is entitled to prospective medical care, including but not limited to the arthroscopic procedure recommended by Dr. John B. Wood.

In regard to disputed issue (O), the Arbitrator makes the following Conclusions of Law:

Petitioner and Respondent agreed that Petitioner has received temporary total disability benefits for the period of February 25, 2019 through March 24, 2019 and again from July 6, 2019 through June 4, 2020, a period of 52 weeks, for a total payment of $16,280.19. Respondent alleges that an overpayment of temporary total disability benefits may have occurred.

Between March 19, 2019 and June 28, 2019, Petitioner was offered and accepted, a temporary alternative duty (TAD) position which allegedly accommodated her current physical disabilities. Petitioner alleges, and Respondent denies, that during this period, she was guaranteed 40 hours of work per week. Petitioner claims that during that period, she worked less than 40 hours per week totaling 72.25 hours. At an hourly rate of $14.11 per hour, this would represent an underpayment of $1,019.45.

By agreement of counsel, and with the approval of the Arbitrator, ruling on these issues are preserved for hearing at a later date.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	03WC027555
Case Name	SMITH,DANIEL JR v. MID AMERICAN HEATING
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0242
Number of Pages of Decision	22
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	James DeSanto
Respondent Attorney	Francis O'Byrne

DATE FILED: 5/19/2021

21IWCC0242

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DANIEL SMITH,

Petitioner,

vs. NO: 03 WC 27555

MID AMERICAN,

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 causation, benefit/wage rate, temporary total disability (TTD), 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History

We initially review the procedural history in this case and discuss certain aspects of the previously issued decisions and orders to help guide our analysis.

Arbitrator's Decision – December 1, 2010

Arbitration proceedings, pursuant to Section 19(b) of the Act, were held on multiple dates spanning many years from January 26, 2004 through July 26, 2010. On December 1, 2010, an Arbitration decision was issued by Arbitrator Hennessy finding Petitioner sustained accidental injuries arising out of and in the course of his employment on February 3, 2003. Petitioner's

current condition of ill-being was found to be causally related to that accident. Petitioner's average weekly wage in the year preceding his accident was determined to have been $1,296.00. He was awarded $609,501.36 for medical expenses, prospective implantation of a spinal cord stimulator per Dr. Glaser and Dr. Tumlin, $387,702.26 in TTD benefits (with Respondent receiving credit for payments made through June 30, 2003), and penalties and attorney's fees in excess of $600,000.00.

Commission Decision on Review – December 19, 2011

Respondent filed a review of the Arbitrator's decision and, on December 19, 2011, the Commission issued its Decision. It was signed by Comm. Dauphin with Special Concurring Opinions, pursuant to *Zeigler v. IC,* 51 Ill.2d 137, 281 N.E.2d 342 (1972), by Comm. DeVriendt (for Comm. Mason whom he replaced) and Comm. White (for Comm. Lindsay whom she replaced). This Decision affirmed the Arbitrator's findings as to accident and average weekly wage but found that Petitioner only established causation through his emergency room (ER) visit on September 22, 2003, "at which time a physician noted significant symptom magnification." *Comm.Dec.12/19/11 at 1*. The Commission modified the TTD period to end as of September 22, 2003, reduced the medical award to $21,840.74 for expenses rendered through that date, and vacated the awards for prospective medical, penalties and fees. Significantly, for reasons which will be discussed later, the case was remanded to the Arbitrator pursuant to *Thomas v. IC,* 78 Ill.2d 327, 399 N.E.2d 1322,35 Ill.Dec. 794 (1980), but also included "summons language" allowing for the remand to the Arbitrator "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." *Comm.Dec.12/19/11 at 25*. This Decision also indicated, "The probable cost of the record to be filed as return to Summons is the sum of $35.00, payable to the Illinois Workers' Compensation Commission…and deposited with the Office of the Secretary of the Commission." *Id*.

The Commission Decision focused on the September 22, 2003, ER visit on which date Dr. Massimilian noted that Petitioner exhibited questionable pain behaviors. *Comm.Dec.12/19/11 at 24*. Petitioner had mild paravertebral muscle spasm in the central spinous process and negative straight-leg-raising test to 45 degrees bilaterally, "but no other significant abnormalities." *Id.* Dr. Massimilian diagnosed Petitioner with "acute exacerbation of chronic neck and low back pain" and "narcotic dependence." *Id*.

In the Analysis section, the Commission noted, "Dr. Mercier also found Petitioner's subjective complaints inconsistent with the clinical findings." *Id*. The Commission detailed more about Dr. Mercier's June 30, 2003 Section 12 examination (a/k/a, "IME") earlier in the Decision (*Id. at 9-11*). However, it did not overtly state that it found Dr. Mercier's opinion to be persuasive in regard to Petitioner reaching maximum medical improvement (MMI) and being able to return to work full duty due to Petitioner having "no reliable objective findings on physical exam of functional permanent impairment." *Id. at 11*. Instead, the Analysis section continued to focus on Petitioner's prior back problems and injuries from 1987 through August 20, 2002. The Decision stated, "The Commission further notes that Petitioner had chronic back problems prior to the [sic] February 2003." *Id. at 24*.

The Commission concluded by stating, "Finally, despite ongoing complaints of almost debilitating pain after the work accident, Petitioner failed to fully comply with the treatment prescribed by his doctors prior to [9/22/03], including the physical therapy prescribed by Dr. Goldflies and the epidural steroid injections prescribed by Dr. Diesfeld." *Id.*

Circuit Court Decision – September 6, 2013

Petitioner appealed the Commission Decision and, on September 6, 2013, the Circuit Court of McHenry County issued a "Decision" which concluded:

> the determination of the Commission to terminate benefits as of [9/22/03] is reversed and remanded. Furthermore, this Court remands this matter to the Commission to complete its analysis of the impact of its decision regarding Section 19(d). *Cir.Ct.Dec. at 5*.

The Court acknowledged:

> The Decision of the Commission addresses the inconsistencies in the petitioner's claims as well as the contradictions between Mr. Smith's testimony and the records of his own physicians. The Commission made specific note of the inconsistencies between the petitioner's testimony and his medical records and cited specific examples from the records of Dr. Kroll, Dr. Lorenz and Dr. Goldflies in the Decision.
>
> Accordingly, the Commission had a basis on which to determine that the petitioner's credibility was lacking. To the extent that this determination played a role in the Decision of the Commission, this Court finds that there was sufficient evidence to support the conclusion and that it was not against the manifest weight of the evidence. *Id. at 3-4*.

However, although the Court agreed with the Commission that Petitioner is not credible, it continued:

> The Commission determined that the Petitioner failed to meet his burden of establishing that his condition of ill being extended beyond September 22, 2003. The Commission clearly based its decision on its analysis of the petitioner's credibility and the observations of Dr. Massimilian in the emergency room on September 22, 2003. This Court notes that Dr. Massimilian was obviously suspicious of the petitioner's complaints by virtue of the fact that he made a record of his observation that the petitioner's complaints seemed to arise only when he felt that he was being observed. Furthermore, Dr. Massimilian diagnosed an acute exacerbation of chronic neck and low back pain.
>
> Based on this, the Commission has determined that the condition of ill being had resolved by September 22, 2003. *However, review of the record fails to reveal any evidence that the chronic condition at issue had resolved or returned to its pre-accident state. The Commission makes no reference to any such finding by any physician*. As the

> Commission has determined that the petitioner has established that he suffered an injury in the incident of February 3,2003, then *there must be some evidence to support the resolution of that injury by September 22,2003*. The observations of Dr. Massimilian that the petitioner exhibited questionable pain behavior on September 22, 2003 does not confirm the resolution of the injury without anything more, particularly since Dr. Massimilian further opined that the petitioner was suffering from chronic neck and low back pain. Dr, Massimilain [sic] does not opine that the petitioner's condition related to February 3, 2003 had resolved or that he wasn't suffering from any condition of ill being, rather that that his current complaints were suspicious and that he had a chronic neck and low back condition.
>
> *In the absence of some evidence to support the conclusion that the petitioner's condition had resolved or never even existed, this court must hold that the determination that the Petitioner failed to establish his condition extended beyond September 22,2003 to be against the manifest weight of the evidence*.

Id. 4-5. *(Emphases added).* The Court also discussed the applicability of §19(d) of the Act when it wrote:

> Finally, The Commission found that the Petitioner failed to fully comply with the treatment prescribed by his doctors prior to September 22, 2003. Specifically, the petitioner failed to undergo physical therapy and epidural steroid injections prescribed by his physicians. The respondent argues that pursuant to 820 ILCS 305/19(d) 2011, such a refusal permits the Commission to reduce or suspend the compensation of any such injured employee.
>
> While the Commission makes it clear that it finds the petitioner did not comply with this section, the exercise of discretion contemplated by Section 19(d) is not so clear. The absence of any specific finding with respect to this determination leaves the Court to speculate as to the Commission's intent. The absence of a decision prevents this Court from reviewing the applicability of Section 19(d) or whther [sic] the evidence supports any such decision. *Id. at 5*.

We initially note that the Court wrote, "The Commission clearly based its decision on its analysis of the petitioner's credibility and the observations of Dr. Massimilian in the emergency room on September 22, 2003." *Cir.Ct.Dec. at 4*. However, the Court did not mention these additional Commission findings:

- At the ER on September 22, 2003, Petitioner "reported earlier that day his leg 'gave out' and he fell to the floor." *Comm.Dec.12/19/11 at 24*.
- On June 30, 2003, almost three months prior to that ER visit, Dr. Mercier found Petitioner's "subjective complaints inconsistent with the clinical findings." *Id*.
- Petitioner "had chronic back problems prior to the [sic] February 2003." *Id*.

Respectfully, the Commission maintains that these findings are among those in the record that support terminating TTD and medical benefits because his alleged conditions of ill-being are no longer causally related to his work injury of February 3, 2003. We believe if the Commission had been clearer, and had stated it was specifically finding Dr. Mercier's June 30, 2003 opinion to be persuasive, the Court would most likely have affirmed the termination of causation under a manifest-weight standard. However, there appears to have been some confusion due to the Commission's focus on the September 22, 2003 ER record of Dr. Massimilian, which did not provide a clear basis for terminating causation. We do not believe the previous Commission decision intended to base its termination of causation *solely* on the records of Dr. Massimilian. Although these records remain relevant as another example of Petitioner's questionable pain behaviors, the more persuasive opinion for terminating causation was that of Dr. Mercier.

Second, the Court wrote, "review of the record fails to reveal any evidence that the chronic condition at issue had resolved or returned to its pre-accident state. The Commission makes no reference to any such finding by any physician." *Cir.Ct.Dec. at 4*. Again, we point out that the Commission's Decision actually did "reference" Dr. Mercier's June 30, 2003 IME findings and opinion but, since it did not do so in the "Analysis" section, the Court must not have believed that the Commission relied on Dr. Mercier's opinion as a basis for terminating causation. Based upon our review of that Commission Decision, we believe the opinion of Dr. Mercier was a significant reason the Commission terminated causation. Perhaps the Commission's error was to award three additional months of TTD and medical benefits extending until September 22, 2003, since this made the basis for its decision unclear. However, it was at that ER visit that Dr. Mercier's opinion regarding Petitioner's lack of credibility was confirmed by another physician, Dr. Massimilian. In our view, the ER records were not the *sole* basis of the Commission's previous Decision. Rather, they were additional support for the persuasive opinion Dr. Mercier provided three months earlier.

This confusion regarding the basis of the Commission's decision would have been avoided if the Commission had specifically stated that it found Dr. Mercier's opinion persuasive and terminated benefits on June 30, 2003. In any event, the issue facing us now is that the Court did not reinstate the Arbitrator's decision regarding causation nor direct an award of TTD and medical benefits through the date of hearing. Rather, it simply "reversed" the Commission's determination "to terminate benefits as of [9/22/03]" and remanded the matter on that issue along with instructions to "complete its analysis of the impact of its decision regarding Section 19(d)." This seems to have left the question of causation very open-ended. It appears that the Commission, on Remand, had the option to choose a different date to terminate causation as long as it was based on "some evidence to support the conclusion that the petitioner's condition had resolved or never even existed."

Commission Decision on Remand – August 15, 2014

On August 15, 2014, the Commission issued a Decision and Opinion on Remand, which was unanimously issued by three Commissioners, none of them being the same Commissioners who had deliberated and decided the previous Decision and Opinion on Review. The Commission, on Remand, interpreted the Circuit Court's decision as follows:

- "the Judge affirmed the decision of the Commission in regards [sic] to the Petitioner's lack of credibility." *Comm.Dec.8/15/14 at 1*.

- "the Judge found that there was no medical evidence in the record that indicated the chronic condition had resolved or returned to its pre-accident state and remanded this case back to the Commission for a finding in that regard." *Id. at 1-2*.

- "In this particular instance the Commission found that Petitioner is not entitled to any further temporary total disability after [9/22/03]. Petitioner has the right to go back to the Arbitrator and try to prove that he is entitled to [TTD] after the date of the Arbitration hearing or to prove that he has sustained permanent disability as a result of the [2/3/03] accident. *The Commission assumes that the Circuit Court Judge remanded this back to the Commission to make a determination of whether Petitioner is entitled to further temporary disability* ***since the hearing date*** *or to determine when and if Petitioner is entitled to any permanent disability as a result of this injury*. The Commission stated in its original decision that 'as provided in Section 19(b) of the Act, the 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.'" *Id. at 2 (Emphases added)*.

- "*The Commission found* that as of [9/22/03], based on Petitioner's lack of credibility, the medical records of the various treating physicians, the Petitioner's lack of cooperation with those physicians, and the emergency Room Doctor's findings on that date, the *Petitioner was not entitled to further temporary disability and medical treatment thereafter up until the date of the hearing* before the Arbitrator. ***The Commission believes the Circuit Judge had no objection to that finding***. The Commission did not find that Petitioner's condition had fully resolved and if so when that resolution occurred. That is an issue that had yet to be decided and the Petitioner and the Respondent have the right under Section 19(b) to offer evidence for or against it before the Arbitrator. Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322,35 Ill.Dec. 794 (1980)." *Id. (Emphases added)*.

- "Therefore the Commission, per the Remand of the Circuit Court Judge, 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…."

With all due respect to the previous Commission Panel, we believe the Commission on Remand misinterpreted the Circuit Court decision. The Circuit Court ordered that the Commission's determination "to terminate benefits as of [9/22/03] is reversed." However, the Commission stated it, "believes the Circuit Judge had no objection to that finding" that Petitioner was not entitled to further TTD and medical treatment after September 22, 2003 to the date of hearing.

The Commission further interpreted the Court's Decision as remanding the case for a determination, pursuant to *Thomas v. IC*, of additional TTD or permanency *since the hearing date*. In other words, the Commission apparently reasoned that, although it found Petitioner was not entitled to TTD and medical benefits after September 22, 2003, it did not actually "terminate benefits" entirely as of that date, because Petitioner could still obtain another hearing on the issues of additional TTD and permanency.

We point out that the Circuit Court decision is also confusing because, at the top of page five under the "Issues" section, it stated, "In the absence of some evidence to support the conclusion that the petitioner's condition had resolved or never even existed, this Court must hold that the determination that the Petitioner failed to establish his condition *extended beyond September 22,2003* to be against the manifest weight of the evidence." *Cir.Ct.Dec. at 5*. This could indicate the Court was finding the evidence showed that Petitioner's condition *had* "extended beyond" September 22, 2003. However, in the "Conclusion" paragraph, the Court wrote, "the determination of the Commission to terminate benefits *as of September 22, 2003* is reversed and remanded." The question, therefore, is whether the Commission was being instructed to extend TTD and medical benefits beyond September 22, 2003, to some date to be determined? Or, was the Commission free to choose a different date, possibly even earlier, on which to terminate causation that is better supported by evidence "that the petitioner's condition had resolved or never even existed?"

On the issue of the Court's instructions to complete its analysis of §19(d) of the Act, the Commission wrote:

> The Judge also remanded this matter back to the Commission "to complete its analysis of the impact of its decision regarding Section 19(d)." Section 19 (d) of the Act provides that "If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery, OR shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the Commission may, in its discretion, reduce or suspend the compensation of any injured employee."
>
> Nowhere in the Commission is [sic] decision Section 19(d) cited. The Commission took the Petitioner's lack of credibility, the various inconsistent medical records of treating physicians, as well as his failure to fully comply with the treatment that they prescribed, to come to the conclusion that Petitioner failed to meet his burden of proof regarding causal connection and further temporary total disability. However, even if it was mentioned, that Section of the Act allows the Commission, in its discretion, to use the Petitioner's failure to comply with the reasonable treatment as one of the basis [sic] for denying benefits.

Id. at 3 (Underlines in original). Based on our review of the Commission's previous decisions, we do not believe Petitioners' benefits were specifically denied based on Section 19(d). Rather, the Commission used Petitioner's "failure to fully comply" with recommended treatment as evidence regarding the credibility of Petitioner's complaints and the issue of causation in general.

In any event, in what has become a significant issue for the current Review before us, the Commission ordered:

> IT IS THEREFORE ORDERED BY THE COMMISSION that this case is 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. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

However, unlike the previous Commission Decision and Opinion on *Review*, no summons language was included in this Decision and Opinion on *Remand*.

This has led to a disagreement between the parties regarding whether the Commission's Decision on Remand was a final, appealable decision or was interlocutory. We find that, since the Commission Decision on Remand did not provide a procedural "vehicle" (i.e., the summons language), there was no way for Petitioner to have appealed the Decision to the Circuit Court at that time. On its face, it was strictly an interlocutory remand to the Arbitrator pursuant to *Thomas v. IC*. Therefore, we also find that the Commission's Decision and Opinion on Remand is not "law-of-the-case" regarding its conclusions because neither party had the opportunity to appeal that decision to the Circuit Court. We find that all the matters before us relate back to the original Commission §19(b) Decision. That original Decision was remanded back to the Commission by the Circuit Court and the issues have never been settled. Since the Commission's Decision on Remand was *not* a final, appealable decision, we find that both parties should be allowed to appeal our current Decision and Opinion on Review *and* the previous Decision and Opinion on Remand.

Arbitration Decision – October 29, 2018

On November 14, 2017, a hearing was held before Arbitrator Ory, pursuant to the Commission's Decision and Opinion on Remand, and a decision was issued on October 29, 2018. This decision is attached, to which we make the modifications outlined below.

ANALYSIS

We are mindful that six different Commissioners, via two unanimous prior Commission decisions, all found that Petitioner was not credible and should have had his benefits terminated by September 22, 2003. We are also uncertain how the Circuit Court confirmed the Commission's finding regarding Petitioner's lack of credibility yet reversed on the issue of causation. As mentioned above, perhaps this is attributable to the Commission's having spent more time discussing the September 22, 2003 ER record in the Analysis section and insufficiently discussing Dr. Mercier's opinion of June 30, 2003.

This is, undoubtedly, a complicated case. We must initially determine the issues that are properly before the Commission at this time. On September 6, 2013, the Circuit Court remanded the previous Commission Decision and Opinion on Review, which had been issued on December 19, 2011 pursuant to §19(b) of the Act. As mentioned above, the Commission's Decision and

Opinion on Remand, issued on August 15, 2014, attempted to explain its previous findings and why it believed it was complying with the Circuit Court's decision. However, since the Commission's remand decision did not contain "summons language," there was no opportunity for either party to appeal that Decision to the Circuit Court for a judicial determination regarding whether the Commission's interpretation of the Circuit Court's directives was correct.

In our view, the Commission remains bound by the Circuit Court's decision and directives, which require modifying the first Commission Decision and Opinion on Review, the subsequent Commission Decision and Opinion on Remand and the most recent Arbitration Decision.

Nevertheless, we do so with deference to the *factual* findings made by the Commission in its §19(b) Decision, issued on December 19, 2011, but we will also consider evidence that was presented at the previous arbitration hearing, even if it was not specifically highlighted in the Commission's Decision. Our understanding is that the Circuit Court's directives require us to re-analyze the *legal* conclusions regarding causation through the date of the first Arbitration hearing, which ended on July 26, 2010, without taking any additional evidence pertaining to events prior to that hearing.

Regarding the most recent Arbitrator's Decision, which actually led to this Review, we have only considered the evidence presented at that hearing on November 14, 2017, that relates to facts, events, medical treatment and medical opinions from July 26, 2010 through November 14, 2017.

Causation Determination as Remanded by the Circuit Court

As discussed above, the Circuit Court's decision was unclear, so we believe it most appropriate to follow the directive in the Conclusion section stating that the Commission's determination "to terminate benefits *as of* September 22, 2003 is reversed and remanded."

Based on the Circuit Court's directive, we find that Petitioner's benefits should actually have been terminated earlier, on June 30, 2003, because we find Dr. Mercier's opinion most persuasive regarding Petitioner's injuries, causation, maximum medical improvement (MMI), prospective medical treatment and ability to work as of that date. We find Dr. Mercier's opinion persuasive, as contained in his June 30, 2003 report, that Petitioner's "alleged injury resulted in a low back muscle ligamentous strain only." He noted that Petitioner exhibited "extensive subjective non-anatomical" sensory and motor loss along with other findings that "represent marked false reporting to clinical testing indicating [his] willingness to not only falsify information regarding his medical history, but on his physical exam. This puts in serious doubt the reliability of [his] subjective complaints." Dr. Mercier reviewed Petitioner's medical records dating back to 1995, which reflected pre-existing conditions, including those involving the lumbar, cervical, bilateral knees and legs. He opined that Petitioner was at MMI and could return to his normal duties because "there is no reliable objective findings on his physical exam of functional permanent impairment."

On April 5, 2007, Dr. Mercier examined Petitioner again. He reiterated his opinion that

Petitioner's alleged February 3, 2003 injury was limited to a low back muscle ligamentous strain. He wrote, "Any and all medical care, testing, lost time from work, work restrictions and disability for problems in other areas of his body are not related to alleged events in February 2003." Dr. Mercier stated that his opinions from June 30, 2003 were unchanged.

On September 20, 2007, Dr. Mercier performed an updated records review and, again, stated that his opinions of June 30, 2003 were unchanged.

The previous Commission Decision, issued on December 19, 2011 pursuant to §19(b) of the Act, focused too much on the September 22, 2003 opinion of Dr. Massimilian and was not clear enough in explaining that Dr. Massimilian's observations and findings were simply additional support for the opinions of Dr. Mercier. Although Petitioner was awarded three additional months of TTD and medical benefits, it was actually Dr. Mercier's opinion that was being relied upon to terminate causation.

Based on Petitioner's lack of credibility, which the Circuit Court already affirmed, we find that Petitioner's alleged complaints after his work accident were not credible. We further find that, to the extent Petitioner may have had any objectively-supported complaints, those were related to his pre-existing conditions and not related to the work accident as of Dr. Mercier's June 30, 2003 opinion. The Commission does not find that Dr. Massimilian's diagnosis of an "acute exacerbation of chronic neck and low back pain," on September 22, 2003, was intended to be a causation opinion. The "acute exacerbation" was due to a fall, which we do not believe was caused or contributed to by any condition of ill-being related to the work accident. We further find that the "chronic neck and low back pain" were not causally related to the work accident because the Commission does not believe Petitioner is credible about his complaints both before and after the work accident. In summary, we do not believe that there was any aggravation of his condition(s) that extended beyond the June 30, 2003 IME of Dr. Mercier.

We reaffirm the previous Commission Decision on Remand's explanation that its discussion of Petitioner's failure to fully comply with the treatment prescribed by his doctors was evidence regarding his lack of credibility, generally; not a specific denial of benefits under Section 19(d).

Temporary Total Disability and Medical Benefits

The Commission finds Petitioner is entitled to TTD and medical benefits through June 30, 2003, the date of Dr. Mercier's IME.

To the extent the Circuit Court intended to order the Commission to find that Petitioner's condition remained causally related *after* September 22, 2003, we find that Petitioner's medical treatment was unreasonable and unnecessary based on Dr. Mercier's opinion and Petitioner's lack of credibility. In other words, since Petitioner is not credible about his symptoms and complaints, the alleged need for treatment is not credible either.

Similarly, to the extent the Circuit Court intended to order "causation" and "benefits" to continue beyond September 22, 2003, because it believed the Commission based its finding on

Dr. Massimilian's ER record, we find that the Commission actually denied TTD based on Petitioner's lack of credibility and Dr. Mercier's opinion that Petitioner had reached MMI and was able to return to work full duty. We, too, find Dr. Mercier's opinion most persuasive on this issue.

Based on the Commission's prior determination that Petitioner's average weekly wage in the year preceding his accident was $1,296.00, we find that his weekly TTD rate is $901.59. The Commission previously determined that Petitioner's period of TTD began on February 10, 2003. *Comm.Dec.12/19/11 at 2*. We note that the Circuit Court did not modify this beginning date in its decision on remand. Therefore, we find Petitioner is entitled to 20-1/7 weeks of TTD from February 10, 2003 through June 30, 2003, at the rate of $901.59 per week.

Causation Since the Arbitration Hearing that Ended on July 26, 2010

The Review before us also involves the Arbitrator's Decision, issued on October 29, 2018, that addressed the issues of causation, TTD, medical expenses and permanent disability benefits *since* the previous hearing that was held on July 26, 2010.

As the Arbitrator's Decision indicates, much of the testimony and evidence presented was related to Petitioner's conditions and treatment dating back to his accident in 2003. We do not believe the Circuit Court intended to order the Commission to consider new evidence on the issue of causation that would allow the parties to relitigate or supplement the evidence they had presented at the initial Arbitration hearing.

On the issue of causation as it relates to Petitioner's entitlement to additional TTD and medical benefits *after* the arbitration hearing that ended on July 26, 2010, we find that there was no evidence presented at the most recent hearing, on November 14, 2017, that would cause us to alter our determination that Petitioner's condition was no longer causally related to his work accident after June 30, 2003.

TTD and Medical Benefits Since the Previous Arbitration Hearing

Our decision regarding causation results in a denial of additional TTD and medical benefits. However, the Arbitrator's October 29, 2018 decision is hereby modified to reflect that there *was* evidence, submitted at the hearing on November 14, 2017, that could support Petitioner's claim for continued TTD and medical benefits. This evidence includes Dr. Glaser's testimony and records, Petitioner's testimony, and the testimony of Petitioner's witnesses. Nevertheless, we find that this evidence is not as persuasive as Dr. Mercier's June 30, 2003 opinion. Dr. Mercier reaffirmed his opinion on April 5, 2007, September 20, 2007 and October 13, 2015, and in his deposition testimony on April 20, 2017. The Commission finds that the combination of Petitioner's lack of credibility and the opinions of Dr. Mercier support its finding that Petitioner failed to prove he was entitled to TTD or medical benefits after June 30, 2003 or, at the very latest, after the September 22, 2003 ER visit as explained in the original Commission decision.

We also point out that, at the most recent hearing, Petitioner testified that he has not tried to get any other type of job since 2003 and he does not feel capable of doing so. *T.11/14/17 at 33*. However, the March 17, 2016 record of Dr. Glaser states, "the work letter was faxed over to job." The Commission questions what job is being referenced. An entry from later that day indicates, Petitioner "stated that the job did received the fax[. T]hey found where the fax was placed." Although under different circumstances, this reference to a "job" may be overlooked as a typographical or inadvertent error, the already-affirmed findings about Petitioner's lack of credibility cause us to question whether Petitioner actually did have a job (or other jobs) while he has been claiming to be temporarily totally disabled. Furthermore, in the event Petitioner might claim that he was having this letter faxed to Respondent, it does not make sense why Petitioner would have been so concerned about getting an "off work letter" sent to Respondent, which had not paid any benefits to him for years, that he would pester his doctor for it to be faxed immediately. This record seems to reflect a situation of someone needing an off-work note for a job they currently have.

In any event, we base our decision to terminate causation as it relates to TTD and medical benefits, on the persuasive opinion of Dr. Mercier.

Nature and Extent

Since Petitioner's accident occurred prior to September 1, 2011, the permanency factors in §8.1b(b) of the Act do not apply. Based on a thorough review of the evidence, the Commission finds Petitioner sustained a lumbar muscle ligamentous strain, on February 3, 2003, which had resolved as of his IME with Dr. Mercier on June 30, 2003. We find Petitioner is entitled to 37.5 weeks of permanent partial disability benefits, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 7.5% loss of use of the person as a whole.

Based on the Commission's prior determination that Petitioner's average weekly wage in the year preceding his accident was $1,296.00, we find that his weekly permanent partial disability rate is $542.17, which was the maximum allowable under §8(b)4 of the Act on the date of his accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that all prior Commission awards for temporary total disability and medical expenses are hereby vacated.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $901.59 per week for a period of 20-1/7 weeks, from February 10, 2003 through June 30, 2003, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive credit for the $10,833.92 in temporary total disability benefits it paid through June 30, 2003, and a permanency advance in the amount of $27,108.50.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner

the medical expenses in evidence that were incurred prior to June 30, 2003, under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $542.17 per week for a period of 37.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 7.5% loss of use of the person as a whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $21,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

/s/ *Maria E. Portela*

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SMITH, DANIEL
Employee/Petitioner

Case# **03WC027555**

MID AMERICAN
Employer/Respondent

On 10/29/2018, 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 2.42% 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:

1591 DeSANTO, JAMES J
ATTORNEY AT LAW
712 FLORSHEIM
LIBERTYVILLE, IL 60048

0445 RODDY LAW LTD
FRANCIS J O'BYRNE JR
303 W MADISON ST SUITE 1900
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

Daniel Smith
Employee/Petitioner

v.

Mid American
Employer/Respondent

Case # **03** WC **27555**

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 **Christine M. Ory**, Arbitrator of the Commission, in the city of **New Lenox** on **November 14, 2017.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 3, 2003**, 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, to a limited degree,*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$66,019.20**; the average weekly wage was **$1,296.00**.

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

To date, Respondent has paid **$10,833.92** in TTD and/or for maintenance benefits, and is entitled to a credit for any and all amounts paid. **[An award of TTD was previously made for the period from 02/10/2003 through 09/22/2003, which is 32-1/7 weeks @ $753.31 per week]**

Respondent shall be given a credit of for **$10,833.92** TTD, **$0** for TPD, **$0** for maintenance, and **$27,108.50 advance** for other benefits, for a total credit of **$37,942.42. [This was previously awarded]**

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

ORDER

Permanent Disability

Petitioner is entitled to **125 weeks at $542.17 per week** as petitioner's permanent disability has resulted in **25% person as a whole pursuant to § 8(d) 2** 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.

Christine MOny

Signature of Arbitrator

October 26, 2018

Date

ICArbDec p. 2

OCT 29 2018

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Daniel Smith,	)	
Petitioner,	)	
vs.	)	**No. 03 WC 27555**
Mid American Heating	)	
and Air Conditioning	)	
Respondent.	)	
	)	

ADDENDUM TO ARBITRATOR'S DECISION
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing in New Lenox on November 14, 2017 on remand pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

This matter was previously heard by Arbitrator Hennessy pursuant to §19b, 8a beginning on January 26, 2004, with numerous proceedings until the final hearing, and proofs closed, on July 26, 2010. The decision was issued on December 1, 2010. Arbitrator Hennessy determined petitioner sustained accidental injuries that arose out of and in the course of his employment with respondent on February 3, 2003; that petitioner provided timely notice of the accident in accordance with the provision of the Act; that there was a causal connection between petitioner's back condition of ill-being and the work accident of February 3, 2003; that respondent was liable for $609,501.36 in medical expenses incurred, with appropriate credits to be given for prior payment; and to pay prospectively for the cost of the spinal cord stimulator prescribed by Drs. Scott Glaser and Dr. Timothy Tumlin; that respondent was to pay TTD totaling $387,702.26, less credit for any payment made; and $498,601.81 in penalties under §19k, $2,500 in penalties under §19 l and $99,720.63 in attorneys' fees under §16.

On review, the Commission determined petitioner sustained accidental injuries that arose out of and in the course of his employment with respondent on February 3, 2003; but reduced the TTD award to 32-1/7 weeks @ $753.31 per week; finding petitioner was only temporarily and totally disabled from February 10, 2003 to the emergency room visit of September 22, 2003; reduced the medical award to $21,840.74 for medical treatment through September 22, 2003; and awarded respondent credit for TTD paid of $10,833.92 and PPD advance of $27,108.50.

At issue in this hearing on November 14, 2017 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 the unpaid medical bills.
3. Whether Petitioner is entitled to additional temporary total disability.
4. What is the nature and extent of petitioner's injury?

FINDING OF FACTS

James E. Smith Testimony

James E. Smith, petitioner's older brother, testified in behalf of petitioner. James had worked as a pipe fitter for 40 years. He had worked alongside of sheet metal workers and is

familiar with the physical demands of the job of sheet metal worker. He confirmed a sheet metal worker had to climb up and down ladders and do a lot of heavy lifting. Petitioner lived with James from 2002 to 2007. Before 2003, petitioner was in great physical shape. James identified a photo of petitioner which was taken a few years before 2003. After 2003, petitioner was hard to get along with to the point James had to have him removed from his home.

James testified petitioner's condition has worsened since 2010; he had gained a lot of weight. Since 2003, petitioner has not done anything of a physical nature. James has helped repair petitioner's home and built a ramp for petitioner.

Raymond Crawford Testimony

Raymond Crawford, stepfather to petitioner, testified in behalf of petitioner. Crawford became petitioner's stepfather in 1993 and has known petitioner's family since 1980. In 2001 and 2002, petitioner lived with Crawford in Dyer, Indiana. During that period of time, petitioner was in excellent physical shape.

Crawford is retired carpenter and is familiar with the job of a sheet metal worker. Since 2010, Crawford has driven petitioner to various doctors. Petitioner uses a wheel chair. Petitioner also uses a walker; but gets fatigued easily when he does. When petitioner is on medication he is mostly withdrawn and sometimes argumentative. Petitioner has not been able to work since 2003.

Petitioner, Daniel Smith, Testimony

Petitioner's education has been mainly trade preparatory, even in high school, which included wood working, automotive, sheet metal and metal trades. His last two years in high school and thereafter he worked in the trades.

Since 2010, his lacks agility and movement in his back, neck and knee. His sleep pattern and mood has changed. For no reason at all he lashes out at people. His pain scale is from 7 to 10, depending upon the pain medication he is on. The pain medical is prescribed by Dr. Scott Glaser.

The job of a sheet metal worked required petitioner to measure, cut and form sheet metal. This required a lot of lifting. He has not been able to return to work since his fall at work in 2003, with the exception he was able to work light duty from February 3, 2003 to February 7, 2003.

He is now in a wheel chair due to repeated falls from his back, neck and knee; he is unstable. He takes medication for the pain three times a day; 26 pills per day. The medication is prescribed by Dr. Glaser, Dr. Rahim, Dr. Pablo Soto from Chicago Cardiologist and Dr. Sayed for PTSD and depression.

He lives in a house his brother purchased, which he said is filthy. He is unable to maintain it; occasionally he hires people to help.

He now uses a cane in order to ambulate. He is trying to move around to lose weight. Petitioner's picture was taken in 1995. He testified he was in better shape than the photo depicts in 2002, before the accident.

The temporary spinal cord stimulator Dr. Glaser prescribed in March, 2008 brought 50% relief to petitioner's back. Dr. Glaser also completed a form for medical marijuana, which helps reduce the pain. He also takes narcotics. He was to get the permanent stimulator installed on March 17, 2008, but it was denied by the workers' compensation insurance carrier.

Petitioner's 1995 Photo (PX.1)

Petitioner confirmed this was his photo taken in 1995

Pain and Rehab Specialists of Greater Chicago records (PX.2)

Petitioner was followed by Dr. Scott Glaser from May 28, 2010 to March 4, 2016.

Dr. Amina Rahim records (PX.4)

Petitioner was under the care of Dr. Amina Rahim from March 26, 2013 to October 30, 2015 for a variety of issues; only a few times relative to his back. It does not appear Dr. Rahim provided any direct treatment to petitioner's back.

Dr. Scott Edward Glaser April 11, 2017 Deposition (PX.5)

Dr. Scott Glaser, an interventional pain management specialist, testified via deposition in behalf of petitioner. Dr. Glaser has provided care and treatment to petitioner since 2007 to the date of his deposition.

Dr. Glaser's testimony concentrated on the treatment he performed as an interventional pain management doctor. There was very little testimony regarding petitioner's condition and treatment since the last hearing on July 27, 2010.

Included with the records was the bill for services rendered from May 28, 2010 through March 8, 2016 totaling $5,988.00

Dr. Charles Waite Mercier April 20, 2017 Deposition (RX.1)

Dr. Mercier, board certified orthopedic surgeon, testified via deposition in behalf of respondent.

Dr. Mercier had examined petitioner on June 30, 2003. He determined petitioner was at maximum medical improvement and could return to work at his regular position after suffering an acute lumbosacral strain/contusion in the work accident of February 3, 2003. (7-9)

Dr. Mercier's opinion did not change at the time of his April 5, 2007 exam (10-11). On September 20, 2007, Dr. Mercier performed a records review and provided a report (12). On October 13, 2015, Dr. Mercier examined petitioner and reviewed medical records; his opinion remained the same as that he expressed on June 30, 2003 (12).

Despite the fact that petitioner was in a wheel chair at the time of his 2015 exam, Dr. Mercier had no objective findings to document petitioner's ongoing disability (86). Dr. Mercier did not believe petitioner could get out of the wheel chair and return to work; he also agreed petitioner's condition had significantly deteriorated over time (87). Dr. Mercier confirmed that at the time of his initial exam of the petitioner, the petitioner was at MMI and capable of returning to work from the work injury (93).

[The questioning from pages 13 through 85 and 94 through 101 all related petitioner's condition that was decided in the previous decision]

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

In rendering this decision, the Arbitrator reviewed Arbitrator Hennessy's decision and the final Commission decision in order to ascertain the evidence relied upon by the Commission in determining petitioner's condition through the date of the last hearing on July 27, 2010; and compared it with the evidence presented in the present hearing, which included the testimony of James Smith, Raymond Crawford and petitioner, as well as all the medical evidence.

F. In support of the Arbitrator's decision with regard to whether Petitioner's present condition of ill-being is causally related to the injury, the Arbitrator makes the following finding:

The Arbitrator finds petitioner's condition of ill-being of acute lumbosacral strain/contusion, with ongoing complaints, is causally connected to the work accident of February 3, 2003. Although, for the most part, the extent of petitioner's disability was baked into the previous decision by the Commission, Dr. Mercier noted at the time of his October 13, 2015 exam that petitioner's condition had continued to deteriorate. The Arbitrator relied upon this finding by Dr. Mercier from the October 13, 2015 exam in making the determination that petitioner's ongoing back complaints were, in part, caused by the work accident.

J. In support of the Arbitrator's decision with regard to the medical bills incurred, the Arbitrator finds the following:

The previous decision cut off medical benefits after September 22, 2003. There was no evidence introduced at this hearing that supports an award for medical treatment after the last hearing.

K. In support of the Arbitrator's decision with regard to TTD, the Arbitrator finds the following:

The previous decision cut off TTD benefits as of September 22, 2003. There was no evidence introduced at this hearing that supports an award for TTD after the last hearing.

L. In support of the Arbitrator's decision with regard to the nature and extent of the injury, the Arbitrator finds the following:

At the time of his exam on October 13, 2015, Dr. Mercier noted petitioner's condition had deteriorated. In reliance of same, the Arbitrator, finds the nature and extent of petitioner's injury is 25% man as a whole, which is 125 weeks at the maximum rate of 542.17 per week.

N. In support of the Arbitrator's decision with regard to credit due respondent, the Arbitrator finds the following:

The previous decision by the Commission already determined respondent is entitled to a credit of $10,833.92 for TTD and a PPD advance of $27,108.50. The Arbitrator has no jurisdiction to alter this previous credit award.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC010560
Case Name	MITCHELL,GREG v. MEADE ELECTRIC COMPANY
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0243
Number of Pages of Decision	14
Decision Issued By	Thomas Tyrrell, Commissioner

Petitioner Attorney	James Babcock
Respondent Attorney	Daniel Arkin

DATE FILED: 5/19/2021

/s/ Thomas Tyrrell, Commissioner

Signature

21IWCC0243

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

Gregory Mitchell,

Petitioner,

vs. NO: 15 WC 10560

Mead Electric Company,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical bills, temporary total disability ("TTD"), 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.

In the interest of efficiency, the Commission primarily relies on the Arbitrator's detailed recitation of facts. On March 18, 2015, Petitioner sustained an injury to his low back while driving one of Respondent's trucks. The driver's seat in the truck was in poor condition. Immediately following his injury, his pain was so severe that he was unable to drive the entire distance to his home in Lake in the Hills, Illinois; instead, he spent the night in a hotel. An MRI of the back revealed a 2-mm broad-based annular disc bulge with bilateral neuroforaminal stenosis. The medical evidence shows that Petitioner's low back complaints required minimal conservative treatment. In fact, Petitioner's doctors prescribed only medication and a short course of physical therapy. Although Dr. Jain recommended Petitioner undergo a bilateral L4-5 transforaminal ESI, Petitioner declined to proceed with the injection. Petitioner last sought treatment relating to this work incident on April 27, 2015. He returned to work full duty on or around April 29, 2015.

Petitioner continued to work without incident in his usual job as a truck driver until he sustained a temporary aggravation to his low back on September 4, 2015. On that date, he felt excruciating pain in his low back after lifting a heavy bag of cement. Following this incident, he visited his doctor on September 16, 2015. The doctor prescribed a short course of physical therapy; however, Petitioner did not attend therapy. Although Petitioner testified that he continued to see his primary care doctor regarding his low back complaints, there are no corresponding medical records in evidence. He testified that his pain never improved following this second work incident.

Petitioner testified that he continues to experience pain in his low back and left buttock every day. He no longer takes any prescription medication for his ongoing back complaints. On the date of hearing, Petitioner had no future appointments scheduled with any doctor specifically relating to his low back complaints.

Petitioner did not return to work with Respondent following this incident; however, this was unrelated to the work injury Petitioner sustained. No doctor prescribed permanent restrictions for Petitioner as a result of either work incident. Furthermore, no doctor opined that Petitioner is unable to return to his regular job with Respondent. Instead, Petitioner chose to start a new job driving a truck with a different company in September 2015. He testified that he only drives locally and still has some difficulties driving a truck.

After carefully considering the totality of the evidence and analyzing the five factors pursuant to Section 8.1b(b) of the Act, the Commission finds Petitioner sustained a 2% loss of use of the whole person. Petitioner credibly testified that he continues to experience low back pain. However, his condition required limited and very conservative treatment. The initial work injury required less than two months of treatment before Petitioner returned to work full duty. Petitioner sustained the low back injury on March 18, 2015, and ceased treatment relating to the injury on April 27, 2015. He continued to perform his normal job duties until he sustained an aggravation of his low back injury on September 4, 2015. The medical records in evidence show that Petitioner only sought medical attention once following this second incident. Petitioner voluntarily left his job with Respondent and began working as a truck driver for another company. He testified that he continues to experience difficulties while driving his truck but requires no prescription medication or other treatment to alleviate his ongoing symptoms. Due to the limited and conservative treatment Petitioner underwent as a result of the initial work injury and the subsequent aggravation, the Commission finds Petitioner sustained a 2% loss of use of the whole person.

As a final matter, the Commission corrects a scrivener's error in the Decision of the Arbitrator. On page two (2) of the Decision, the Arbitrator mistakenly wrote that Petitioner experienced excruciating pain in the lower back on September 4, **2016**. The Commission modifies the above-referenced sentence to read as follows:

> Thereafter, on Friday, September 4, **2015**, while attempting to retrieve and lift an 80-pound bag of cement from six inches off the warehouse floor for transport to a job site, he experienced excruciating pain to the lower back.

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 March 25, 2019, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of **$898.50**/week for **4-6/7** weeks commencing **March 25, 2015** through **April 27, 2015**, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical services of **$6,474.33**, as set forth in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner permanent partial disability benefits of **$735.37**/week for **10** weeks, because Petitioner's injuries caused **2%** loss of use of the whole person, as provided for in §8(d)2 of the Act.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $17,500.00. 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.

DATED:

/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

MITCHELL, GREGORY
Employee/Petitioner

Case# **15WC010560**
16WC008881

MEADE ELECTRIC COMPANY
Employer/Respondent

On 3/25/2019, 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 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0222 GOLDBERG WEISMAN & CAIRO
JAMES E BABCOCK
ONE E WACKER DR SUITE 3800
CHICAGO, IL 60601

0507 RUSIN & MACIOROWSKI LTD
DANIEL W ARKIN
10 S RIVERSIDE PLZ SUITE 1925
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

Gregory Mitchell
Employee/Petitioner

v.

Meade Electric Company
Employer/Respondent

Case # **15** WC **10560**

Consolidated cases: **16 WC 08881**

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 **Maria Bocanegra**, Arbitrator of the Commission, in the city of **Chicago**, on **02/13/2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **03/18/15**, 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 March 18, 2015 **and reached MMI on April 27, 2015, which is the last date of treatment for this accident.**

In the year preceding the injury, Petitioner earned **$70,082.48**; the average weekly wage was **$1,347.74**.

On the date of accident, Petitioner was **45** years of age, ***married*** with **0** dependent children.

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

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

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

ORDER

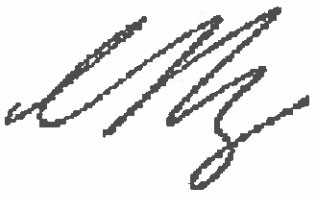
Respondent shall pay Petitioner temporary total disability benefits at the rate of **$898.50** per week for the periods from **March 25, 2015** through **April 27, 2015** or **4-6/7th weeks** pursuant to Section 8(b) of the Act.

Respondent shall pay the reasonable and necessary medical services in the gross amount of **$6,474.33**, subject to Section 8(a) and 8.2 of the Act.

Respondent shall pay a partial permanent disability of **3%** loss of use of a person as a whole or **15 weeks** at the statutory maximum of **$735.37** 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.



Signature of Arbitrator

3-22-2019
Date

MAR 25 2019

FINDING OF FACT

Petitioner was employed by Respondent driving six-wheeler dump trucks with tag trailers since June 2014. On March 18, 2015, Petitioner was assigned a truck that he was unfamiliar with. Prior to March 18, 2015, Petitioner testified that he was not having any difficulties with his lower back, walking or bending or lifting prior to the accident. (T. p 10, 11, 31)

Upon performing a pre-trip inspection, Petitioner noticed that the driver's seat padding was not all there, some of it was torn and missing and did not have the traditional air-ride suspension. (T. p. 12) Photos of the truck and the truck seat were admitted into evidence (Pet. Ex. 1 & 2) displaying a seat cushion in a worn condition with no air-ride mechanisms.

At about 1:00 p.m., while hauling 70,000 pounds of material from Respondent's Cermak & Halsted yard to a job site, Petitioner's truck struck a large pot hole buckle in the road at the bottom of the Western Avenue off ramp from the Kennedy. When the truck struck the defect at 25 to 30 miles per hour, Petitioner testified that he felt a big slam with the seat bottoming out on the frame of the truck causing his body to move up and down. (T. p. 14)

Petitioner testified that he felt pain immediately on both sides of his lower back with a sharp pain in his left buttocks but continued his shift until 3:00 p.m. (T. p. 15) Petitioner lived in Lake in the Hills and testified that upon completing work, the pain was so severe that he spent the night in hotel taking Tylenol or aspirin and lying flat on his back. (T. p17)

The following morning, Petitioner reported the accident to the safety director Rob and Jim Rosdenberger, a manager and completed a requested accident report and was directed to Physicians Immediate Care. (T. p18, 19) Upon examination, Petitioner testified that the lower back pain was in the kidney area down into the left buttocks and made walking difficult. Petitioner was prescribed medication which did not help and was provided restrictions. (T. p 20-21) Petitioner continued working March 19, 2015 but thinks he took the rest of the week off.

On March 19, 2015, Petitioner presented to Physicians Immediate Care (Pet. Ex. 3) and provided a history of severe bilateral low back pain since the day before while using a different truck where hydraulics supports were broken. Also noted was that Petitioner had progressively worsening back pain especially with driving over pot holes/bumps. The physical exam indicated an altered gait and posture with a limp and hunched over. A diagnosis was made of low back pain and Petitioner was released to return to work with a 30 pound below waist restriction until 03/23/2015.

Petitioner next sought medical attention with Dr. Goldvekht of Advanced Physical Medicine. Px4. Dr. Goldvekht's history on March 25, 2015 was that Petitioner was assigned to a new semi-truck and he noticed that the air seat did not work. Petitioner related that after working for 13 hours he was having difficulty getting out of seat and could not drive home due to pain in his low back, left buttock and leg. His complaints were of pain in the low back shooting down his left leg. The pain was recorded as constant, and will increase to a sharp pain with certain movements and rated the pain a 9/10. Examination found severe restrictions with range of motion with positive left straight leg raising test, a positive Patrick's test and positive Eli's test with pain on palpation. The assessment was of lumbar disc syndrome and radiculitis. Dr. Goldvekht's records stated that the condition did result from the type of injury/onset in the report. An MRI, medication and physical therapy was prescribed

Petitioner returned to D. Goldvekht on April 22, 2015 at which time he testified to having difficulty bending, lying flat and squatting. See, Px4. Medication and therapy was prescribed together with an MRI. The therapy was described as stretching exercises with electrodes and the Tramadol prescribed provided more relief

than the muscle relaxer. (T. p24-26, 29) Following review of the MRI with Dr. Goldvekht, a referral was made to Dr. Jain who prescribed on April 27, 2015 additional medication and an injection to the back. The injection was declined and Petitioner was released to return to work. (T. p27-29)

On follow up exam, April 22, 2015 ROM was found to be moderately decreased in the left, Patrick's test was positive as was Kemp's test but SLR was negative. Petitioner was noted to still walk with a mild antalgic gait. The MRI was interpreted as a 2mm broad based annular disc bulge and referral was made to Dr. Jain for a bilateral L4/L5 facet injection. The actual MRI report of April 6, 2015 found a small amount of bone marrow edema involving the l4-5 articulating facet with adjacent edema/inflammation. Dr. Goldvekht placed Petitioner off work for the period from March 25, 2015 through April 27, 2015. (Pet. Ex 4)

Dr. Neeraj Jain, M.D.'s exam of April 27, 2015 found lumbar axial pain upon palpation with decreased range of motion and diagnosed a lumbar facet syndrome, lumbar discogenic pain and lumbosacral radiculopathy and stated that the condition was directly related to the injury.

Upon returning to work, Petitioner testified to continuing pain in the lower back and left side pain daily. Lifting increased the pain. (T. p.30-31)

Petitioner continued working for Respondent. Thereafter, on Friday, September 4, 2016, while attempting to retrieve and lift an 80-pound bag of cement from six inches off the warehouse floor for transport to a job site, he experienced excruciating pain to the lower back. (T. p.37-39) Petitioner obtained assistance in loading the truck and returned to the job site were the load was unloaded by others. The pain was described as being sharper more intense pain that that which was experienced after returning to work from the March 18, 2015 accident. (T. p. 45) Petitioner did not return to work for Respondent and resigned on September 22, 2015 because he felt he could not do the heavy lifting. (T. p.49-50) On September 16, 2015, Petitioner returned to Dr. Goldvekht who prescribed an MRI and medications.

Ozvaldo Gomez Diaz Petitioner's general foreman testified on behalf of Respondent.
Mr. Gomez Diaz acknowledge that Petitioner told him that he had injured himself loading his truck and that his back was hurt and that if occurred while loading his truck at least within a month of the event but not as long as a month and a half. (T. p140, 142, 143, 150)

Petitioner has one visit to Dr. Goldvekht for this incident on September 16, 2015.
The exam found decreased range of motion with spasm of the lower back, tender trigger points into the buttocks and a positive Kemp's test. A diagnosis was made of lumbar disc syndrome, sprain strain. An MRI, anti-inflammatory, stomach medication and Terocin pain patches were prescribed. The American Diagnostic report of September 17, 2015 found mild lumbar spondylosis similar to the previous study but the previously seen bone marrow edema at the L4-5 level on the left had resolved. Dr. Goldvekht provided a disability statement for the period from 09/16/2015 through October 14, 2015. (Exhibit 4)

Curry testified extensively as to the kinds of seats fitted for various work trucks in Respondent's fleet. Curry stated that Petitioner did not submit any work order or report any damage or defect relative to the seat in question.

Petitioner continues to work as a truck driver but continues to experience pain in his lower back and sharp left buttock pain about the same as after the March 18, 2015 accident. (T. p52-54)

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment

Three witnesses testified at trial. Having considered all evidence, the Arbitrator finds Petitioner's testimony credible, forthright and otherwise unrebutted. Although Petitioner's testimony regarding notice of the second accident was not detailed, Respondent's witness Ozvaldo Gomez Diaz ultimately acknowledged notice within 45 days of the event. All witness testimony was otherwise credible.

ISSUE (C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
ISSUE (E) Was timely notice of the accident given to Respondent?

a. March 18, 2015 Accident – 15 WC 10560

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having considered all testimonies and evidence, the Arbitrator concludes Petitioner has proven by a preponderance of the evidence that he sustained accidental injuries to his low back/lumbar spine that arose out of and in the course of his employment with Respondent on March 15, 2015. In support thereof, the Arbitrator finds Petitioner's testimony credible as to the mechanism of injury and that he believed the seat of his work truck was broken. Petitioner stated that he drove the truck with the seat like this and experienced pain when going over a bump. Petitioner's medical histories note similar reports – that the seat was broken, that he drove for a long period and experienced progressively worsening low back pain and that it was increased with going over bumps or potholes. The arbitrator finds Petitioner credible in this regard. Here, there is no issue that Petitioner as in the course of his employment. The mechanism of injury arises out of his employment as Petitoiner was performing employment related tasks – that of driving the work truck – at the time of the onset of his low back pain.

Further, Petitioner testified that he had no similar low back left buttocks issues or accidents prior to the event of March 18, 2015 wherein his assigned dump truck and trailer with a combined weight of 70,000 pounds struck a road defect at the bottom the Western Avenue exit ramp resulting in immediate low back pain. The truck's seat is depicted as described. It is torn and has no hydraulics. Px1, 2. The Arbitrator has considered the testimony of Curry and finds that while Curry was credible as to his knowledge regarding the types of seats utilized in the various trucks in Respondent's fleet, it does not rebut the fact that Petitioner's particular seat was at issue for Petitioner. Even if no work order was issued for a defective seat, Petitioner credibly testified that he believed the seat was broken and this belief was repeatedly and timely echoed in the medical records. Therefore, the Arbitrator finds Petitioner proved accident and further gave timely notice to his employer, who ultimately sent him for medical care at PIC.

b. September 4, 2015 Accident – 16 WC 8881

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having considered all testimonies and evidence, the Arbitrator concludes Petitioner has proven by a preponderance of the evidence that he sustained accidental injuries to his low back/lumbar spine that arose out of and in the course of his employment with Respondent on September 4, 2015. In support thereof, the Arbitrator finds Petitioner's testimony credible as to the mechanism of injury of lifting and dropping a bag of cement he was attempting to load. While unwitnessed, Gomez, Respondent's general foreman, testified he recalled Petitioner mentioning an accident. Petitioner's version of events is unrebutted and corroborated in the treatment records. Therefore, the Arbitrator finds Petitioner has proven accident and that he gave timely notice to Respondent.

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

a. March 18, 2015 Accident – 15 WC 10560

Based upon the evidence presented, the Arbitrator finds that there is a causal relationship between Petitioner's condition of ill-being and the accident of March 18, 2015. There is no evidence that Petitioner was suffering from any problems with his lower back and left buttock prior to the date of the accident. Petitioner provided credible testimony as to the mechanism of injury, his course of care, which under a chain of events theory demonstrated a prior state of good health and an immediate change thereafter following this accident. In this case, the Arbitrator concludes that Petitioner has proven that his work accident was a causative factor in his current condition of ill-being as it relates to his lower back and left hip.

In so finding, the Arbitrator relies upon the opinions of Petitioner's treating physicians, Dr. Goldvekht & Dr. Jain in their diagnosis and statements regarding causal connection within the records that Petitioner sustained and injury of lumbar disc syndrome and radiculitis. The Arbitrator finds Petitioner's condition for the March 2015 accident reached MMI on April 27, 2015, which is Petitioner's last visit with Dr. Jain. Thereafter, Petitioner returned to work for Respondent until his next accident.

b. September 4, 2015 Accident – 16 WC 8881

The Arbitrator finds Petitioner's low back and lumbar conditions are causally related to his September 2015 work accident as described in the medical treatment records. On 9/16/15, Dr. Goldvekht diagnosed lumbar disc syndrome, lumbar sprain/strain. A new MRI showed similar findings compared to the earlier MRI done for the March 2015 accident except that the bone marrow edema had resolved. Respondent presented to contrary evidence. Therefore, the Arbitrator finds Petitioner's low back/lumbar condition is causally related to his September 2015 work accident.

ISSUE (J) Were the medical services that were provide to Petitioner reasonable and necessary?

a. March 18, 2015 Accident – 15 WC 10560

Based upon the evidence presented, the Arbitrator finds that the bills itemized as follows are reasonable and necessary. The Arbitrator further finds that each bill contains a corresponding date of service which is found in the record. The records correlated to treatment reasonable and necessary as to Petitioner's low back condition. Accordingly, the Arbitrator awards these bills in gross subject to the fee schedule. The bills awarded are as follows:

PHYSICIANS IMMEDIATE CARE	$327.52
ADVANCED PHYSICAL MEDICINE	$1,969.18
AMERICAN DIAGNOSTIC MRI	$1,700.00
PINNACLE PAIN MANAGEMENT	$325.00
EQMD	$2,152.63

b. September 4, 2015 Accident – 16 WC 8881

Based upon the evidence presented, the Arbitrator finds that the bills itemized as follows are reasonable and necessary. The Arbitrator further finds that each bill contains a corresponding date of service which is found in the record. The records correlated to treatment reasonable and necessary as to Petitioner's low back condition. Accordingly, the Arbitrator awards these bills in gross subject to the fee schedule. The bills awarded are as follows:

EQMD	$2,203.04
AMERICAN DIAGNOSTIC MRI	$1,700.00

ISSUE (K) What temporary benefits are in dispute?

a. March 18, 2015 Accident – 15 WC 10560

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Petitioner claims he was temporarily totally disabled from **March 25, 2015 through April 27, 2015** or **4 6/7 weeks**. The arbitrator adopts the findings of the treating physicians together with the testimony of the Petitioner in awarding benefits for this period totaling **4 6/7 weeks at the rate of $898.50 per week.** The Arbitrator further notes that Petitioner did attempt to return to work in a light duty status following his visit with Physicians Immediate Care on 03/19/2015.

b. September 4, 2015 Accident – 16 WC 8881

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Petitioner claims he was temporarily totally disabled from **September 16 through September 26, 2015** or 10 days per the stipulation sheet. He was unable to recall the exact day he returned to work for another employer. The arbitrator adopts the findings of the treating physicians together with the testimony of the Petitioner in awarding benefits for this period totaling **1 compensable week at the rate of $906.48 per week** as no benefits are owing for the first three days since Petitioner was not temporarily totally disabled 14 days or more. There are no credits claims.

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

a. March 18, 2015 Accident – 15 WC 10560

Petitioner treated for this accident until April 27, 2015, which is his last visit with Dr. Jain. Therefore, any claim for permanency is ripe for adjudication. In applying the five factors in Section 8.1b of the Act, the Arbitrator finds as follows:

- No AMA impairment ratings were presented and the Arbitrator give this factor no weight.

- As to occupation, the Petitioner is a union truck driver. There is no indication he was unable to return to this occupation. The Arbitrator gives no weight to this factor.

- As to the Petitioner's age, 45, at the time of injury, the Arbitrator notes that Petitioner is middle aged and has somewhat of a remaining work life expectancy. Petitioner will have to deal the effects of his disability for as long as remains in the labor-intensive workforce. The Arbitrator assigns some weight to this factor.

- As to future earning capacity, no evidence was presented that wages were diminished. The Arbitrator assigns no weight this factor.

- As to the disability in the medical records, the injury sustained was a sprain and strain with a left sided radicular component. Based on all of the above, the Arbitrator finds the Petitioner's injury to be both serious and permanent, and awards the loss of 3% of the person as a whole (15 weeks) pursuant to Section 8 (d) (2) of the Act at a PPD maximum rate of $735.37.

b. September 4, 2015 Accident – 16 WC 8881

In light of the fact that Petitioner testified that he returned to the condition he was in following his return to work from the previous injury of March 18, 2015, and since an award is made in that prior accident, no benefits are awarded for partial permanent disability for the September 4, 2015 accident.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC008881
Case Name	MITCHELL,GREGORY v. MEADE ELECTRIC COMPANY
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0244
Number of Pages of Decision	13
Decision Issued By	Thomas Tyrrell, Commissioner

Petitioner Attorney	James Babcock
Respondent Attorney	Daniel Arkin

DATE FILED: 5/19/2021

/s/ Thomas Tyrrell, Commissioner
Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Gregory Mitchell,

Petitioner,

vs. NO: 16 WC 8881

Meade Electric Company,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission solely seeks to correct a scrivener's error in the Decision of the Arbitrator. On page two (2) of the Decision, the Arbitrator mistakenly wrote that Petitioner experienced excruciating pain in the lower back on September 4, **2016**. The Commission modifies the above-referenced sentence to read as follows:

> Thereafter, on Friday, September 4, **2015**, while attempting to retrieve and lift an 80-pound bag of cement from six inches off the warehouse floor for transport to a job site, he experienced excruciating pain to the lower back.

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 March 25, 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,000.00. 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.

/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

MITCHELL, GREGORY
Employee/Petitioner

Case# **16WC008881**
15WC010560

MEADE ELECTRIC COMPANY
Employer/Respondent

On 3/25/2019, 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 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0222 GOLDBERG WEISMAN & CAIRO LTD
JAMES E BABCOCK
ONE E WACKER DR SUITE 3800
CHICAGO, IL 60601

0507 RUSIN & MACIOROWSKI LTD
DANIEL W ARKIN
10 S RIVERSIDE PLZ SUITE 1925
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

Gregory Mitchell
Employee/Petitioner

v.

Meade Electric Company
Employer/Respondent

Case # **16** WC **8881**

Consolidated cases: **15 WC 10560**

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 **Maria Bocanegra**, Arbitrator of the Commission, in the city of **Chicago**, on **02/13/2019**. 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 **09/04/2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$70,705.44**; the average weekly wage was **$1,359.72**.

On the date of accident, Petitioner was **45** years of age, ***married*** with **0** dependent children.

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits at the rate of **$906.48** per week for the periods from **September 16, 2015** through **September 26, 2015** for **1-1/4th** weeks pursuant to Section 8(b) of the Act.

Respondent shall pay the reasonable and necessary medical services in the gross amount of **$3,903.04** pursuant Section 8(a) and 8.2 of the Act.

No sums are payable for partial permanent disability.

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

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

Signature of Arbitrator

3-22-2019
Date

MAR 25 2019

FINDING OF FACT

Petitioner was employed by Respondent driving six-wheeler dump trucks with tag trailers since June 2014. On March 18, 2015, Petitioner was assigned a truck that he was unfamiliar with. Prior to March 18, 2015, Petitioner testified that he was not having any difficulties with his lower back, walking or bending or lifting prior to the accident. (T. p 10, 11, 31)

Upon performing a pre-trip inspection, Petitioner noticed that the driver's seat padding was not all there, some of it was torn and missing and did not have the traditional air-ride suspension. (T. p. 12) Photos of the truck and the truck seat were admitted into evidence (Pet. Ex. 1 & 2) displaying a seat cushion in a worn condition with no air-ride mechanisms.

At about 1:00 p.m., while hauling 70,000 pounds of material from Respondent's Cermak & Halsted yard to a job site, Petitioner's truck struck a large pot hole buckle in the road at the bottom of the Western Avenue off ramp from the Kennedy. When the truck struck the defect at 25 to 30 miles per hour, Petitioner testified that he felt a big slam with the seat bottoming out on the frame of the truck causing his body to move up and down. (T. p. 14)

Petitioner testified that he felt pain immediately on both sides of his lower back with a sharp pain in his left buttocks but continued his shift until 3:00 p.m. (T. p. 15) Petitioner lived in Lake in the Hills and testified that upon completing work, the pain was so severe that he spent the night in hotel taking Tylenol or aspirin and lying flat on his back. (T. p17)

The following morning, Petitioner reported the accident to the safety director Rob and Jim Rosdenberger, a manager and completed a requested accident report and was directed to Physicians Immediate Care. (T. p18, 19) Upon examination, Petitioner testified that the lower back pain was in the kidney area down into the left buttocks and made walking difficult. Petitioner was prescribed medication which did not help and was provided restrictions. (T. p 20-21) Petitioner continued working March 19, 2015 but thinks he took the rest of the week off.

On March 19, 2015, Petitioner presented to Physicians Immediate Care (Pet. Ex. 3) and provided a history of severe bilateral low back pain since the day before while using a different truck where hydraulics supports were broken. Also noted was that Petitioner had progressively worsening back pain especially with driving over pot holes/bumps. The physical exam indicated an altered gait and posture with a limp and hunched over. A diagnosis was made of low back pain and Petitioner was released to return to work with a 30 pound below waist restriction until 03/23/2015.

Petitioner next sought medical attention with Dr. Goldvekht of Advanced Physical Medicine. Px4. Dr. Goldvekht's history on March 25, 2015 was that Petitioner was assigned to a new semi-truck and he noticed that the air seat did not work. Petitioner related that after working for 13 hours he was having difficulty getting out of seat and could not drive home due to pain in his low back, left buttock and leg. His complaints were of pain in the low back shooting down his left leg. The pain was recorded as constant, and will increase to a sharp pain with certain movements and rated the pain a 9/10. Examination found severe restrictions with range of motion with positive left straight leg raising test, a positive Patrick's test and positive Eli's test with pain on palpation. The assessment was of lumbar disc syndrome and radiculitis. Dr. Goldvekht's records stated that the condition did result from the type of injury/onset in the report. An MRI, medication and physical therapy was prescribed

Petitioner returned to D. Goldvekht on April 22, 2015 at which time he testified to having difficulty bending, lying flat and squatting. See, Px4. Medication and therapy was prescribed together with an MRI. The therapy was described as stretching exercises with electrodes and the Tramadol prescribed provided more relief

than the muscle relaxer. (T. p24-26, 29) Following review of the MRI with Dr. Goldvekht, a referral was made to Dr. Jain who prescribed on April 27, 2015 additional medication and an injection to the back. The injection was declined and Petitioner was released to return to work. (T. p27-29)

On follow up exam, April 22, 2015 ROM was found to be moderately decreased in the left, Patrick's test was positive as was Kemp's test but SLR was negative. Petitioner was noted to still walk with a mild antalgic gait. The MRI was interpreted as a 2mm broad based annular disc bulge and referral was made to Dr. Jain for a bilateral L4/L5 facet injection. The actual MRI report of April 6, 2015 found a small amount of bone marrow edema involving the l4-5 articulating facet with adjacent edema/inflammation. Dr. Goldvekht placed Petitioner off work for the period from March 25, 2015 through April 27, 2015. (Pet. Ex 4)

Dr. Neeraj Jain, M.D.'s exam of April 27, 2015 found lumbar axial pain upon palpation with decreased range of motion and diagnosed a lumbar facet syndrome, lumbar discogenic pain and lumbosacral radiculopathy and stated that the condition was directly related to the injury.

Upon returning to work, Petitioner testified to continuing pain in the lower back and left side pain daily. Lifting increased the pain. (T. p.30-31)

Petitioner continued working for Respondent. Thereafter, on Friday, September 4, 2016, while attempting to retrieve and lift an 80-pound bag of cement from six inches off the warehouse floor for transport to a job site, he experienced excruciating pain to the lower back. (T. p.37-39) Petitioner obtained assistance in loading the truck and returned to the job site were the load was unloaded by others. The pain was described as being sharper more intense pain that that which was experienced after returning to work from the March 18, 2015 accident. (T. p. 45) Petitioner did not return to work for Respondent and resigned on September 22, 2015 because he felt he could not do the heavy lifting. (T. p.49-50) On September 16, 2015, Petitioner returned to Dr. Goldvekht who prescribed an MRI and medications.

Ozvaldo Gomez Diaz Petitioner's general foreman testified on behalf of Respondent.
Mr. Gomez Diaz acknowledge that Petitioner told him that he had injured himself loading his truck and that his back was hurt and that if occurred while loading his truck at least within a month of the event but not as long as a month and a half. (T. p140, 142, 143, 150)

Petitioner has one visit to Dr. Goldvekht for this incident on September 16, 2015.
The exam found decreased range of motion with spasm of the lower back, tender trigger points into the buttocks and a positive Kemp's test. A diagnosis was made of lumbar disc syndrome, sprain strain. An MRI, anti-inflammatory, stomach medication and Terocin pain patches were prescribed. The American Diagnostic report of September 17, 2015 found mild lumbar spondylosis similar to the previous study but the previously seen bone marrow edema at the L4-5 level on the left had resolved. Dr. Goldvekht provided a disability statement for the period from 09/16/2015 through October 14, 2015. (Exhibit 4)

Curry testified extensively as to the kinds of seats fitted for various work trucks in Respondent's fleet. Curry stated that Petitioner did not submit any work order or report any damage or defect relative to the seat in question.

Petitioner continues to work as a truck driver but continues to experience pain in his lower back and sharp left buttock pain about the same as after the March 18, 2015 accident. (T. p52-54)

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment

Three witnesses testified at trial. Having considered all evidence, the Arbitrator finds Petitioner's testimony credible, forthright and otherwise unrebutted. Although Petitioner's testimony regarding notice of the second accident was not detailed, Respondent's witness Ozvaldo Gomez Diaz ultimately acknowledged notice within 45 days of the event. All witness testimony was otherwise credible.

ISSUE (C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
ISSUE (E) Was timely notice of the accident given to Respondent?

a. March 18, 2015 Accident – 15 WC 10560

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having considered all testimonies and evidence, the Arbitrator concludes Petitioner has proven by a preponderance of the evidence that he sustained accidental injuries to his low back/lumbar spine that arose out of and in the course of his employment with Respondent on March 15, 2015. In support thereof, the Arbitrator finds Petitioner's testimony credible as to the mechanism of injury and that he believed the seat of his work truck was broken. Petitioner stated that he drove the truck with the seat like this and experienced pain when going over a bump. Petitioner's medical histories note similar reports – that the seat was broken, that he drove for a long period and experienced progressively worsening low back pain and that it was increased with going over bumps or potholes. The arbitrator finds Petitioner credible in this regard. Here, there is no issue that Petitioner as in the course of his employment. The mechanism of injury arises out of his employment as Petitoiner was performing employment related tasks – that of driving the work truck – at the time of the onset of his low back pain.

Further, Petitioner testified that he had no similar low back left buttocks issues or accidents prior to the event of March 18, 2015 wherein his assigned dump truck and trailer with a combined weight of 70,000 pounds struck a road defect at the bottom the Western Avenue exit ramp resulting in immediate low back pain. The truck's seat is depicted as described. It is torn and has no hydraulics. Px1, 2. The Arbitrator has considered the testimony of Curry and finds that while Curry was credible as to his knowledge regarding the types of seats utilized in the various trucks in Respondent's fleet, it does not rebut the fact that Petitioner's particular seat was at issue for Petitioner. Even if no work order was issued for a defective seat, Petitioner credibly testified that he believed the seat was broken and this belief was repeatedly and timely echoed in the medical records. Therefore, the Arbitrator finds Petitioner proved accident and further gave timely notice to his employer, who ultimately sent him for medical care at PIC.

b. September 4, 2015 Accident – 16 WC 8881

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having considered all testimonies and evidence, the Arbitrator concludes Petitioner has proven by a preponderance of the evidence that he sustained accidental injuries to his low back/lumbar spine that arose out of and in the course of his employment with Respondent on September 4, 2015. In support thereof, the Arbitrator finds Petitioner's testimony credible as to the mechanism of injury of lifting and dropping a bag of cement he was attempting to load. While unwitnessed, Gomez, Respondent's general foreman, testified he recalled Petitioner mentioning an accident. Petitioner's version of events is unrebutted and corroborated in the treatment records. Therefore, the Arbitrator finds Petitioner has proven accident and that he gave timely notice to Respondent.

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

a. March 18, 2015 Accident – 15 WC 10560

Based upon the evidence presented, the Arbitrator finds that there is a causal relationship between Petitioner's condition of ill-being and the accident of March 18, 2015. There is no evidence that Petitioner was suffering from any problems with his lower back and left buttock prior to the date of the accident. Petitioner provided credible testimony as to the mechanism of injury, his course of care, which under a chain of events theory demonstrated a prior state of good health and an immediate change thereafter following this accident. In this case, the Arbitrator concludes that Petitioner has proven that his work accident was a causative factor in his current condition of ill-being as it relates to his lower back and left hip.

In so finding, the Arbitrator relies upon the opinions of Petitioner's treating physicians, Dr. Goldvekht & Dr. Jain in their diagnosis and statements regarding causal connection within the records that Petitioner sustained and injury of lumbar disc syndrome and radiculitis. The Arbitrator finds Petitioner's condition for the March 2015 accident reached MMI on April 27, 2015, which is Petitioner's last visit with Dr. Jain. Thereafter, Petitioner returned to work for Respondent until his next accident.

b. September 4, 2015 Accident – 16 WC 8881

The Arbitrator finds Petitioner's low back and lumbar conditions are causally related to his September 2015 work accident as described in the medical treatment records. On 9/16/15, Dr. Goldvekht diagnosed lumbar disc syndrome, lumbar sprain/strain. A new MRI showed similar findings compared to the earlier MRI done for the March 2015 accident except that the bone marrow edema had resolved. Respondent presented to contrary evidence. Therefore, the Arbitrator finds Petitioner's low back/lumbar condition is causally related to his September 2015 work accident.

ISSUE (J) Were the medical services that were provide to Petitioner reasonable and necessary?

a. March 18, 2015 Accident – 15 WC 10560

Based upon the evidence presented, the Arbitrator finds that the bills itemized as follows are reasonable and necessary. The Arbitrator further finds that each bill contains a corresponding date of service which is found in the record. The records correlated to treatment reasonable and necessary as to Petitioner's low back condition. Accordingly, the Arbitrator awards these bills in gross subject to the fee schedule. The bills awarded are as follows:

PHYSICIANS IMMEDIATE CARE	$327.52
ADVANCED PHYSICAL MEDICINE	$1,969.18
AMERICAN DIAGNOSTIC MRI	$1,700.00
PINNACLE PAIN MANAGEMENT	$325.00
EQMD	$2,152.63

b. September 4, 2015 Accident – 16 WC 8881

Based upon the evidence presented, the Arbitrator finds that the bills itemized as follows are reasonable and necessary. The Arbitrator further finds that each bill contains a corresponding date of service which is found in the record. The records correlated to treatment reasonable and necessary as to Petitioner's low back condition. Accordingly, the Arbitrator awards these bills in gross subject to the fee schedule. The bills awarded are as follows:

EQMD	$2,203.04
AMERICAN DIAGNOSTIC MRI	$1,700.00

ISSUE (K) What temporary benefits are in dispute?

a. March 18, 2015 Accident – 15 WC 10560

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Petitioner claims he was temporarily totally disabled from **March 25, 2015 through April 27, 2015** or **4 6/7 weeks**. The arbitrator adopts the findings of the treating physicians together with the testimony of the Petitioner in awarding benefits for this period totaling **4 6/7 weeks at the rate of $898.50 per week.** The Arbitrator further notes that Petitioner did attempt to return to work in a light duty status following his visit with Physicians Immediate Care on 03/19/2015.

b. September 4, 2015 Accident – 16 WC 8881

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Petitioner claims he was temporarily totally disabled from **September 16 through September 26, 2015** or 10 days per the stipulation sheet. He was unable to recall the exact day he returned to work for another employer. The arbitrator adopts the findings of the treating physicians together with the testimony of the Petitioner in awarding benefits for this period totaling **1 compensable week at the rate of $906.48 per week** as no benefits are owing for the first three days since Petitioner was not temporarily totally disabled 14 days or more. There are no credits claims.

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

a. March 18, 2015 Accident – 15 WC 10560

Petitioner treated for this accident until April 27, 2015, which is his last visit with Dr. Jain. Therefore, any claim for permanency is ripe for adjudication. In applying the five factors in Section 8.1b of the Act, the Arbitrator finds as follows:

- No AMA impairment ratings were presented and the Arbitrator give this factor no weight.

- As to occupation, the Petitioner is a union truck driver. There is no indication he was unable to return to this occupation. The Arbitrator gives no weight to this factor.

- As to the Petitioner's age, 45, at the time of injury, the Arbitrator notes that Petitioner is middle aged and has somewhat of a remaining work life expectancy. Petitioner will have to deal the effects of his disability for as long as remains in the labor-intensive workforce. The Arbitrator assigns some weight to this factor.

- As to future earning capacity, no evidence was presented that wages were diminished. The Arbitrator assigns no weight this factor.

- As to the disability in the medical records, the injury sustained was a sprain and strain with a left sided radicular component. Based on all of the above, the Arbitrator finds the Petitioner's injury to be both serious and permanent, and awards the loss of 3% of the person as a whole (15 weeks) pursuant to Section 8 (d) (2) of the Act at a PPD maximum rate of $735.37.

b. September 4, 2015 Accident – 16 WC 8881

In light of the fact that Petitioner testified that he returned to the condition he was in following his return to work from the previous injury of March 18, 2015, and since an award is made in that prior accident, no benefits are awarded for partial permanent disability for the September 4, 2015 accident.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC032195
Case Name	NOREK, JOSHUA v. BOONE COUNTY FIRE DISTRICT 2
Consolidated Cases	
Proceeding Type	Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0245
Number of Pages of Decision	17
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	James Gesmer
Respondent Attorney	Lloyd McCumber

DATE FILED: 5/20/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Joshua Norek,
Petitioner,

vs. NO: 18 WC 32195

Boone County Fire Protection District 2,
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 and prospective medical and being advised of the facts and law, makes the changes as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

This matter was arbitrated pursuant to §8(a) and the parties advised the Arbitrator that the issue of TTD was deferred. As such the matter will be remanded to the Arbitrator to adjudicate possible additional awards.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 15, 2020, is hereby changed as stated above and otherwise is affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Commission remands this case to the Arbitrator for further proceedings for a determination of any mount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS FURTHER ORDERED BY THE COMMISSION that 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.

There is no bond for the removal of this cause to the Circuit Court by Respondent pursuant to §19(f)(2) of the Act. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 20, 2021

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

04/20/21
DLS/dw
046

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
8(A)

NOREK, JOSHUA Case# **18WC032195**
Employee/Petitioner

BOONE COUNTY FIRE PROTECTION DISTRICT 2
Employer/Respondent

On 7/15/2020, 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 0.14% 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:

1131 GESMER & REYNOLDS PC
JAMES A GESMER
526 E JEFFERSON ST SUITE 118
ROCKFORD, IL 61107

0075 POWER & CRONIN LTD
LLOYD R McCUMBER
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
8(A)

JOSHUA NOREK
Employee/Petitioner
v.
BOONE COUNTY FIRE PROTECTION DISTRICT 2
Employer/Respondent

Case # **18 WC 32195**

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 Michael Glaub, Arbitrator of the Commission, in the city of Rockford, on June 16, 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?
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 Treatment.**

FINDINGS

On the date of accident, ***July 27, 2018***, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned ***$43,680.00***; the average weekly wage was ***$840.00***.

On the date of accident, Petitioner was ***30*** 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 ***$10,078.92*** for TTD and ***0*** for TPD for a total credit of ***$10,078.92***.

Respondent is entitled to credit for ***$10,078.92*** under Section 8(j) of the Act.

ORDER

- Respondent shall pay $1,006.00 for reasonable and necessary medical services, as provided in Section 8(a) of the act.
- Respondent shall authorize and pay for lumbar spine injection therapy as recommended by Dr. Fischer and as further set forth herein.

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

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

Signature of Arbitrator

July 14, 2020
Date

ICArbDec19(b)

JUL 15 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JOSHUA NOREK
Employee/Petitioner

v.

BOONE COUNTY FIRE PROTECTION DISTRICT #2
Employer/Respondent

Case # **18 WC 32195**

I. FINDINGS OF FACT

Trial Testimony of Petitioner

Petitioner, Joshua Norek, testified that he had been employed by Respondent, Boone County Fire Protection District #2, as a firefighter since the early part of 2009. Petitioner also testified that prior to July 27, 2020 he had never pursued a workers compensation claim (T 9-10). Petitioner further testified that prior to going to work for a concurrent job as a paramedic at ATS Ambulance in May 2018, he underwent a full preemployment physical examination at Rockford Orthopedic (T 10-11).

Petitioner testified that prior to July 27, 2018, he treated at Caraotta Chiropractic on occasion for sporadic low back problems (T 11). The handwritten medical records from Caraotta Chiropractic indicate that Petitioner treated there on one occasion in 2013 and 2014, on three occasions in 2015, on one occasion in 2016, and on six occasions in 2017. Those records also indicate that Petitioner treated with Dr. Caraotta in January 2018 and then again on March 1, 2018, and April 12, 2018 (RX 2).

Petitioner testified that the treatment with Dr. Caraotta involved chiropractic alignments and manipulations, electrical muscle stimulation and electro-therapy, and that Dr. Caraotta never ordered an MRI (T 12-13, 36). Petitioner also testified that between December 2012, when he

first sought treatment at Caraotta Chiropractic, and April 12, 2018, he did not experience constant and continuous problems involving his low back (T 43).

Petitioner testified that between April 12, 2018, and July 26, 2018, he did not notice anything notable about his low back and lower extremities. Petitioner also testified that when he reported for work on July 27, 2018, he did not notice anything unusual about his low back and lower extremities (T 13-14).

Petitioner testified that he was called to a fire on July 27, 2018. At the scene of the fire, Petitioner testified that he was working on the exterior of the house on a hose line. Petitioner also testified that the firefighter who was holding the back end of the hose line slipped, causing him to bear the full weight of the hose. Petitioner also testified that when this happened, he lost his footing on a sloped driveway, fell and hit the ground (T 14).

Petitioner testified that when he fell, he felt pain on the right side of his lower back and his left buttock, as well as numbness in his lower extremities. Petitioner also testified that he continued to perform his job duties to help put out the fire (T 15). Petitioner further testified that the night of his work accident, he was experiencing pain in most of his lower back, but that the right side was more painful (T 30).

Petitioner testified that due to his symptoms, he was transported via ambulance to the OSF Saint Anthony Medical Center Emergency Department (T 16). The medical records from OSF Saint Anthony Medical Center from July 27, 2018, indicate that Petitioner reported that he has had some mild chronic aching to the low back in the past, but that his pain significantly increased that evening. The records also indicate that Petitioner reported that he was experiencing spasms and pain radiating down both legs. Petitioner underwent at CT scan of the lumbar spine and thoracic spine, which did not reveal a fracture or dislocation. Petitioner was

administered Toradol and Norflex and was instructed to take Norco and Prednisone and to follow-up with his primary care physician (PX 1).

Petitioner testified that on July 31, 2018, he consulted with Dr. Sapying at OSF Medical Group-Poplar Grove (T 17). Dr. Sapying's records from that date indicate that Petitioner reported constant low back pain, radiating down the right leg to the mid-calf, as well as occasional numbness at the back of the right thigh. Dr. Sapying's diagnosis was acute right-sided low back pain with right-sided sciatica, and he prescribed Naproxen and Norco and instructed Petitioner to apply heat as-needed (PX 2).

Petitioner testified that he consulted with Dr. Pocock at OSF Medical Group-Poplar Grove on August 6, 2018 (T 17-18). Dr. Pocock's records from that date indicate that Petitioner reported a previous history of intermittent back pain symptoms. Dr. Pocock also noted that Petitioner's back pain symptoms in the past had not warranted the need for imaging, epidural injections or surgery. Dr. Pocock's diagnoses were acute bilateral low back pain with bilateral sciatica, and he prescribed physical therapy and Flexeril and ordered Petitioner not to work (PX 2).

Petitioner testified that he returned to see Dr. Pocock on August 13, 2018 T 18). Dr. Pocock's records from that date indicate that Petitioner complained of pain radiating down to both feet. Dr. Pocock's examination findings on that date included paraspinal spasming. Dr. Pocock prescribed Flexeril, ordered a lumbar spine MRI and ordered Petitioner not to work (PX 2).

Petitioner testified that he underwent a lumbar spine MRI on August 14, 2018 (T 18). The radiologist interpreted the MRI to reveal a congenitally small central canal with mild facet arthritic changes in the lower lumbar levels, as well as mild to moderate facet arthropathy at L5-S1 bilaterally and L4 bilaterally (PX 1).

Petitioner testified that he started physical therapy at OSF Saint Anthony on September 4, 2018 (T 19). The OSF Saint Anthony physical therapy records indicate that Petitioner attended six physical therapy sessions in September 2018 (PX 1). The initial physical therapy report from September 4, 2018, indicates that Petitioner reported the circumstances surrounding is July 27, 2018, work accident, and that he complained of right-sided low back pain and lower extremity numbness, tingling and pain (PX 1).

Petitioner testified that he returned to see Dr. Pocock on October 1, 2018 (T 19-20). The medical records from that date indicate that Dr. Pocock's examination findings included muscle spasming on the right side. Dr. Pocock's assessment was acute bilateral low back pain without sciatica. Dr. Pocock instructed Petitioner to continue with physical therapy and to remain off of work (PX 2).

Petitioner testified that he continued to attend physical therapy in October 2018 (T 20). The medical records from OSF Saint Anthony indicate that Petitioner attended five physical therapy sessions between October 5 and October 30, 2018 (PX 1).

Petitioner testified that he attended a Section 12 examination with Dr. Stephen Weiss on October 23, 2018. Petitioner also testified that Dr. Weiss spent approximately 6 minutes on October 23, 2018, talking to him and examining him (T 20). Dr. Weiss' report from October 23, 2018, indicates that he diagnosed Petitioner with a resolved work-related lumbar spine strain and recommended an additional two weeks of a formal physical therapy program, to be followed by four weeks of a home exercise program (RX 3).

Petitioner testified that he returned to see Dr. Pocock on November 5, 2018 (T 20). Dr. Pocock's records from November 5, 2018, indicate that he prescribed Norco (PX 2).

Petitioner testified that he continued to attend physical therapy in November 2018 (T 20-21). The physical therapy records indicate that Petitioner attended six sessions between

November 5, 2018, and November 27, 2018 (PX 1). Petitioner testified that the physical therapy ended on November 27, 2018, due to lack of funding to pay for it (T 21).

Petitioner testified that he returned to see Dr. Pocock on December 6, 2018. Dr. Pocock's records from that date indicate that he recommended additional physical therapy and suggested that Petitioner consult with an orthopedic surgeon (PX 2). Petitioner testified that he was not able to seek the recommended treatment, as he did not have group health insurance coverage at that time (T 21-22).

Petitioner testified that he returned to see Dr. Pocock on January 24, 2019 (T 22). The medical records from that date indicate that Petitioner reported worsening back pain, radiating down both legs. Dr. Pocock's examination findings on that date included tenderness of the right sacroiliac joint. Dr. Pocock prescribed Naproxen, Norco and Flexeril (PX 2).

Petitioner testified that on March 6, 2019, he was examined by Dr. Theodore Fisher at Illinois Bone and Joint Institute at the request of his counsel. Petitioner also testified that Dr. Fisher spent approximately 45 minutes with him and had x-rays taken of his lumbar spine. Dr. Fisher's report of March 6, 2019, indicates that his assessment was as follows: 1) Right sacroiliitis with subchondral cysts and sclerosis changes noted on the July 28, 2018, CT scan; 2) Facet arthropathy bilaterally at L5-S1 and to a lesser extent at L4-5, and on the right at L3-4; and 3) Lumbar spine sprain/strain, most likely resolved at this point with ongoing pain most likely from the first two assessments (PX 4).

Dr. Fisher's report of March 6, 2019, indicates that he recommended that Petitioner undergo right-sided sacroiliac diagnostic and therapeutic injections, possible radiofrequency ablation and possible percutaneous SI joint fusion if necessary. Dr. Fisher also recommended that Petitioner continue his exercise program for physical therapy, and he opined that it is within a degree of medical and surgical certainty that Petitioner's work accident of July 27, 2018, either

caused, accelerated or exacerbated his problems with the sacroiliitis and facet arthropathy (PX 4).

Petitioner testified that he returned to see Dr. Pocock on April 4, 2019 (T 23). Dr. Pocock's medical records from that date indicate that his examination findings included decreased sensation in the left leg and slight pain with straight leg raising. Dr. Pocock instructed Petitioner to continue to take his medications (PX 2).

Petitioner testified that he returned to see Dr. Pocock on June 26, 2019 (T 23). The medical records from that date indicate that Dr. Pocock's examination findings included positive straight leg raise bilaterally (PX 2).

Petitioner testified that he attended a second examination with Dr. Stephen Weiss on August 20, 2019, at the request of Respondent. Petitioner also testified that Dr. Weiss spent approximately 20 minutes with him on August 20, 2019 (T 23).

Dr. Weiss' report from the August 20, 2019, examination indicates that his examination findings included diminished sensation bilaterally in the S1 dermatomes, tenderness at the right L3-4 facet joint and on left SI joint stress, as well as decreased lumbar spine flexion. Dr. Weiss opined that Dr. Fisher's recommendation of facet joint injections and/or sacroiliac injections are reasonable, but that they are not related to Petitioner's work accident of July 27, 2018. Dr. Weiss also opined that Petitioner's facet joint and sacroiliac derangements would not have been caused or aggravated by the July 27, 2018, work accident (RX 3).

Petitioner testified that he returned to see Dr. Pocock on September 5, 2019 (T 23). Dr. Pocock's medical records from that date indicate that he prescribed Gabapentin (PX 2).

Petitioner testified that he returned to see Dr. Pocock on October 3, 2019 (T 23-24). Dr. Pocock's medical records from that date indicate that his examination findings included spasms

and decreased right lateral sensation. Dr. Pocock's assessment on that date was chronic bilateral low back pain with bilateral sciatica (PX 2).

Petitioner testified that until approximately one month ago, he was taking Naproxen, Flexeril, Norco and Gabapentin. Petitioner also testified that he has not worked as a paramedic or a firefighter since July 27, 2018, but that he had been working on and off as a swim instructor for the YMCA (T 24-25).

Petitioner testified that at the present time, he experiences constant pain in his low back, decreased sensation below his right knee and numbness and tingling in both feet (T 26). Petitioner also testified that the right-sided low back pain has stayed consistent, and that the left-sided low back pain fluctuates in severity (T 31). Petitioner further testified that he has been experiencing constant pain in his low back and tingling in his feet and lower extremities since July 27, 2018 (T 43). Petitioner additionally testified that it is his desire to pursue the medical treatment recommended by Dr. Fisher (T 27).

CONCLUSIONS OF LAW

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

In support of the Arbitrator's decision relating to (F) whether Petitioner's present condition of ill-being is causally related to the injury of July 27, 2018, the Arbitrator finds the following facts: The Arbitrator, having read and considered all of the medical records, having reviewed the opinions of Dr. Fisher and Dr. Weiss and having heard Petitioner's testimony, finds that the accident of July 27, 2018, could or might be causally related to the treatment rendered to Petitioner and could or might be causally related to the current condition of ill-being, as evidenced by the testimony of Petitioner and the medical records.

The Arbitrator notes that Dr. Fisher testified that his assessment after examining Petitioner on March 6, 2019, was right sacroiliitis, facet arthropathy bilaterally at L5-S1, to a lesser extent

at L4-5 and on the right at L3-4 and a lumbar spine sprain/strain, most likely resolved (PX 3, Page 14). The Arbitrator also notes that Dr. Fisher testified that he recommended a diagnostic and therapeutic SI joint injection on the right and a possible facet injection or medial branch block for the facet arthropathy. Dr. Fisher further testified that if Petitioner has temporary relief from his injection to the SI joint, he may be candidate for an SI joint fusion in the future (PX, Page 17).

The Arbitrator notes that Dr. Fisher testified that the degenerative findings noted on the July 28, 2018, CT scan predate the work accident, but that they could have easily been aggravated by the accident, causing symptoms such as pain in the lower back and buttock area and right lower extremity numbness and tingling (PX, Pages 15-16, 18-19). Dr. Fisher further testified that in his opinion, Petitioner's work accident of July 27, 2018, either aggravated or accelerated the right-sided sacrioliitis, causing the need for the diagnostic and therapeutic SI joint injection on the right (PX 3, Pages 19-20).

The Arbitrator notes that Dr. Fisher testified that assuming that Petitioner made complaints to the chiropractor in April 2018 of intermittent low back pain radiating down the left lower extremity, that would not have changed his causation opinion regarding the right sacroiliitis (PX 3, Page 31). Dr. Fisher also testified that if Petitioner sought chiropractic treatment three months prior to his work accident for mild symptoms and then was able to work full duty as a firefighter and then experienced a trauma, it would be his opinion that this would represent an aggravation (PX 3, Page 31).

The Arbitration rejects the causation opinion of Dr. Weiss, that being that the facet joint and sacroiliac joint derangements were not caused or aggravated by the July 27, 2018, work accident. Dr. Weiss noted in his February 4, 2020, report that he based his causation opinion in great part on Petitioner making complaints of low back pain intermittently running down the left

lower extremity when he sought chiropractic treatment on January 30, 2018, and April 12, 2018. Dr. Weiss therefore opined that based upon his review of the chiropractic records, Petitioner had been having left psoas symptoms for about a half a year prior to the work accident of July 27, 2018 (RX 3).

The Arbitrator has carefully reviewed the findings and opinions of Dr. Fisher, who is a fellowship trained and board certified orthopedic spine surgeon, and those of Dr. Weiss, and finds the opinions of Dr. Fisher to be more credible as to the issue of causal connection. The Arbitrator finds that the opinions of Dr. Fisher as to causal connection are consistent with Petitioner's testimony regarding the specifics of his undisputed work accident of July 27, 2018. The Arbitrator also notes that even though the April 12, 2018, handwritten chiropractic note appears to mention left psoas, Dr. Fisher is recommending treatment for right sacroillitis.

Based upon the above, the Arbitrator is satisfied that there is overwhelming evidence to support a finding of causal connection between the accident of July 27, 2018, the treatment rendered to Petitioner and his current condition of ill-being.

O. Is Petitioner entitled to any prospective medical care?

In support of (O), whether Petitioner is entitled to any prospective medical care, the Arbitrator finds the following facts: The Arbitrator, having heard the testimony of Petitioner and having read and considered all of the medical records, as well as the opinions of Dr. Fisher and Dr. Weiss, finds that Petitioner is in need of further medical treatment that is causally related to his work injury of July 27, 2018. Dr. Fisher opined that Petitioner should initially undergo a diagnostic and therapeutic SI joint injection on the right and a possible facet injection or medial branch block for the facet arthropathy. Dr. Fisher also testified that if Petitioner received temporary relief from his injection to the SI joint, he may be a candidate for a Radiofrequency

Ablation procedure or an SI joint fusion in the future (PX 3, pages 17-18, PX 4). Dr. Fisher additionally opined and testified that this recommended injection therapy is related to Petitioner's work injury of July 27, 2018 (PX 3, pages 20-21, PX 4). The Arbitrator notes that Respondent's examining physician, Dr. Weiss, opined that Dr. Fisher's recommendation of facet joint injections and/or sacroiliac joint injections is reasonable (RX 3).

The Arbitrator has carefully considered the records of Dr. Fisher, Dr. Pocock and Dr. Weiss and finds that Petitioner is in need of further medical treatment which is causally related to his work injury of July 27, 2018. The Arbitrator therefore finds that Petitioner is entitled to receive reasonable and necessary medical treatment, including a diagnostic and therapeutic sacroiliac joint injection on the right, that is causally related to the July 27, 2018, work 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?

Having found in favor of Petitioner as to the issue of causal connection, the Arbitrator finds that Respondent is liable for the following medical bills, totaling $1,006.00, pursuant to the Workers' Compensation Fee Schedule:

1. OSF Healthcare (PX 5) $1,006.00

The Arbitrator finds that the above medical bill relate to services rendered to Petitioner between December 6, 2018, and October 3, 2019, that were causally related to his work accident of July 27, 2018. Accordingly, based on the Arbitrator's finding on the issue of causal connection, the Arbitrator further finds that Respondent shall pay reasonable and necessary medical expenses incurred in the care of treatment for his causally related conditions pursuant to Sections 8 and 8.2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC010795
Case Name	THEIL, IRENE v. CENVEO, INC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0246
Number of Pages of Decision	34
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	KEITH SPARKS
Respondent Attorney	Peter Havighorst

DATE FILED: 5/21/2021

/s/Kathryn Doerries, Commissioner

Signature

21IWCC0246

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 NO CC TO CTS-VACATE HAND AWARDS	☐ Second Injury Fund (§8(e)18)
X Correct scriveners error Arb dec p4	☐ PTD/Fatal denied
☒ Modify REDUCE PPD RT ARM	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

IRENE THEIL,

Petitioner,

vs. NO: 13 WC 10795

CENVEO, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, permanent partial disability, and Other-Motion to reopen proofs and evidentiary rulings, and being advised of the facts and law, reverses, in part, corrects scrivener's errors, and modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Petitioner is a 50-year-old (d/o/b 7/7/62) employee of Respondent, who described her job as a machine operator. Petitioner began working for Respondent on 9/4/00. Her job entailed picking up envelopes from the line and placing them in boxes. After that, she pushed the box on the line as the box was taped. She also had to check quality of the envelopes. Petitioner worked 8 hours per day and she packed envelopes the whole day. Petitioner testified she would pack about 280,000 envelopes, some days more, in an 8 hour day. Between 2000 and 2012 she did not always work the same machine and some machines were faster than others. The size of the envelopes also varied. (T.10.-12)

Petitioner testified the machine makes the envelopes and she has to lift about 1,200 or 1,400 at once in one movement into the box. Petitioner testified as the machine completes a certain number of envelopes, she would grab them, push them together and turn them around, then squeeze them together one more time. Next she would lift them and place them into a box. She packed 2,400-2,800 envelopes per box. Some boxes contained 2,000 envelopes, depending on the size of the envelope. (T.12-13) When she finished packing the box, it weighed 25-30 pounds. (T.13-15) When she finished packing the box, she folded it and put it on the line to get taped and loaded. Petitioner had 2 breaks for 10 minutes apiece and a 20 minute break for lunch. (T.15.-16)

Petitioner testified she had other duties too in 2012. Petitioner testified she performed inspection and checked the quality of the envelopes. Petitioner testified that when the machine was stopped she would be moved to other duties. Petitioner testified that her job was basically packing envelopes and checking quality. At the end of the day she had to check the number of boxes produced and fill out forms. (T.16)

Petitioner testified that in January and February 2012, she was asked to work on a heavier machine. This required her to work with bigger envelopes and the paper she loaded in the machine weighed about 60 pounds. Petitioner testified she started feeling tingling at the tips of her fingers and pain in her shoulder. Due to her hand symptoms, Petitioner saw Dr. Kowalczyk, her primary care physician, in early 2012. The medical record of 2/13/12 shows complaints of hand pain with a diagnosis of CTS. (PX 1)

Petitioner testified that on March 8, 2012, the line was very short and it was full of boxes. She stated it was not her job to move the boxes on the line. She called the supervisor asking if someone should help move the boxes. The mechanic said it was not his job. Petitioner testified that as she was pushing a box, the box was stuck in the area where they are taped. The boxes kept coming and she tried to pull the box that was stuck from the machine. Petitioner testified they could not stop the machine. At that time she did not have authority to stop the line. (T.18-19) Petitioner picked up the box and felt a very strong pain in her wrist, elbow and shoulder; the pain went down her arm. When she felt the pain, she asked the mechanic to work in her place as she had already taken her break. Petitioner advised her supervisor the line was full and she felt a strong pain in her arm.

Petitioner testified she believed she saw Dr. Kowalczyk, on March 8, 2012. (T.20-21) Medical records in evidence show Petitioner did not see Dr. Kowalczyk until June 25, 2012, for a wellness exam. (PX 1) Petitioner went to Respondent's facility, Concentra, on March 9, 2012, where she complained of right arm pain and the diagnosis was right arm strain. The questionnaire there indicated negative for illness or injury. (PX 3). Petitioner continued to treat at Concentra in 2012. Petitioner received two injections to her elbow and one to her wrist; she believed they were pain blockage injections. Petitioner continued to treat at Concentra into the beginning of 2013 and she saw Dr. Wasserman of Lake County Neurology on October 10, 2012, for a 2nd opinion. (T.21-22) Petitioner sought a neurologist consult due to right upper extremity pain and she also reported tingling and pain in her right hand. Petitioner reported occasional cervical pain unrelated to the right upper extremity pain. Dr. Wasserman diagnosed possible epicondylitis, cervicalgia, and possible cervical radiculopathy. (PX 2)

Petitioner was referred to Dr. Kevin Tu on April 11, 2013. Dr. Tu ultimately recommended surgery for her right elbow. Prior to seeing Dr. Tu, Petitioner stated that her right hand was 'really bad', but Dr. Tu recommended only the elbow surgery. (T.22-24)

Petitioner underwent right elbow surgery on August 9, 2013. Prior to surgery Petitioner continued working for Respondent as a machine operator on light duty. Following the elbow surgery, Petitioner was restricted from work starting March 18, 2013. After surgery, Petitioner began receiving physical therapy for her right elbow and followed up with Dr. Tu. She was released from care in January 2014 and returned to work for Respondent.

Petitioner testified that she had contacted Respondent's Human Resources Department (HR) in November 2013 and provided them documentation as to her ability to return to work, but Respondent at that time did not have work available for her. Petitioner testified she was unable to obtain any paperwork from HR as to whether she was still employed or had been terminated. (T.24-27)

Petitioner testified that currently she feels much better. She testified sometimes she feels right upper extremity pain with weather changes, when she works harder, or working with heavier boxes. When she takes a break she feels better. Petitioner is able to perform all of her work duties. From 2014 to current she has missed days from work, but she has not needed to return for further medical treatment since her release from care. (T.28-30)

Deposition of Dr. Tu

Dr. Kevin Tu, orthopedic surgeon, testified via evidence deposition on behalf of Petitioner. (PX 6) He testified he sees about 100 patients per week and performs about 200-300 surgeries per year. (PX 6, T. 4) Dr. Tu saw Petitioner on April 11, 2013, he believed on referral from her attorney. He reviewed her prior treating records and obtained a history. She reported she worked for a factory line packing envelopes and she started to have right elbow pain. (PX 6, T.4-9)

Dr. Tu noted Petitioner received steroid injections however, she still had right elbow symptoms with any type of lifting activities. She reported the pain towards the outside of the elbow. Petitioner reported the injury occurred when she was trying to grab envelopes off the line and she started having pain in her right elbow. (PX 6, T.9)

Dr. Tu examined Petitioner noting tenderness over the lateral epicondyle and with resisted flexion/extension. He stated the physical exam findings were consistent with lateral epicondylitis and it had not resolved with conservative treatment. He stated her only real option was surgery. His findings were consistent with the prior medical records he reviewed. He noted her EMG revealed CTS, but, when he saw her, the symptoms related more to the epicondylitis. (PX 6, T.9-11)

Dr. Tu testified Petitioner should be on restricted duty with no use of her right arm. He stated lateral epicondylitis is essentially tennis elbow. It occurs with the extensor carpi radialis brevis tendon. He stated the tendons in the forearm attach at the outside of the elbow, lateral condyle. He stated doing repetitive lifting activities can cause the condition. (PX 6, T.11-12)

Dr. Tu stated typically treatment is conservative, i.e., therapy, injections and brace, and most patients' conditions will resolve in 3-6 months. He stated if patients do not have resolution, he recommends surgical intervention. He recommended surgery in this case as Petitioner had failed conservative care and her symptoms were persistent, confirmed on exam, and she was unable to return to full duty. (PX 6, T.12-15)

Dr. Tu performed surgery on August 9, 2013, which involved a debridement of the extensor carpi radialis brevis (ECRB). Dr. Tu testified that the surgical procedure confirmed his diagnosis of lateral epicondylitis. (PX 6, T.16-18)

Dr. Tu saw Petitioner post-operatively on August 21, 2013, and he noted no tenderness over the lateral epicondyle. He noted she still had limited ROM as she was in a splint. He prescribed physical therapy and kept her off work. (PX 6, T.18-19)

Dr. Tu next saw Petitioner September 10, 2013 and her findings were the same, no tenderness and her ROM was improving. She did have decreased strength. Physical therapy was continued and Petitioner remained off work. (PX 6, T.19-20)

Dr. Tu testified he saw Petitioner October 23, 2013, and she continued to report no tenderness. Therapy was continued but she was allowed to return to work with restrictions of no right arm use. He again saw Petitioner November 20, 2013, and noted no tenderness and her strength was improving; it was noted as almost normal. He recommended a home exercise program and she was released to return to work without restrictions. (PX 6, T.20-21)

Dr. Tu testified Petitioner's symptoms resolved after surgery, and the surgery allowed Petitioner to return back to her activities. Dr. Tu testified that her improvement was also confirmation of his diagnosis. (PX 6, T.21-22)

Dr. Tu testified that he believed Petitioner's work activities were the cause of her condition for which he had performed surgery. He noted she had been seen at Concentra on March 9, 2012, and the treater there felt she had symptoms consistent with lateral epicondylitis. He noted Petitioner received injections and the natural history was consistent with the diagnosis. He noted the similar history of injury she reported at Concentra. (PX 6, T.22)

Dr. Tu testified that he believed the mechanism of injury described, in a hypothetical, of Petitioner performing lifting activities and continuously packing 15-30 pound boxes, certainly could result in lateral epicondylitis. He stated lateral epicondylitis is usually traumatic, like with lifting activities and sometimes with direct trauma to the area. Dr. Tu testified typically it is repetitive or a sort of lifting type activity, especially with hand and wrist, causing the epicondylitis and stressing the tendon. Typically with his patients, he sees it is caused by repetitive type activities. (PX 6, T.22-24)

Dr. Tu testified Petitioner described her work activities as putting envelopes into boxes repetitively, and her job duties also included lifting. Petitioner did not report how many envelopes/boxes per hour or minute she loaded or lifted, but had reported working full time up to

the time of the incident. Dr. Tu testified Petitioner had received medical treatment and was then on restricted duty. When he saw her, she was not working at all. She reported she did that work essentially most of the day. He did not know how many boxes she lifted or how often. (PX 6, T.26-29)

Dr. Tu agreed that at his first exam April 11, 2013, he found tenderness at the lateral epicondyle, no medial tenderness. He noted there was normal distal sensation, blood flow was normal and she had full ROM which was expected. There was tenderness with resisted extension, consistent with his diagnosis. He agreed he had reviewed medical records of Concentra (Dr. Nolan). He was aware that the November 2012 EMG did not show CTS. He agreed Dr. Lewis' diagnosis developed from initially focusing on the elbow to more consistent with CTS, based on his records. He indicated based on Dr. Lewis' last visit on January 31, 2013, there was still some minimum point tenderness at the right lateral epicondyle. He agreed there was improvement, but she still had symptoms. Dr. Tu testified that Petitioner had some long standing symptoms before he saw her that had temporarily improved, but when he first saw her the symptoms were again present. (PX 6, T.29-34)

Dr. Tu agreed that the Dr. Lewis May 14, 2012, notes showed the lateral epicondylitis was improving and Dr. Lewis diagnosed right CTS and returned her to regular duty. He agreed Dr. Lewis examined Petitioner again on July 23, 2012, which revealed a normal exam. Dr. Tu agreed Petitioner was working quality control, which was not as fast or heavy work, putting less stress on her elbow. (PX 6, T.34-37)

Dr. Tu released Petitioner to full duty work and advised her to return if she experienced any additional problems. When he last saw Petitioner, she was not requesting surgery for CTS. Dr. Tu did not treat Petitioner for CTS as she had no symptoms of CTS. (PX 6, T.39-40)

Dr. Tu testified that after the surgery, Petitioner's function was better and she had no pain or tenderness with resistant extension. Dr. Tu testified that Petitioner's physical exam was better, she had reported no problems with lifting or household activities, and no problems with her elbow. Dr. Tu testified Petitioner had been released back to full duty but her packing job with Respondent was no longer available for her. At that time Petitioner was doing better functionally. (PX 6, T.40-42)

Deposition of Dr. Cohen

Dr. Mark Cohen, orthopedic surgeon, testified via evidence deposition for Respondent on July 13, 2015. (RX 1). He specializes in disorders of the upper extremities, hand, wrist, forearm, and elbow. He is on staff at Rush and is a full professor in the orthopedics department. (RX 1, T.5-7)

Dr. Cohen examined Petitioner on March 22, 2013. He testified that reportedly Petitioner developed right arm pain about March 8, 2012, while lifting a carton off a line. He indicated the first medical record he saw was dated March 19, 2012, from a company clinic where she complained of right wrist soreness. Petitioner had subsequently treated for a forearm strain and right elbow lateral epicondylitis. Dr. Cohen testified that Petitioner had an EMG in April 2012 that

showed mild CTS. He noted Petitioner received a cortisone injection to her right carpal tunnel in July 2012 and had been treated with medications. Dr. Cohen noted Petitioner had a 2nd EMG in November 2012 that was within normal limits. Petitioner's last doctor visit before his IME was January 2013, at Concentra with Dr. Lewis who noted minimal tenderness of the right lateral epicondyle. Dr. Cohen noted Dr. Lewis had mentioned Petitioner had 2 cortisone injections, elbow and wrist. Dr. Cohen noted that Petitioner was referred to a psychiatrist. (RX 1, T.8-10)

Dr. Cohen testified that on March 19, 2012, Petitioner was seen at Concentra for follow up for right wrist soreness and they had noted a possible diagnosis of right forearm strain. Dr. Cohen testified that as of March 28, 2012, Petitioner complained of forearm and lateral elbow pain together. Dr. Cohen testified he had examined Petitioner and noted she was sad, tearful and appeared frustrated, which was unrelated to his physical exam. (RX 1, T.10-11)

Dr. Cohen performed various tests and provocative maneuvers to rule out CTS or peripheral nerve conditions. Dr. Cohen testified that Petitioner's symptoms were not related specifically to activity or use. Dr. Cohen testified he examined Petitioner for evidence of changes like atrophy or swelling and the test results were normal. (RX 1, T.11-13)

Dr. Cohen testified that he tested grip strength several times in Petitioner's bilateral hands. Dr. Cohen noted her right side grip strength markedly improved when tested in a rapid manner. Dr. Cohen could not reproduce pain to palpation and areas of subjective pain on palpation, and that did not fit any anatomical distribution. Dr. Cohen stated Petitioner's subjective complaints were distinct from his objective findings. (RX 1, T.13-16)

Dr. Cohen stated following his exam he reviewed the MRI films and authored a June 5, 2013 addendum report. Dr. Cohen reviewed the MRI film dated March 25, 2013, Dr. Wasserman's records dated April 3, 2013, and Dr. Tu's record of April 11, 2013. Dr. Cohen stated he had no changes in his opinions after reviewing the additional records. He felt Petitioner may benefit from a psychological evaluation. (RX 1, T.16-18)

On cross examination, Dr. Cohen testified he reviewed records regarding Petitioner's work duties and job history. He had no other details other than Petitioner worked as a machine operator and hurt herself lifting a carton off the line. Currently she was working quality control. He had no further information about the job other than she packed envelopes. He did not know how many envelopes she packed or how many boxes she lifted per day. (RX 1, T.18-23)

Dr. Cohen agreed in his report he had no records from Dr. Lewis and no prior records from her PCP. She had seen Dr. Bridgeforth prior to Dr. Lewis. The first record he had was March 19, 2012. He stated his opinions were only as good as the information he was provided; if there was a report from the day of injury and the history was not accurate, his opinions might change. His opinions take into consideration the medical records he reviewed. He stated the more information the better but he could not comment on what he had not seen as to hypothetical opinions. He agreed the March 19, 2012, record only indicated right wrist soreness; diagnosis of right forearm strain. (RX 1, T.23-26)

Dr. Cohen agreed in the records it discussed Petitioner's March 8, 2012, accident and her

report of pain in her hand and forearm; right arm and hand injury. She was reporting problems with her arm and in the history she reported pain worse with bending her arm and lifting. There was no pain noted to palpation on exam; nor with resisted wrist movements or over the medial or lateral epicondyles. He stated she was diagnosed with right arm strain, but no pain on provocative objective tests. He agreed she did complain about the right arm injuries and right arm pain and soreness. He stated 'arm' was a catch-all term. Dr. Cohen agreed in his final opinion he had no specific diagnosis to account for her complaints and physical findings. He agreed she had continued to complain of proximal forearm and lateral elbow and she had been diagnosed with right forearm pain and right lateral epicondylitis, as he wrote in his report of March 28, 2012. (RX 1, T.26-29)

Dr. Cohen stated Petitioner's chief complaint from the March 28, 2012, visit involved proximal forearm and lateral elbow or lateral epicondyle soreness. (RX 1, T.29) He agreed he had nothing noted in his report of a 4/17/12 treatment visit. He believed she had been diagnosed prior to the April 2012 visit with lateral epicondylitis. His report did not note Dr. Lewis' May 14, 2012, visit where Dr. Lewis' exam revealed very mild tenderness at the lateral epicondyle. As to the October 25, 2012, visit, Dr. Cohen noted she had reported entire right upper extremity pain; continued complaints. (RX 1, T.29-33)

Dr. Cohen indicated in his January 31, 2013, visit notation, he believed she could continue working full duty. He was aware Dr. Tu's final diagnosis was right lateral epicondylitis; Dr. Bridgeforth and Lewis of Concentra also diagnosed right lateral epicondylitis. He indicated the Dr. Bridgeforth note dated the day after the injury, shows she had no pain at the epicondyle and no pain on provocative tests for epicondylitis. He stated there are varying reports of symptoms in the records in this case and he agreed there were multiple diagnoses including forearm strain, tennis elbow, wrist tendonitis, and CTS from the various doctors. Dr. Cohen was asked to examine Petitioner and provide his best opinion of what was causing her pain. He again noted her variable reports and various diagnoses noted in the records. On his exam he noted she had minimal tenderness at the lateral epicondyle. He stated throughout the records she had global complaints. Dr. Cohen stated on his exam her complaints and his findings were not consistent with lateral epicondylitis. She had reported to him entire right arm symptoms. At the IME, he was given a neurologist report dated March 18, 2013, regarding the MRI; he did not have a copy of it, but had noted it in his report. (RX 1, T.33-40)

Dr. Cohen testified lateral epicondylitis can be caused by nothing, i.e., idiopathic, it could be post-traumatic, and he was sure it could be precipitated by heavy lifting. The records provided for the exam were the basis of his opinions. Dr. Cohen testified he was asked for a diagnosis of Petitioner's condition and he stated he did not have a diagnosis to account for all of Petitioner's subjective complaints and her objective physical findings. Dr. Cohen had questioned if it may be cervical related. He indicated if he is asked to provide an opinion and he does not believe he has adequate records to make an opinion, he will state that in a report. If asked if Petitioner's occupational activities could be associated with epicondylitis, he would have stated he did not have enough information. Dr. Cohen was aware Petitioner was a machine operator. (RX 1, T.40-44)

Dr. Cohen testified that in his March 22, 2013, report he indicated all of the treatment records he had reviewed at that time. He believed he did an addendum report June 5, 2013, with

additional records noted. (RX 1, T.44)

Medical Records

Petitioner was seen by Dr. Kowalczyk on February 13, 2012. Petitioner's right hand/wrist pain complaints were noted and Dr. Kowalczyk diagnosed right CTS. Dr. Avramov authored a letter to Dr. Kowalczyk February 27, 2012, noting he had seen Petitioner post EMG. Dr. Avramov stated the EMG showed right mild median neuropathy and right ulnar neuropathy. He noted history of Petitioner working in a packing factory and packed envelopes and also lifted heavy weights. Petitioner next saw Dr. Kowalczyk on June 25, 2012, for a wellness exam and Petitioner reported feeling fair. (PX 1)

Petitioner presented to Concentra March 9, 2012. The injury date was noted as March 8, 2012, and it was noted negative to illness or injury per Petitioner's questionnaire. Petitioner was diagnosed with right arm strain and placed on restrictions of no lifting, pushing/pulling +5 pounds. Petitioner had a follow-up visit at Concentra March 12, 2012, and they noted moderate soreness in her proximal forearm and made the same diagnosis and provided the same restrictions. Petitioner followed up at Concentra on March 19, 2012, where Petitioner complained of pain, soreness and numbness in her right wrist with recurrent spasm and numbness, worse at night, and repetitive packing. An MRI of Petitioner's right wrist was recommended to rule out CTS. Petitioner was diagnosed with right wrist tenosynovitis rule out early CTS, and right forearm strain. Medication and therapy were prescribed. (PX 3)

Petitioner presented to Dr. Wasserman at Lake County Neurological on October 10, 2012. (PX 2) It was noted Petitioner worked quality control at an envelope company and was working as a packer up to 3 months prior and had changed positions. Petitioner sought a neurological consult because of pain in her right upper extremity. Initially it was noted she was having difficulty with her right hand and arm; they noted patient was not fluent in English and had a problem explaining symptoms. Petitioner complained of initial symptoms of tingling and pain in right hand and fingers that began March 2012 when she had an accident while pushing packages of envelopes. He noted Petitioner had seen her PCP. Dr. Wasserman noted Petitioner had injections to the wrist and elbow which did not help. Dr. Wasserman's records indicated that it was unclear if there was an actual event or the result of repetitive motion. Petitioner complained of weakness and occasional cervical pain unrelated to other right upper extremity pain. Petitioner complained of pain in her right shoulder, wrist and elbow. Dr. Wasserman noted Petitioner received therapy for tenosynovitis but reported no improvement and splinting likewise had been of no benefit. Dr. Wasserman's impression was right upper extremity pain, possible CTS, possible epicondylitis, cervicalgia, possible cervical radiculopathy. Dr. Wasserman recommended medications and splint. (PX 3)

Dr. Wasserman saw Petitioner for a follow up on November 12, 2012, and noted Petitioner was initially seen for RUE pain. He again noted her history of lifting boxes on an assembly line. Dr. Wasserman noted Petitioner had therapy at Concentra that did not help. Dr. Wasserman's impression was right upper extremity pain, possible CTS, possible epicondylitis, cervicalgia, possible cervical radiculopathy. Dr. Wasserman recommended medications and splint, and was then considering an MRI, EMG and further therapy and injections. (PX 3)

Dr. Wasserman saw Petitioner for a follow up on January 6, 2013, and noted same history and assessment. Dr. Wasserman noted that injections and therapy had not helped. He noted the April 2012 EMG had shown mild CTS and noted the November 30, 2012 EMG had been interpreted as normal per Petitioner. Dr. Wasserman was again considering a right elbow MRI and further therapy. (PX 3)

Petitioner followed up with Dr. Wasserman again on March 18, 2013, and he noted Petitioner's right upper extremity pain of unknown etiology. He stated Petitioner's pain seemed to originate in the elbow area and could be tenosynovitis or epicondylitis, but Petitioner had failed to respond to conservative treatment. (RX 3)

Petitioner underwent an upper extremity joint MRI on March 25, 2013, revealing mild tendinitis with superimposed tiny interstitial tear common extensor tendon adjacent to lateral epicondyle origin, no elbow ligament tear, no fractures or bone contusion, or significant joint effusion, mild degenerative change proximal radioulnar joint. (PX 3)

Petitioner presented to Dr. Tu at G&T Orthopedics on April 11, 2013. (PX 3) Dr. Tu noted a history of right elbow injury March 8, 2012, at work. Dr. Tu noted Petitioner received significant conservative treatment and two EMG's and an MRI were performed. Petitioner reported difficulty lifting. Dr. Tu's diagnosis was right elbow lateral epicondylitis and he recommended right elbow debridement surgery. He imposed a no right arm use restriction at that time. (PX 3)

Petitioner followed up with Dr. Wasserman again on April 13, 2013 noting the same history and ongoing complaints. Dr. Wasserman noted the MRI showed a small tear proximal extensor tendon adjacent to lateral epicondyle. He also noted mild tendonitis. Dr. Wasserman noted Petitioner's shoulder pain began after she returned to work June of July 2012 working in a different capacity. Dr. Wasserman's impression was right upper extremity pain which may be related to a small tear proximal extensor tendon adjacent to lateral epicondyle. He stated mild tendonitis may be contributing to her pain. Dr. Wasserman referred Petitioner to Dr. Arnold for further workup. Dr. Wasserman prescribed medications and to remain off work. Petitioner was to return in one month or PRN.

Petitioner again presented to Dr. Tu on June 6, 2013. Dr. Tu noted that the right elbow surgery had been denied by WC. Petitioner was still complaining of difficulty lifting. It was noted that Petitioner had been in the hospital for depression. Dr. Tu's diagnosis was lateral epicondylitis elbow. Dr. Tu further noted Petitioner's failed conservative care and again prescribed surgery and work restrictions with no right arm use. (PX 3)

Petitioner followed up with Dr. Tu on June 26, 2013. Dr. Tu noted he was treating Petitioner for right lateral epicondylitis elbow. He noted Petitioner was still having difficulty lifting and her depression had improved. Dr. Tu again noted the same diagnosis, recommended surgery and imposed the same work restrictions. (PX 3)

The operative report of August 9, 2013 notes a diagnosis of right elbow lateral epicondylitis; debridement including bone. Dr. Tu saw Petitioner on August 21, 2013, for post-surgery follow up where he prescribed therapy and Petitioner was restricted from work. Therapy

records from October 22, 2013, noted Petitioner improving with less pain, and further stated Petitioner's symptoms were consistent with rotator cuff strain and impingement. (PX 3)

Dr. Tu saw Petitioner on October 23, 2013, for post-surgery follow up. Dr. Tu noted Petitioner's symptoms continued to improve with PT; Strain continues to improve. Petitioner was noted to have regained ROM. Dr. Tu's impression was right elbow lateral epicondylitis and he was to consider full duty release at next month's visit. Dr. Tu again saw Petitioner November 20, 2013, and noted Petitioner's continued improvement of symptoms with PT, strain continued to improve, and with regained ROM. Dr. Tu's impression was right elbow lateral epicondylitis. Dr. Tu recommended Petitioner continue home PT and he released Petitioner to regular duty as of November 25, 2013. (PX 3)

Dr. Tu saw Petitioner January 8, 2014, and Petitioner was recommended to continue with home PT. Dr. Tu noted Petitioner tried returning to work but no job was available. Dr. Tu noted significant improvement in function and he released Petitioner to work activities with no restrictions and return as needed. (PX 3)

Prior to trial, Petitioner moved to amend the Application for Adjustment of Claim amending the date of loss from February 15, 2012, to March 8, 2012. Petitioner's motion was granted. Petitioner testified to a specific incident on March 8, 2012, where she "tried to pull the box that was stuck back from the machine and I started pulling stronger, and that's when I felt something happened, the pain in my arm." (T. 18) Petitioner testified she saw Dr. Kowalczyk on March 8, 2012, after her shift, but the medical records indicate Petitioner did not see Dr. Kowalczyk between February 2012 and June 25, 2012; that June visit being a wellness check with Petitioner reporting she was feeling fair. There was no reported injury at that time and no hand complaints noted. (PX 1)

Petitioner was seen by Dr. Kowalczyk in February 2012, prior to this specific accident claim, and he ordered an EMG. Dr. Avramov authored a letter to Dr. Kowalczyk noting the EMG showed mild right median neuropathy and right ulnar neuropathy. (PX 1) This evidences Petitioner was clearly having CTS type symptoms prior to March 8, 2012.

Petitioner presented to Concentra March 9, 2012, regarding a right arm injury; no hand complaints were noted. The questionnaire completed at that time indicated negative for illness or injury. The March 12, 2012, Concentra follow-up documented moderate soreness proximal forearm with a diagnosis of right forearm strain. On March 19, 2012 Petitioner complained of right wrist numbness, recurrent spasm. The March 28, 2012, Concentra record noted right forearm injury, complaints of moderate soreness, proximal forearm and lateral epicondylitis with heavy lifting; the diagnosis was noted as right forearm strain, right lateral epicondylitis, rule out cubital tunnel-medial epicondylitis, and she was provided an injection to her elbow. The April 17, 2012 Concentra note indicated an EMG of April 13, 2012, again revealed mild CTS. Dr. Nolan Lewis saw Petitioner May 14, 2012, and noted Petitioner's right lateral epicondylitis resolving. A repeat EMG was performed November 30, 2012 that revealed a normal right upper extremity. (PX 3)

Petitioner saw Dr. Wasserman of Lake County Neurological on October 10, 2012. Petitioner then complained of right hand and arm difficulty since March 2012 when she was

pushing packages of envelopes. Petitioner reported her initial symptoms were tingling and pain in her right hand and fingers. Petitioner's history of initial symptoms then were clearly different than what was reported at Concentra. Dr. Wasserman noted his impression as right upper extremity pain, possible CTS, possible epicondylitis, cervicalgia, possible cervical radiculopathy. Dr. Wasserman saw Petitioner again November 12, 2012, and January 6, 2013, for right upper extremity pain with the same impression; he noted the November 2012 EMG as normal. On March 18, 2013, Dr. Wasserman noted Petitioner's right upper extremity pain of unknown etiology and stated her pain seemed to originate in the elbow area and may be tenosynovitis or epicondylitis. After a March 25, 2013, MRI, Petitioner was seen by Dr. Wasserman on April 13, 2013. Dr. Wasserman stated Petitioner's right upper extremity pain may be related to a small tear proximal extensor tendon adjacent to the lateral epicondyle; tendinitis may be contributing to her pain. (PX 2)

Dr. Cohen examined Petitioner on March 22, 2013, and authored an addendum report June 5, 2013, after reviewing additional records. (RX 1) Petitioner reported pain starting in her right shoulder and tingling and electric shocks down her arm and tingling in the lateral elbow and proximal arm radiating to her hand. (RX 1, 11-13) Dr. Cohen testified Petitioner had very few reproducible objective findings. (RX 1, 16-18) Dr. Cohen noted that Petitioner's November 2012 EMG had been within normal limits. Dr. Cohen's reports indicated symptom magnification was possible, as well as a psychological component. He noted the discrepancies with testing were difficult to explain anatomically and he could not provide a diagnosis to account for Petitioner's global extremity findings and subjective complaints. (RX 1)

Petitioner was seen by Dr. Tu April 11, 2013 and he likewise noted the EMG was normal. Dr. Tu noted her main complaint was right elbow pain, no hand complaints noted. His diagnosis was right elbow lateral epicondylitis and he recommended elbow debridement surgery, which was ultimately done August 9, 2013. History contained in the records of Dr. Tu reported a right arm injury from the work accident. Dr. Tu's follow-up visits noted Petitioner's right arm symptoms improving post-surgery, and ultimately she was released at MMI on January 8, 2014. (PX 4)

Dr. Tu provided a causal connection opinion regarding the lateral epicondylitis, but provided no such opinion regarding Petitioner's CTS. Dr. Tu further testified that when he saw Petitioner she was not requesting surgery regarding CTS, he did not treat her for CTS, and Petitioner had no symptoms of CTS when he treated her for lateral epicondylitis. (PX 6, 39-40)

Based on the credible evidence presented, the Commission finds Petitioner met her burden of proving she sustained a specific trauma on March 8, 2012. Petitioner further sustained her burden of proving her condition of right lateral epicondylitis was caused by said work-related accident. The Commission relies on the medical opinion of Dr. Tu who testified that based on her history of trying to grab envelopes off the line she sustained pain to her elbow. After failing conservative treatment, he performed surgery for lateral epicondylitis. Dr. Tu testified his surgical findings and post-operative recovery supports his opinion and diagnosis. However, the Commission finds Petitioner failed to prove her condition of CTS was caused by the work accident. Petitioner clearly had prior complaints for which she sought medical treatment. Notably, there is no medical opinion stating Petitioner's condition of CTS was caused or aggravated by the work accident of March 8, 2012. Thus, Petitioner failed to meet the burden of proving the CTS condition

was causally related to the accident of March 8, 2012.

The Commission, herein, reverses the Arbitrator's decision and finds Petitioner failed to prove her condition of ill-being regarding her right CTS is related to the accident and vacates the award of medical expenses for treatment of right CTS and the PPD award regarding the right hand.

The Commission, herein, affirms the finding of causal connection regarding Petitioner's lateral epicondylitis condition and affirms the award of temporary total disability, and medical expenses for treatment related to the right lateral epicondylitis condition.

The Commission performs an analysis under Section 8.1(b) regarding the right lateral epicondylitis as follows:

1) There was no impairment rating performed so this factor is given no weight.
2) Petitioner was performing similar functions at Respondent, albeit more inspection duties currently. Little weight is given to this factor.
3) Petitioner was 50 years old and still has a moderate amount of potential work life expectancy. Some weight can be given to this factor.
4) Petitioner was earning the same as she did prior to the accident. Thus there is no evidence of wage loss. No weight is given to this factor.
5) Petitioner suffered a right arm, lateral epicondylitis injury from this accident when she cleared the boxes from the assembly line. Petitioner underwent surgical intervention for right elbow lateral epicondylitis; debridement including bone. Petitioner was released to regular duty work as of 11/25/13. Significant weight is given to this factor.

In reviewing the totality of the evidence, the Commission finds that the Arbitrator issued an award for permanency regarding the right arm in an amount higher than supported by the evidence. Based on the above, when considering the five factors, the Commission modifies the Arbitrator's Decision, to decrease Petitioner's permanent partial disability award from 22.5% loss of use of the right arm, to 17.5% loss of use of the right arm pursuant to Section 8(e) of the Act. Petitioner has essentially recovered from her physical injuries and has been working her full-duty job since returning to work. Petitioner has not sought additional medical treatment, nor did she introduce evidence that she is taking any medications as a result of her injuries. Based on the evidence and testimony presented, and considering the above factors, the Commission finds this award more fitting the evidence.

The Commission, herein, corrects a scriveners' error in the Arbitrator's decision, page 4, paragraph 5 to the date of be October 25, 201**2**, as that was the date on which Petitioner returned to Dr. Lewis. (PX 3)

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's finding of causal connection regarding Petitioner's right CTS condition is, herein, reversed. The Commission, herein, vacates the award for medical expenses and the award for PPD regarding Petitioner's right CTS.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $346.14 per week for a period of 42-4/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act. ($14,735.67 total TTD)

IT IS FURTHER ORDERED BY THE COMMISSION that the finding of causal connection regarding Petitioner's right lateral epicondylitis is affirmed, and, herein, modifies the permanent partial disability (PPD) award to order Respondent shall pay to Petitioner the sum of $311.51 per week for a period of 44.275 weeks, as provided in §8(e)(10) of the Act, for the reason that the injuries sustained caused the 17.5% loss of use of Petitioner's right arm. ($13,792.11 total PPD)

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical expenses under §8(a) of the Act relating to the right arm epicondylitis condition, as evidenced in PX 7, with Respondent entitled to credit for amounts paid by providers and Respondent to hold Petitioner harmless for any claims of providers for which Respondent is receiving credit.

IT IS FURTHER ORDERED BY THE COMMISSION, to correct the Arbitrator's decision, page 4, paragraph 5 to the date of be October 25, 201**2**, as that was the date on which Petitioner returned to Dr. Lewis. (PX 3)

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $28,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court

MAY 21, 2021

o-3/23/21
KAD/jsf

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

THEIL, IRENE
Employee/Petitioner

Case# **13WC010795**

CENVEO
Employer/Respondent

On 3/22/2019, 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 2.45% 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:

0293 KATZ FRIEDMAN EAGLE ET AL
KEITH SPARKS
77 W WASHINGTON ST SUITE 2000
CHICAGO, IL 60602

1139 NOBLE & ASSOCIATES PC
BRADLEY D MELZER
387 SHUMAN BLVD SUITE 210E
NAPERVILLE, IL 60563

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

Irene Theil
v.
Cenveo
Employer/Respondent

Case # **13** WC **10795**

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

DISPUTED ISSUES

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

FINDINGS

On **March 8, 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 **$26,997.88**; the average weekly wage was **$519.19**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **0** dependent children.

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

Respondent ***has*** 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 **$10,648.66** for other benefits, for a total credit of **$10,648.66**.

Respondent is entitled to a credit under Sections 8(a), 8(j), and 8.2 of the Act for any and all payments for medical, surgical, hospital, or prescription expenses through Respondent's group plans, including but not limited to those as set forth in Petitioner's Exhibit 7.

ORDER

ACCIDENT

The Arbitrator finds that the Petitioner proved an accident arising out of and in the course of the employment, occurring on or about March 8, 2012, by a preponderance of the evidence.

CAUSATION

The Arbitrator finds that the Petitioner proved by a preponderance of the evidence that her conditions of ill-being of right carpal tunnel syndrome and right lateral epicondylitis was causally related to an accident arising out of and in the course of the employment occurring on or about March 8, 2012.

MEDICAL

Respondent shall pay for reasonable and necessary causally related medical services as reflected in PX 7 pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall be given a general credit amount for any medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

TTD

Respondent shall pay temporary total disability benefits pursuant to Section 8(d) of the Act for 42 4/7 weeks at a TTD rate of $346.14 per week representing the period from March 18, 2013 to January 8, 2014.

PERMANENCY

Respondent shall pay Petitioner the sum of $311.51 per week for a period of 66.425 weeks since the Petitioner proved by a preponderance of the evidence that her causally related carpal tunnel syndrome and right elbow condition resulted in permanent partial disability to the extent of 5% of the right hand and 22.5% of the right arm.

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.

Charles M Watte

March 21, 2019

Signature of Arbitrator

MAR 22 2019

MEMORANDUM OF THE DECISION OF THE ARBITRATOR

The matter was heard by an Arbitrator designated by the Commission in the City of Chicago, County of Cook and State of Illinois.

The Arbitrator renders findings on the following disputed issues:

(C) Did an accident occur that arose out of and in the course of Petitioner's employment;

(F) Whether Petitioner's current condition of ill-being causally related to the injury;

(J) Were the medical services provided to Petitioner reasonable and necessary; has Respondent paid all appropriate charges for all reasonable and necessary medical services;

(K) Whether Petitioner is entitled to temporary total disability; and

(L) The nature and extent of the injury

FINDINGS OF FACT

After proofs were closed, the Arbitrator heard Respondent's motion regarding reopening proofs to enter in additional records into evidence. The parties stipulated that the omission of Respondent's deposition exhibits into the record was a clerical error and were supplemented into the record without objection. Additionally, after a hearing on the merits and issues, additional medical records from Concentra medical facility were not added to the record.

Petitioner, Irene Theil, was employed with Respondent, Cenveo, since September 2000. (T.10). Petitioner started as a machine operator with Respondent and was a machine operator at the time of the accident on March 8, 2012. (T.11).

Petitioner testified that her normal work schedule as a machine operator was an eight-hour work day. (T.11). She has two 10-minute breaks during her day and a 20-minute lunch break. (T.15). Petitioner testified that during a normal work day, she packs approximately 280,000 envelopes and sometimes more. (T.12). She testified that during her normal work day as a machine operator, she packs envelopes 8 hours a day excluding her allotted break periods. (T.46).

During her packing duties, Petitioner would work on different machines. (T.12). Some machines are faster and have more envelopes, while other machines have smaller or bigger envelopes. (T.12). However, her duties on each machine essentially remain the same; she must pack the envelopes into the boxes. (T.12).

Petitioner testified that the machine she works on creates the envelopes and pushes them down the line to her. (T.13). Petitioner then grabs a large stack of envelopes all at once,

approximately 600 – 1,200 at a time, to then place into an open empty box. (T.13). Petitioner testified that the boxes varies in sizes but some can contain up to 2,400 envelopes. (T.13-14).

Petitioner indicated that the packing process is completely done by hand and is not automated. (T.13). Petitioner testified when the stacks of envelopes arrive to her, she grabs a large stack and squeezes them together and then turns them around. (T.14). She then has to re-grab the stack by squeezing them again and puts them into the box. (T.14). She repeats this process approximately twice per box. (T.14). Petitioner completes approximately 280 boxes per day. (T.14). When the box is fully packed, they typically weigh approximately 25 – 30 pounds. (T.15). After she closes the box, she pushes the box down the line and starts the process all over again. (T.15).

Petitioner testified that during her packing duties, she also performs quality assurance. (T.16). During the packing process, Petitioner would ensure quality by visually checking her envelopes and if she sees something wrong with a specific envelope, she would remove them before packing her box. (T.36, 45).

On March 8, 2012, Petitioner was on an envelope machine with a very short line. (T.17). The line became full of boxes and became backed up. (T.17). She testified that moving the boxes down the line was not her job responsibility and she notified her supervisor about getting help to move the envelope boxes in order to do her packing duties. (T.17). According to Petitioner, there is a separate person who is responsible for controlling the movement of the boxes from the line to a pallet. (T.46).

As the boxes continued to back up, Petitioner attempted to push the boxes further down the line. (T.17-18). Petitioner testified that she pulled and jerked the box toward her in an attempt to unblock the backup. (T.18, 47). As Petitioner forcefully pulled on the box, Petitioner noticed a strong pain up her entire right arm. (T.18-19, 47). Petitioner testified that the boxes were full of envelopes and weighed approximately 30 pounds at the time. (T.18).

Petitioner described that when the line is backed up with boxes, the envelopes on the production line started to back up as well. (T.18). Petitioner described that the envelopes in her station were starting to fall off the production table and onto the floor. (T.18). Petitioner indicated that the line should have been stopped at that point but she did not have authority to stop the line. (T.18-19).

Petitioner notified her supervisor of her injury after the incident. (T.20). She described that the line was full and she tried pulling a box out and in the process she was injured. (T.20). She indicated she related experiencing a strong pain. (T.20). Petitioner was currently working 3rd shift, which was from 12 a.m. to 8 a.m., and completed her shift in a modified role not doing her machine operator position. (T.20).

Petitioner notified Human Resources later that day regarding her injury and the accident. (T.21). Petitioner was instructed to treat at Concentra Medical Center. (T.21).

On March 9, 2012, Petitioner treated with Dr. Bridgeforth at Concentra Medical Center. (Px.3). The medical notes indicate Petitioner works for Respondent and complains about her arm being injured on 3/8/2012. (Px.3). Petitioner described to Dr. Bridgeforth injuring her right arm and hand while picking up boxes. (Px.3). Specifically, Petitioner described moving boxes off the line, boxes weighed up to 30 pounds, when she developed moderate pain and soreness in her right arm. (Px.3). Dr. Bridgeforth noted that all other systems found to be non-contributory or negative to her injury based on comprehensive questionnaire. (Px.3). Petitioner was diagnosed with right arm strain, instructed to do physical therapy and given work restrictions of no lifting over 5 pounds. (Px.3).

On March 19, 2012, Petitioner was rechecked by Dr. Bridgeforth for her injury. (Px.3). Petitioner had continued pain and soreness in the right wrist. (Px.3). Dr. Bridgeforth ordered an MRI of the right wrist to rule out carpal tunnel syndrome. (Px.3). Petitioner's diagnosis was right wrist tenosynovitis and right forearm strain. (Px.3). Petitioner was ordered to continue physical therapy, modified duty, and continued on medication. (Px.3).

On March 28, 2012, Petitioner returned to Dr. Bridgeforth with complaints of continued pain and soreness in the right elbow without improvement. (Px.3). Petitioner notes moderate soreness over the proximal forearm and lateral epicondyle with heavy lifting. (Px.3). Her diagnosis was right forearm strain and right lateral epicondylitis. (Px.3). Petitioner was ordered to continue medications, physical therapy, and modified duty at 10 pounds. (Px.3). Dr. Bridgeforth ordered and EMG/NCV because of Petitioner's continued persistent numbness to rule out cubital tunnel. (Px.3). Additionally, Petitioner received an injection over the right lateral epicondyle. (Px.3).

On April 17, 2012, Petitioner returned to Dr. Bridgeforth following an EMG/NCV examination. (Px.3). Dr. Bridgeforth noted that the examination showed early mild right carpal tunnel. (Px.3). Petitioner notes that she is working regular duty with Respondent at the time of this examination. (Px.3). Petitioner described that when working at the machines she has increased pain in her right wrist and right lateral epicondyle. (Px.3). Petitioner was diagnosed with right carpal tunnel, right lateral epicondylitis, and right forearm strain. (Px.3). Petitioner was given restrictions of no use of the right arm and referral to hand specialist, Dr. Lewis. (Px.3).

On May 14, 2012, Petitioner treated with Dr. Nolan Lewis at Concentra Medical Center. (Px.3). Dr. Lewis noted that Petitioner was diagnosed with right lateral epicondylitis and received a steroid injection previously. (Px.3). He notes that Petitioner works as a packer of envelopes with Respondent for the last 12 years. (Px.3). Dr. Lewis noted mild tenderness over the lateral epicondyle and provocative resisted wrist extension testing. (Px.3). Petitioner noted that she wears an elbow strap and wrist brace with perceived benefit. (Px.3). Dr. Lewis diagnosed

Petitioner with resolving right lateral epicondylitis. (Px.3). He recommended observation and left hand work only modification. (Px.3).

On July 2, 2012, Petitioner returned to Dr. Lewis with persistent symptoms down her entire right upper extremity. (Px.3). He noted that EMG testing conducted 4/13/12 revealed mild right carpal tunnel. (Px.3). Further, he noted that Petitioner has been treated for 4 months for a diagnosis of right lateral epicondylitis with a steroid injection two months prior. (Px.3). Dr. Lewis diagnosed Petitioner with right carpal tunnel syndrome and resolved right lateral epicondylitis. (Px.3). He recommended a steroid injection for the carpal tunnel syndrome which was administered. (Px.3). Petitioner was returned to regular duty on 7/3/2012. (Px.3).

On July 23, 2012, Petitioner again treated with Dr. Lewis for continued pain through her upper extremity. (Px.3). Dr. Lewis notes that Petitioner has received two injections for her right lateral epicondylitis condition and one injection for her right carpal tunnel syndrome. (Px.3). He recommended Petitioner continue current medication management and continue regular work duties. (Px.3).

On October 10, 2012, Petitioner treated with Dr. Michael Wasserman with Lake Cook Neurological Consultants. (Px.2). Dr. Wasserman noted a neurological examination was being conducted as Petitioner continues to experience pain in the right upper extremity. (Px.2). Petitioner noted that her symptoms began in March 2012 when she had an accident at work pushing packages of envelopes. (Px.2). Dr. Wasserman diagnosed Petitioner with possible carpal tunnel syndrome, possible epicondylitis, cervicalgia and possible cervical radiculopathy. (Px.2).

On October 25, 2013, Petitioner returned to Dr. Lewis with complaints of pain in her entire right upper extremity. (Px.3). Dr. Lewis noted that as a result of Petitioner's persistent symptoms, he recommended a repeat EMG. (Px.3).

On November 30, 2012, Petitioner underwent a repeat EMG testing with Dr. Barbara Heller at the referral of Dr. Lewis. (Px.3). Dr. Heller's impression was that the EMG and NCV study of the right upper extremity is electrophysiologically normal. (Px.3).

On December 6, 2012, Petitioner treated with Dr. Lewis following the EMG testing. (Px.3). Dr. Lewis noted the EMG results were normal but Petitioner continues to indicate she experiences symptoms in her right upper extremity. (Px.3).

On January 16, 2013, Petitioner saw Dr. Wasserman noting that she had a slight decrease in her pain of the right upper extremity but they do continue to be present. (Px.2). Dr. Wasserman diagnosed possible carpal tunnel syndrome, possible epicondylitis, cervicalgia, and possible cervical radiculopathy. (Px.2). He recommended an MRI of the right elbow, medication, physical therapy, and continued use of wrist splint. (Px.2).

On March 18, 2013, Petitioner returned to Dr. Wasserman for treatment of her right upper extremity. (Px.2). Petitioner notes pain in the radial elbow area and down into the hand. (Px.2). Petitioner continues to work for Respondent and notes her pain has never fully subsided. (Px.2). Petitioner indicated she has more pain at work with when performing her work duties. (Px.2). Dr. Wasserman diagnosed Petitioner with right upper extremity pain with uncertain etiology, noting her pain seems to originate in the elbow area and may be suggestive of tenosynovitis or epicondylitis. (Px.2). He recommended an MRI of the right elbow, medication, and an off work restriction. (Px.2).

On March 22, 2013, Petitioner was examined by Respondent's Section 12 examiner, Dr. Mark Cohen. (Rx.1). The examination was carried out by the assistance of an interpreter in obtaining Petitioner's history. Dr. Cohen notes that Petitioner has worked for Respondent as a machine operator for 30 years. Dr. Cohen notes that the first medical record he has for review was dated March 19, 2012. He notes that Petitioner had described she injured her right upper extremity on March 8, 2012 while lifting a carton filled with envelopes off her line. (Rx.1). Dr. Cohen states that at the time of the examination, he could not identify a specific diagnosis in which to account for Petitioner's rather global right upper extremity symptoms and complaints. (Rx.1). He indicates that he is unaware of an "injury" in Petitioner's case, other than discomfort that began insidiously while lifting a carton of envelopes back in March 2012. He recommended Petitioner do home exercise range of motion exercises, return back to work full duty and be placed at maximum medical improvement. (Rx.1).

On March 22, 2013, Petitioner presented to Dr. Mark Cohen for a Section 12 independent medical examination requested by the Respondent. Dr. Cohen produced his findings in a letter dated March 22, 2013, an addendum letter dated June 5, 2013, and was deposed as to the examination and findings on July 13, 2015. Petitioner told Dr. Cohen that she developed pain in her right arm on approximately March 8, 2012, while lifting a carton off a line. (Rx. 1, Pg. 8) The carton was filled with envelopes. Petitioner said that she experienced 'severe' pain from her shoulder down to her hand. (Rx. 1, Letter 3-22-18) Upon clarification, Dr. Cohen notes that the pain started at her shoulder and tingling and electric shocks down her arm. (Rx. 1, Letter 3-22-18) Petitioner also described these shocks occurring at her elbow and tingling about the lateral elbow and proximal arm, radiating to her hand. (Rx. 1, Letter 3-22-18)

Dr. Cohen further testified to his procedures during the examination: "Observation of her extremities, palpation of her extremities, range of motion testing, motor testing, sensory testing, grip and pinch testing, in addition to provocative maneuvers. For example, to rule out carpal tunnel syndrome or a peripheral nerve condition I also evaluated her elbow, wrist, and hand all separately." (Rx. 1, Pg. 11)

Dr. Cohen found 'her arm appeared to be normal' (Rx. 1, Pg.12), 'she had full mobility of her entire arm with no evidence of asymmetry compared to the left side' (Rx. 1, Pg. 12), 'she had normal motor strength. She had no complaints of problems when I tested her wrist extension or

flexion against resistance.' (RX. 1, Pg. 13), 'her sensory examination was normal' (Rx. 1, Pg. 13), 'I tested her grip strength several times placing the grip meter into both hands and taking measurements of her maximum grip. I then moved the grip and pinch meter back and forth rapidly. And her right-side grip and pinch strength markedly improved when she was tested in a rapid fashion.' (Rx. 1, Pg. 13)

Dr. Cohen went on to say that "this cannot be explained on any anatomic basis, and it does, as my notes suggest, make one consider that there is a possible functional or nonorganic component to her complaints." (Rx. 1, Pg. 13-14) Dr. Cohen testified "It again suggests that there's no identifiable area in which to attribute her pain to." (Rx. 1, Pg. 15) "She had very few reproducible objective findings." (Rx. 1, Pg. 17).

During Dr. Cohen's deposition, he explained "let me just say that there are varying reports of symptoms, pain to palpation, complaints and physical findings in this case. Meaning there is great variability in what the doctors and what I found with respect to Ms. Theil's complaints and physical findings. Yes, I would agree that she was given multiple diagnoses, including forearm strain, tennis elbow, wrist tendonitis, carpal tunnel syndrome, et cetera." (Rx. 1, Pg. 35)

Dr. Cohen also wrote "I would agree with a previous physician, who suggested a psychological evaluation. There may be a psychological component to her current complaints…I do not have a diagnosis to which to account Ms. Theil's rather global right upper extremity findings and complaints, as noted above. I know of no "injury" in this case…I would state that Ms. Theil is at Maximum Medical Improvement…Ms. Theil's limitations may be more due to psychological factors than true organic pathology." (Rx. 1, Letter 3-22-18)

Dr. Cohen later testified "As best as I could appreciate, she appeared to have an emotional or psychological component to her complaints and problems. I was trying to get her the best and most appropriate care. And I did not think it was orthopedic or surgical."(Rx. 1, Pg. 46)

On March 25, 2013, Petitioner had an MRI at 3T imaging of her right elbow. (Px.2). The impression was mild tendinosis with a superimposed tiny interstitial tear in the common extensor tendon adjacent to the lateral epicondylar origin. (Px.2). No other ligament tears were identified.

On April 3, 2013, Petitioner treated with Dr. Wasserman following the MRI examination. (Px.2). Dr. Wasserman noted the small tear in the proximal extensor tendon adjacent to the lateral epicondyle and mild tendonitis in her tendon. (Px.2). Petitioner noted to have continued pain in her right elbow. (Px.2). He diagnosed Petitioner with right upper extremity pain in part related to small tear in the proximal extensor tendon adjacent to the lateral epicondyle. (Px.2). Petitioner was referred to a surgical specialist and restricted from work. (Px.2).

On April 11, 2013, Petitioner began initial treatment with Dr. Kevin Tu at G & T Orthopedics and Sports Medicine. (Px.3). Dr. Tu notes that Petitioner hurt her right elbow on March 8, 2012

while grabbing envelopes off her production line and started feeling pain. (Px.3). He further notes that Petitioner had significant conservative treatment without improvement, including multiple injections. (Px.3). Dr. Tu diagnoses Petitioner with right elbow lateral epicondylitis and recommends surgery as a result of her failed conservative treatments. (Px.3).

On April 29, 2013, Dr. Tu received medical certification by peer review that Petitioner's recommended right elbow debridement of the extensor carpi radialis brevis tendon meets established criteria for medical necessity. (Px.3).

On June 5, 2013, Dr. Cohen, at the request of Respondent, authored an addendum report after reviewing additional records of Petitioner, including Petitioner's March 25, 2013 MRI. (Rx.1). Dr. Cohen indicated that the additional medical records do not change his prior opinions. (Rx.1).

On August 9, 2013, Dr. Tu performed right elbow extensor carpi radialis brevis debridement including bone. (Px.3). His post-operative diagnosis was right elbow lateral epicondylitis. (Px.3).

On August 21, 2013, Petitioner returned to Dr. Tu following her surgery. (Px.3). Dr. Tu recommended starting physical therapy and instructed Petitioner to be off work. (Px.3).

On October 23, 2013, Petitioner had a follow up visit with Dr. Tu for her right elbow. (Px.3). Petitioner is noted to have continued improvement of her symptoms with physical therapy and has regained her range of motion. (Px.3). He recommended Petitioner continue physical therapy and have work restrictions of no use of her right arm. (Px.3).

On November 20, 2013, Petitioner treated with Dr. Tu for her right elbow injury. (Px.3). Petitioner is noted to have significant improvements of her symptoms and function of her right upper extremity. (Px.3). He recommended Petitioner transition to home exercise program and return back to work regular work duties November 25, 2013. (Px.3).

On January 8, 2014, Petitioner had her final follow up visit with Dr. Tu in regard to her right elbow injury. (Px.3). Dr. Tu notes that Petitioner attempted to return back to work full duty but no job was available for her to return. (Px.3). He notes that Petitioner will continue therapy as a home exercise program, Petitioner can work full duty without restrictions and released from medical care. (Px.3).

Petitioner testified that she currently feels much better and improved after her surgery. (T.28). She indicated that during weather changes, she still experiences some residual pain. (T.28). She described that when she works more frequently or with heavier boxes, she will experience some pain but feels better after a short break. (T.28). She has returned back to her normal work duties with Respondent. (T.28). Petitioner has not returned back to receive any medical treatment since being released from care in 2014. (T.29).

Deposition Testimony Dr. Kevin Tu

On July 16, 2014, Petitioner's treating surgeon, Dr. Kevin Tu, testified in an evidence deposition regarding his medical treatment of Petitioner and her condition. (Px.6). Dr. Tu testified to reviewing Petitioner's previous medical records and obtaining a complete medical history from Petitioner. (Px.6, p.8-9). He described that Petitioner was packing envelopes when she started having right upper extremity pain. (Px.6, p.9). He testified he performed surgery on Petitioner's right elbow on August 9, 2013. (Px.6, p.16). He indicated that during Petitioner's operation he performed a Nirschl test which was positive and confirmed the diagnosis of lateral epicondylitis. (Px.6, p.18). Dr. Tu testified that Petitioner's improvement after surgery confirms Petitioner's diagnosis was actually lateral epicondylitis and allowed her to return back to work. (Px.6, p.21). He testified that he believes Petitioner's work duties caused Petitioner's injuries. (Px.6, p.22). He elaborated that "her natural history of how this occurred was pretty clear-cut and consistent with lateral epicondylitis." (Px.6, p.22).

Deposition Testimony of Dr. Mark Cohen

On July 13, 2015, Respondent's Section 12 examiner, Dr. Mark Cohen, testified in an evidence deposition regarding his examination of Petitioner. (Rx.1). He testified to performing an evaluation on Petitioner on March 22, 2013. (Rx.1, p.10). Dr. Cohen testified that any medical record he reviewed in conjunction with his examination would be included in his report. (Rx.1, p.10). He testified to authoring an addendum report on June 5, 2013 after reviewing additional medical records and made no changes to his medical opinions. (Rx.1, p.17).

On cross-examination, Dr. Cohen acknowledged besides knowing Petitioner was a machine operator, he did not have any information about her particular job activities. (Rx.1, p.22). He acknowledged that he did not have any of Petitioner's treating records from Dr. Kowalski when he examined Petitioner. (Rx.1, p.23). Dr. Cohen stated he did not have the medical record of March 9, 2012, the day after Petitioner's reported injury, from Dr. Bridgeforth in which Petitioner complains of a right arm and hand injury. (Rx.1, p.27-28). Dr. Cohen stated that his final opinion regarding his examination of Petitioner was he could not find a specific diagnosis to account for all of Petitioner's complaints and physical findings. (Rx.1, p.28).

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (*O'Dette v. Industrial Commission*, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his employment and his injury. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 63 (1989). An injury is accidental within the meaning of the Act when it is traceable

to a definite time, place, and cause and occurs in the course of employment, unexpectedly and without affirmative act or design of the employee. *Mathiessen & Hegeler Zinc. Co. V. Industrial Board,* 284 Ill. 378 (1918).

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission,* 44 Ill. 2d 214 (1969).

Credibility is the quality of a witness which renders his evidence worthy of belief. The arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his testimony. Where a claimant's testimony is inconsistent with his actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972). While it is true that an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. *Caterpillar Tractor Co. v. Industrial Commission,* 83 Ill. 2d 213 (1980). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. *Gilbert v. Martin & Bayley/Hucks,* 08 ILWC 004187 (2010).

The Arbitrator finds Petitioner's testimony to be credible based upon her demeanor during the hearing, the medical evidence, and testimony of witnesses via evidence deposition.

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

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

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). An injury is accidental within the meaning of the Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel Co. v. Indus. Comm'n*, 128 N.E.2d 718, 720 (Ill. 1955). 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). 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).

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

The arbitrator concludes that Petitioner's accident and injuries arose out of and in the course of Petitioner's employment with Respondent. Further, the arbitrator also finds that Petitioner's right elbow and right hand injuries were causally related to Petitioner's work duties with Respondent.

In support of this conclusion the Arbitrator notes the following:

The arbitrator finds that Petitioner suffered repetitive strain injuries to both her right elbow and hand as a result of her work as a machine operator with Respondent. Petitioner's repetitive job duties packing envelopes, up to 280,000 envelopes in a day, is a risk incidental to her employment. Petitioner credibly testified regarding her job duties as a machine operator and the work required of her position. Respondent did not rebut Petitioner's testimony of her job duties or job description via production of any evidence. Respondent did not provide a witness to testify to Petitioner's job duties or provide a written job description of Petitioner's duties as a machine operator.

Additionally, the arbitrator finds Petitioner's medical record from Concentra on March 9, 2012 supportive and persuasive of Petitioner's injury arising out of and in the course of Petitioner's employment with Respondent. Petitioner testified she notified her employer of the accident and was instructed to report and treat at Concentra Medical Center. Petitioner treated with Dr. Bridgeforth the day following the incident, she described that she hurt herself moving boxes weighing approximately 30 pounds off the production line. (Px.3). Further, in the record, Dr. Bridgeforth specifically notes that no other systems are found to be contributory of her injury. (Px.3.). Petitioner was diagnosed at that time with a right arm strain.

Following this initial visit, Petitioner continues to treat with Respondent's suggested medical provider, Concentra Medical Center. Petitioner provides a consistent description of her injury involving her work duties, to each medical provider on each medical visit throughout her treatment course. Additionally, Petitioner consistently has documented pain in her right upper extremity, specifically at the hand and elbow.

Petitioner testified that for 12 years she has performed her duties as a machine operator with Respondent. She indicated that her duties during a normal work day are approximately 7 hours of packing envelopes, which require approximately 280,000 envelopes to be packed into boxes. In her eight hour work day, she only has two 10 minute breaks and a 20 minute lunch break. At the time of the accident, she stated she had no other duties besides packing envelopes. Respondent did not refute Petitioner's specific work duties during the hearing, nor was any contradictory evidence submitted to refute Petitioner's work duties.

Petitioner testified that when the boxes were completely full of envelopes, they weighed approximately 30 pounds. On March 8, 2012, Petitioner credibly testified that her line became backed up with boxes she had packed. She indicated it was not her job to move the boxes but another employee's responsibility to clear off the line. She notified her supervisor of the issue without resolution. She testified that the backup was causing her envelopes to back up as well and fall onto the floor, off her production line. It is reasonable for Petitioner, in an attempt to continue her work duties and responsibilities of packing 280,000 envelopes a day, to attempt to clear the backlog of boxes by moving them herself. In the process of moving a 30 pound box, Petitioner describes feeling a strong pain throughout her arm. The arbitrator finds the risk of moving packed envelop boxes weighing 30 pounds a risk incidental to her employment as a machine operator.

The arbitrator finds the opinions of Dr. Kevin Tu more comprehensive and persuasive than Dr. Mark Cohen in regard to Petitioner's condition and causation. Resolving conflicting medical testimony is the province of the Commission, and in resolving this issue the Commission may properly attach greater weight to the opinion of the treating physician. *Holiday Inns of America v. Indus. Comm'n*, 43 Ill.2d 88, 89-90, 250 N.E.2d 643 (1969). Dr. Tu treated Petitioner and performed her consequential surgery. Dr. Tu noted that Petitioner had a long history of continued residual complaints prior to recommeding surgery. Petitioner, after her August 9, 2013 right elbow surgery, fully resolved and returned back to work with minimal complaints. Dr. Tu credibly testified that "her natural history of how this occurred was pretty clear-cut and consistent with lateral epicondylitis." (Px.6, p.22). He elaborated that the diagnostic testing performed during the surgery, the Nirschl test, confirmed the diagnosis of right lateral epicondylitis and that her progression after surgery also confirmed the right diagnosis.

Dr. Cohen's only opinions expressed in his reports and throughout his deposition testimony is that he could not determine a specific diagnosis to account for all of Petitioner's complaints and physical findings. (Rx.1, p.28). It was noted during his deposition testimony, Dr. Cohen was missing some of Petitioner's initial treatment records from Concentra. Specifically, the March 9, 2012 treatment date from Dr. Bridgeforth, the date after the alleged accident. The arbitrator further notes that Respondent did not obtain an additional addendum report after Petitioner's surgery. Therefore, during Dr. Cohen's deposition testimony, he never reviewed Dr. Tu's operative findings of Petitioner's condition.

The arbitrator specifically finds that the only opinion in the entire record regarding causation of Petitioner's injuries is Dr. Tu's deposition testimony. Dr. Cohen cannot make a causation opinion for a condition which he is unaware of. Further, Respondent's own attorney stipulates at Dr. Cohen's deposition, that Dr. Cohen did not author or give a causation opinion in his examination report. (Rx.1, p.22).

Therefore, the arbitrator first finds that Petitioner did suffer right hand carpal tunnel and right elbow epicondylitis and that these conditions arose out of and in the course of her employment with Respondent. After finding that Petitioner did suffer a specific medical condition and injury, the arbitrator finds, Dr. Tu's causation opinion persuasive and determines Petitioner's injuries were causally related to her employment as a machine operator for 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?

After finding Petitioner's accident arose out of and in the course of Petitioner's employment and finding a causal relationship between Petitioner's work duties and her carpal tunnel and right elbow epicondylitis, the arbitrator finds that Petitioner's medical services were reasonable and necessary. Dr. Cohen noted that Petitioner's conservative treatment was at least reasonable and necessary but disagreed with surgery for her elbow condition. However, as elaborated earlier, Dr. Cohen's belief that surgery is unwarranted was based on the indication no specific diagnosis was present. The arbitrator has already determined this to be incorrect. Dr. Tu noted that Petitioner warranted surgery after a long history of failed conservative treatment. Further, Respondent elected to obtain a utilization review for the proposed surgery and the outcome indicated the surgery was medically certified. After obtaining the surgery, Petitioner improved and eventually was able to return back to work with Respondent.

The arbitrator awards medical bills up through Petitioner's maximum medical improvement and medical discharge date of January 8, 2014. The arbitrator awards payment of Petitioner's medical bills as illustrated in Petitioner's Exhibit 7.

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

The arbitrator awards temporary total disability benefits representing Petitioner's lost time of March 18, 2013 through January 8, 2014 representing a total period of 42 2/7 weeks.

A claimant is entitled to weekly compensation for the period of temporary total incapacity for as long as the total temporary incapacity lasts. 820 ILCS 305/8(b) (2009). A claimant is entitled to an award of temporary total disability upon showing not only that he did not work but also that he was unable to work. *Freeman United Coal Mining Co. v. Indus. Comm'n*, 318 Ill. App. 3d 170, 174, 741 N.E.2d 1144, 1148 (5th Dist. 2000). The dispositive test is whether a claimant's condition has stabilized and thus, reached maximum medical improvement. *Id.* at 1148-1149.

The arbitrator notes that Petitioner was taken off work by her treating physician on March 18, 2013. Thereafter, Petitioner had a variety of work restrictions which could not be accommodated. Petitioner had surgery on August 9, 2013 and was taken off work through November of 2013. At that time, Petitioner was unable to return back to work by her employer and was not at maximum medical improvement. Petitioner condition did not stabilize or reach MMI until January 8, 2014 when she was released from care by Dr. Tu.

As a result, the arbitrator finds that Respondent shall pay Petitioner temporary total disability benefits totaling a period of 42 2/7 weeks, representing Petitioner's lost time of 3/18/2013 through 1/8/2014.

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

Pursuant to §8.lb of the Act, the following criteria and facts must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent impairment partial disability, the Commission shall base its determination on the following factors:

- (i) The reported level of impairment pursuant to subsection (a);
- (ii) The occupation of the injured employee;
- (iii) The age of the employee at the time of the injury;
- (iv) The employee's future earning capacity; and
- (v) Evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of Section 8.l (b), the Arbitrator notes no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator gives this factor no weight in determining permanent partial disability.

With regard to subsection (ii) of Section 8.1b (b), the occupation of the employee, Petitioner was a machine operator which involved repetitive use of her arms and hands while packing hundreds of thousands of envelopes into boxes each day. Petitioner testified that her only duties during her work day was to pack envelopes. The arbitrator notes that Petitioner's line of occupation

involves a lot of physical activity. Petitioner was able to return back to full duty work with Respondent after her treatment ended. She was released without any restrictions. The arbitrator place some weight in this factor.

With regard to subsection (iii) of Section 8.1b (b), the age of the employee, Petitioner was 50 years old at the time of the accident. The arbitrator notes the Petitioner is an older individual in terms of working life remaining but still has significant years remaining until the age of retirement to utilize the affected body parts in her occupation. The arbitrator puts some weight in this factor.

With regard to subsection (iv) of Section 8.1b (b), the employee's future earning capacity, following Petitioner's work injury, Petitioner returned back to her employment with Respondent. Petitioner no longer operates as a machine operator with Respondent. Petitioner currently is a quality control specialist. Her position is noted to be less repetitive and demanding than her position as a machine operator. However, she is still require to pack envelopes from time to time. The arbitrator puts lesser weight on this factor when making the permanency determination.

With regard to subsection (v) of Section 8.1b (b), evidence of disability corroborated by the treating medical records, the medical records corroborate Petitioner's disability as Petitioner had multiple injections in her right upper extremity. Petitioner had two injections in her right elbow and one injection in her wrist for carpal tunnel. Petitioner treated conservatively with physical therapy for approximately 18 months, with bracing of the wrist and elbow as well. Ultimately, Petitioner require surgical intervention of her right elbow performed by Dr. Tu on August 9, 2013. The medical records indicate Dr. Tu performed right elbow extensor carpi radialis brevis debridement which included removing bone. (Px.3). His post-operative diagnosis was right elbow lateral epicondylitis. (Px.3).

Petitioner was able to return back to work without restrictions. Petitioner was taken off work for 42 2/7 weeks prior to her return to full duty work. Petitioner is reported to have made good progress from her surgery and has not returned for follow up treatment since being released. Petitioner testified to that she still notices issues with her right upper extremity when the weather changes and with increased work activities either heavier boxes or increased frequency. The arbitrator places greater weight on this factor.

Considering all of the above, the arbitrator finds that Petitioner is entitled to 5% loss of the right hand for her carpal tunnel injury and also finds Petitioner is entitled to 22.5% of the right arm for her elbow condition which require two injections and surgical intervention.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC006678
Case Name	ALLEN, MEGAN v. STATELINE STAFFING
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0247
Number of Pages of Decision	33
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Jason Esmond
Respondent Attorney	James Toomey

DATE FILED: 5/21/2021

/s/Kathryn Doerries, Commissioner

Signature

21IWCC0247

STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MEGAN ALLEN,

Petitioner,

vs. NO: 14 WC 06678

STATELINE STAFFING,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical expenses, 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 strikes the last sentence of section K of the Arbitrator's Decision and modifies the Section K paragraph by adding the following: The Commission finds that Petitioner could have returned to full duty work as of the date Dr. Borchardt discharged her from care on March 11, 2014. Dr. Borchardt documented that his physical examination had found no atrophy in Petitioner's left shoulder; she had 90 degrees of active forward flexion, 165 degrees passive forward flexion, and 90 degrees for passive external rotation at 90 degrees of abduction and 80 degrees of passive internal rotation at 90 degrees of abduction. He noted that Petitioner had a left shoulder MRI that was normal and that Dr. Trenhaile did not feel that she had any significant findings to support a diagnosis of her shoulder. Dr. Borchardt documented that Petitioner self-limited her examination, however, moved her arm on her own without any difficulty. Dr. Borchardt also noted that Petitioner had a cervical MRI scan which did not show any pathology and her subjective findings did not correlate with the objective findings. (PX3, p. 137) These are factors that suggest that the Petitioner's condition stabilized and that Petitioner reached maximum medical improvement. See *Beuse v. Industrial Comm'n (Village of Franklin Park)*, 299 Ill. App. 3d 180, 183, 701 N.E.2d 96, 98 (1998) (Among the factors to be considered in determining whether a claimant has reached maximum medical improvement include a release to return to work, with restrictions or otherwise, and medical testimony or evidence concerning claimant's injury, the extent thereof, the prognosis, and whether the injury has stabilized.)

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on December 31, 2018, 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 $330.00 per week for a period of 31-6/7 weeks commencing August 1, 2013, through March 11, 2014, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent shall be given a credit of $9,475.71 for temporary total disability benefits that have been paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $330.00 per week for a period of 12.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use of 2.5% person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is responsible for and shall pay all medical bills for the Petitioner's treatment between July 31, 2013, and March11, 2014, pursuant to the Illinois Medical Fee Schedule under §8(a) and §8.2 of the Act. Where Illinois Department of Public Aid (IDPA) paid a bill, if any, Respondent is liable only to the extent of the IDPA payment; Petitioner is responsible for reimbursement to IDPA. Respondent is entitled to a credit of $4,977.09 for medical paid under §8(j) of the Act. Respondent shall hold Petitioner harmless with respect to medical expenses that have been paid and credit allowed under §8(j).

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 $5,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 21, 2021

KAD/bsd
O03/23/21
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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 ARBITRATOR DECISION

21IWCC0247

ALLEN, MEGAN
Employee/Petitioner

Case# **14WC006678**

STATELINE STAFFING
Employer/Respondent

On 12/31/2018, 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 2.48% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2489 BLACK & JONES
JASON ESMOND
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

2461 NYHAN BAMBRICK KINZIE & LOWRY
JAMES P TOOMEY
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CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

☐ 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

MEGAN ALLEN
Employee/Petitioner

v.

STATELINE STAFFING
Employer/Respondent

Case # 14 WC 06678

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 **Michael Glaub**, Arbitrator of the Commission, in the city of **Rockford**, on **September 17, 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 _____

FINDINGS

On, July 31, 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 not* causally related to the accident. Petitioner's left shoulder condition between July 31, 2013 and March 11, 2014 is causally related to the accident.

In the year preceding the injury, Petitioner earned **$719.63**; the average weekly wage was **$359.80**.

On the date of accident, Petitioner was **27** 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 **$9,475.71** for TTD, **$0** for TPD, $ for maintenance, and $ for other benefits, for a total credit of **$9,475.71**.

Respondent is entitled to a credit of **$4,977.09** for medical paid under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$330.00**/week for **31-6/7** weeks, commencing **August 1, 2013** through **March 11, 2014**, as provided in Section 8(b) of the Act.
Respondent shall be given a credit of **$9,475.71** for temporary total disability benefits that have been paid.

Respondent is responsible for and shall pay all medical bills for the petitioner's treatment between July 31, 2013 and March 11, 2014 pursuant to the Illinois Medical Fee Schedule.

Respondent shall pay the petitioner permanent partial disability benefits of **$330.00**/week for **12.5** weeks because the injuries sustained caused a **2.5%** loss of use 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

December 28, 2018
Date

DEC 31 2018

+Megan Allen v. Stateline Staffing, 14 WC 06678

Findings of Fact

A. Testimony of Petitioner

Petitioner, Megan Naranjo (nee Allen) testified before the Arbitrator on direct and cross-examination on September 17, 2018. Petitioner testified that she believed she started working for Respondent, State Line Staffing, on or about July 12, 2013. (T. 11). She testified that she was working at Cup Pac, and that her job consisted of putting yogurt tops in a box and then taping the box to close it. (T. 12). Petitioner testified that she was hired to work 40 hours per week, and believed that she was being paid $9.50 per hour. (T. 12).

Petitioner testified that at the same time, she was working at Walmart on a full-time basis from 10:00 p.m. to 7:00 a.m. (T. 12-13). She testified that he was earning between $9.20 per hour to $9.30 per hour at Walmart. Petitioner identified Petitioner's Exhibit 13, which was a copy of Petitioner's 2013 W-2 form from Walmart. She testified that the W-2 form reflected her earnings during calendar year 2013. (T. 15). Petitioner testified that Respondent was aware of the concurrent employment with Walmart, and that she was willing to work both jobs because she was "trying to get my kids back." (T. 14).

Petitioner testified that her shift at Cup Pac was 4:30 p.m. to 3:30 a.m., and that Walmart was working with her for the overlap. (T. 14). She testified that she had four dependent children, with the oldest being born in 2005 and the youngest being born in 2010. (T. 15). She testified that DCFS became involved with her children, and that she lost personal custody of all four children on September 17, 2010. (T. 16). She testified that her rights were removed to her three oldest children in 2014, and that she currently has personal custody of her youngest daughter. (T. 16).

Petitioner testified that on July 31, 2013, she was carrying her box to a loader to tape it, and that she tripped on a pallet and fell, landing on her left arm. (T. 17). She testified that all of her weight fell onto her left arm, and that her left wrist and elbow struck the ground. (T. 17). She testified that she reported the fall to a supervisor, and that she presented to the emergency room on the same date. (T. 18).

Petitioner testified that the physical therapy at Physicians Immediate Care made her left arm pain worse, and that the repetitions were "making my arm tighten up to where it didn't want to move." (T. 21). Petitioner denied ever previously having left shoulder problems before July 31, 2013. (T. 21-22). She testified that the cortisone injection that Dr. Trenhaile administered in December 2013 also made her left shoulder pain worse. (T. 22). Petitioner testified that additional physical therapy at Ortho Illinois in January 2014 did not help her shoulder pain. She testified that her shoulder would actually hurt worse while performing physical therapy. (T. 23).

Petitioner testified that on March 11, 2014, she told Dr. Robin Borchardt, "I informed him that I had an attorney and then he no longer wanted to see me and it seemed like he got more nervous when I told him that I had an attorney and my arm wasn't better at the time because I had got a second opinion after the fact and they gave me restrictions." (T. 24). She testified that her TTD checks had been stopped, and that she attempted to return to work, but her employer did not have an open position for her. (T. 25). She also testified that Walmart had fired her because she could not work. (T. 25). She testified that she has not worked in any capacity since the injury on July 31, 2013. (T. 25).

Petitioner testified that in September 2016, she was involved in a motor vehicle accident. She testified that two cars collided and that she was in a stopped vehicle, which was struck. Petitioner testified, "I went into a seizure and had hit my head and I was a passenger and I didn't come – I didn't know where I was for like eight hours after the accident. I was in extreme pain, and it was – it jarred my body, but my back had – was hurt so bad. My – and my legs, I couldn't feel for like a while and then things calmed down. My shoulder went back to hurting as it was. It didn't get hurt in the car accident." (T. 28-29). Petitioner testified that she had a long-standing history of experiencing seizures. (T. 29). Petitioner disputed that she told the Center for Pain Management that she experienced increased pain in both of her arms after the motor vehicle accident. (T. 29-30). She testified that she requested to see an orthopedic doctor for her left arm because she had a workers' compensation injury. (T. 30).

Petitioner testified that while Dr. Marko Krpan recommended surgery in March 2017, she did not have the surgery until December 4, 2017 due to delays in obtaining surgical clearance relative to her seizure disorder. (T. 31). Petitioner testified that the surgery did not help her left shoulder complaints. She testified, "It was so bad after surgery and physical therapy said that my arm was making no progress and they had actually dismissed me from physical therapy because it wasn't helping." (T. 31-32). She testified that Dr. Krpan said, "There is nothing else he can do and that I had a permanent injury." (T. 32).

Petitioner testified that she treats with a pain doctor at Mercy Health Harvard. (T. 33). She testified that she was getting pain medication, a muscle relaxer, anti-inflammatories, and that her doctor wished to start her with a TENS unit. (T. 33). She testified that the pain medications helped pain go down some but not fully. (T. 33).

Petitioner testified that as of the date of hearing, she experienced sharp, shooting pain in her left arm, which stays numb all the way to her fingers. (T. 34). She testified that the pain was from the top of her shoulder all the way down into her left hand. Petitioner testified that her left hand locks up, and that she could not move her arm pretty much backward and could not lift it past shoulder level. (T. 34). Petitioner testified that she could not even lift a gallon of milk with her left hand, as "It felt like my whole arm was ripping. It felt like it was going to tear my arm off, and I almost dropped the gallon

of milk." (T. 35).

Petitioner testified that her husband sometimes needs to help her with activities of daily living, as she cannot scrub her back by herself when she is bathing. (T. 35). She testified that sometimes her husband has to help her get dressed because her left arm does not want to move. (T. 36). She testified that these "bad days" are frequently, which is several days per week. (T. 36). She testified that she had not received any other type of disability benefits since TTD stopped in March 2014. The Petitioner testified that she was right-hand dominant. (T. 37).

On cross-examination, Petitioner testified that she believed she worked a couple of weeks for Respondent. She admitted that it could have been eight days of work spread out over a couple of weeks. (T. 38). Petitioner admitted that she had no check stubs from Walmart showing the days she earned wages.

Petitioner was presented with Respondent's Exhibit #13, which was a recorded statement from Petitioner with adjuster, Cristine Schellin, taken on August 20, 2013. She admitted that she was working at Walmart as a stocker and that this was the second time she had worked at Walmart. (T. 41-42). She admitted that she started working the second time at Walmart in June 2013, but that it could have also been in May 2013. (T. 43). She testified that she knew that she worked at Walmart after the date of loss, as she had to go there with her sling. (T. 43).

Petitioner testified that she did not have physical custody of her children as of the claimed date of accident, but that she continued to have legal custody at that time. (T. 44). She testified that she was working both jobs to try to get her kids home. Petitioner testified that she applied for disability in 2012, but claimed that she believed Social Security Disability denied her because she had started a job. (T. 45).

Petitioner disagreed with the emergency department record at OSF St. Anthony which indicated that she had taken a Norco pill two hours before the fall. (T. 47). She also denied that taking Norco ever made her dizzy. (T. 47).

Petitioner testified that she has not reinjured her left shoulder in any way after the accident of July 31, 2013. (T. 48). She stated that her neck pain was toward the top of the shoulder and collar bone area, between the shoulder and the neck, but on top of the body rather than on the back of her neck.

Petitioner disputed that a physician on March 15, 2012 diagnosed cervicalgia in addition to low back syndrome and myofascial pain syndrome. (T. 50). She did admit to having spinal problems because of a "disc genetic disease." (T. 51). She did not recall if an MRI of the cervical spine had been ordered at that time. Additionally, Petitioner testified that she was not sure if she was diagnosed with fibromyalgia by Dr. Bojan Pavlovic on April 12, 2012. Instead, she indicated Dr. Pavlovic thought it might have been fibromyalgia but was not diagnosed.

Petitioner disputed reporting to Nurse Practitioner Maureen Cain on September 12, 2012 that she had neck and shoulder pain. Instead, Petitioner believed Nurse Practitioner Cain thought the condition was due to migraines, as she did not recall telling her that she had shoulder pain. (T. 52).

Petitioner admitted that she had been prescribed Norco on a fairly regular basis prior to the accident claimed on July 31, 2013. (T. 53). Petitioner admitted that she had a current prescription of Norco 7.5 mg as of the claimed date of accident of July 31, 2013. (T. 54-55). She also admitted being prescribed Norco 7.5 and Norco 5 mg prescriptions up through the present on a regular basis. (T. 55).

Petitioner disagreed with the accuracy of the medical report from Alarise Clay, PA dated August 17, 2013, in which PA Clay referenced right shoulder pain after a work accident. (T. 55-56). Petitioner testified that the functional capacity evaluation that she attempted to undergo in December 2013 was for Social Security Disability purposes, but that the test was never completed due to an elevated heart rate. (T. 56-57).

Petitioner testified that she told Dr. DeRoos that she had already undergone left shoulder MRIs and neck MRIs, but that Dr. DeRoos wanted new studies done. Petitioner also disputed Dr. DeRoos' medical record that she was pushed over and fell very hard onto her outstretched left arm at work. She indicated that that characterization of the accident was "definitely false." (T. 59).

Petitioner disagreed with Dr. DeRoos' report from August 20, 2014, which indicated pain complaints from her neck down her right arm. (T. 61). Petitioner also disputed Dr. Evelyn Oteng-Bediako's October 24, 2016 report, which references increased low back and neck pain since the motor vehicle accident on September 29, 2016. (T. 62). Petitioner was adamant that she did not injure her left arm during the motor vehicle accident. (T. 62).

Petitioner also disputed clinical social worker, Lindsay Pozzi's report from December 13, 2016, which indicates more low back and left shoulder pain since the motor vehicle accident. (T. 63). She claimed that she told Ms. Pozzi that she had low back and left hip pain after the motor vehicle accident, not left shoulder pain. (T. 63).

Petitioner admitted that she did not bring medical treatment records from Drs. Trenhaile, Borchardt, or DeRoos when she started treatment with Dr. Krpan. (T. 63). She also did not bring in the IME reports from Drs. Gleason and Coe. (T. 64). Petitioner claimed that Dr. Krpan had the earlier MRIs, but that he needed a new one because of the age of the left shoulder MRIs. (T. 64). Petitioner testified that she did not recall going to see Dr. Michael Kornblatt for an impairment rating on November 16, 2016.

Petitioner testified that on July 10, 2018, Dr. Krpan offered carpal tunnel release and

cubital tunnel release for the left arm. She admitted that those conditions were new and had nothing to do with the shoulder case. (T. 66).

Petitioner testified that she completed twelfth grade and that her current age was 32. She testified that she carries a purse with her right arm the majority of the time. She testified that she put the head band that she was wearing on her head with her right arm, and that she fixed the bun on her head with her right arm while leaning to the side. (T. 67-68).

On redirect examination, Petitioner testified that on the date of loss, she took a Norco pill after her fall, and as the fall occurred at 8:00 p.m., she arrived at the hospital at approximately 10:00 p.m. (T. 70). She testified that she never took Norco while she was working, as she only took it in the morning and then before bed. (T. 70). On re-cross examination, Petitioner disputed that she was seen at St. Anthony Hospital after midnight on August 1, 2013, but indicated that she was discharged at approximately 1:00 a.m. on August 1, 2013. (T. 71).

Respondent called Scott Nordan to the stand as a witness. Mr. Nordan testified that he works as an investigator at Georgantas Claim Services. (T. 74). He testified that he has worked in that capacity for eleven years. Mr. Nordan testified that he was retained by the Illinois Insurance Guaranty Fund to conduct surveillance of Petitioner, and he identified Petitioner in the courtroom. (T. 74-75). Mr. Nordan testified that he conducted surveillance on Ms. Allen on June 19, 2018 and June 20, 2018. (T. 76). He testified that he in no way selected or edited the events he chose to record when he made surveillance video of Petitioner. He testified that he used a Sony HandyCam which was in good working order prior to taking surveillance. (T. 76-77). Mr. Nordan testified that the video he took had a date and time stamp that was accurate when he was recording video images of Petitioner. He testified that he recorded a copy of the video to his computer and then sent it to the office server. (T. 77). He testified that he did not edit or manipulate the video images that were transferred from the camera before it was placed on the server. He identified Respondent's Exhibit 14A and B which were the surveillance report and the surveillance CD-ROM. (T. 78).

The Arbitrator notes that as Petitioner had no objection as to foundation, the video evidence was admitted into evidence and not viewed on the date of hearing. Subsequent to the date of hearing, the Arbitrator viewed Respondent's Exhibit 14B in its entirety. The Arbitrator first observed Petitioner on June 20, 2018 at 11:32 a.m. carrying two large bags with her right hand and a large bag hanging from her left shoulder. The Arbitrator observes Petitioner putting the bags into the passenger side of a red Buick. He notes that Petitioner had no problem pulling the large left bag off of her left shoulder, and then removed her outer shirt with both her right and left arms. At 11:33 a.m., Petitioner is seen lifting her left arm above shoulder level without any pain behavior. Petitioner then sits in the passenger seat.

The Arbitrator notes that other individuals, including a man and a woman with a

baby carrier also getting into the vehicle. Petitioner at 11:35 a.m. points with her right arm out the open door of the Buick. Petitioner closes her passenger side door at 11:37 a.m., and the vehicle leaves at 11:40 a.m. The Arbitrator notes a different man is driving the vehicle.

At 11:42 a.m., Petitioner is seen retrieving mail and carrying the mail in her left hand. Petitioner enters the vehicle without any apparent pain behavior. The entirety of the video on Respondent's Exhibit 14B is five minutes and four seconds in duration.

Petitioner briefly testified on rebuttal that the bag that she was carrying over her left shoulder was her laptop bag, which weighed only a few pounds. (T. 82). She testified that she was not capable of carrying this bag for a long period of time, and that the bag was actually causing her pain. She testified that she removed the bag "pretty quickly." On cross-examination, Petitioner testified that she probably took a pain pill two hours before the video, which she claimed explained why she could take her shirt off.

B. Medical Record Evidence (Post-July 31, 2013)

Petitioner presented to OSF St. Anthony Hospital's emergency department on August 1, 2013 at 12:11 a.m., complaining that she fell onto her outstretched arm while carrying a box and tripping over a pallet. (PX 1, p. 9). Petitioner denied any head or neck injury but reported pain with any form of movement mainly localized to the left shoulder area. Dr. Liza Pilch ordered X-rays of the left shoulder, which were negative for fracture or dislocation. (PX 1, p. 13). Dr. Pilch diagnosed an acute left shoulder strain/contusion, provided a sling for the left shoulder, and recommended use of ice and Norco as prescribed for pain. She recommended a follow-up with Petitioner's primary care physician or occupational health doctor in 24 to 48 hours. (PX 1, p. 13). The Arbitrator notes that Nurse Brian Mulder recorded, "Pt states that she was at work when she tripped about 20:30 on a pallet about two hours after taking a Norco." (PX 1, p. 14).

On August 3, 2013, Petitioner presented to Dr. Arvin Silva at Crusader Clinic, reporting an accident at work when she allegedly fell forward three days earlier. She complained of posterior left shoulder pain which radiated to the lateral upper arm. Petitioner denied that Norco was helping her pain complaints, even in combination with Aleve. She denied any previous shoulder injuries. Dr. Silva diagnosed acute shoulder pain due to trauma and prescribed Cyclobenzaprine 10 mg as well as continuation of Norco 7.5/325 mg. He provided work restrictions of no lifting greater than 20 pounds for one week. (RX 7, p. 104).

On August 17, 2013, Petitioner presented to Alarise Clay PA-C, complaining of nasal congestion bilateral with headache. She also complained of post nasal drip triggering a cough. (RX 7, p. 102). Additionally, Petitioner complained of right shoulder pain and upper back pain, in addition to lumbar spine pain and pain in the back of her legs. She indicated that the back pain was chronic but the shoulder pain was due to an injury at work. PA-C Clay diagnosed lumbago, acute upper respiratory infection and

Bipolar 2 disorder. She refilled Neurontin, Ibuprofen, and Norco prescriptions. (RX 7, p. 102).

Petitioner returned to Dr. Hofmeister on August 28, 2013, complaining of left shoulder pain after a work injury when a pallet started to fall and she caught herself with her left shoulder, falling down. (RX 7, p. 98). Petitioner complained of pain that radiated up her neck and down her arm. Dr. Hofmeister performed an examination noting active abduction to about 90 degrees, but passive abduction to 160 degrees. She appreciated 4/5 strength to the left supraspinatus and a positive apprehension test. She diagnosed left shoulder pain and ordered a MRI of the left shoulder. Dr. Hofmeister indicated that rotator cuff pathology could be possible or certainly tendinitis. She provided an off-work statement for Petitioner. (RX 7, p. 99).

Petitioner returned to Dr. Hofmeister on September 12, 2013, to discuss her left shoulder MRI results. She indicated that the MRI was negative for any pathology, and recommended that Petitioner undergo a course of physical therapy to help with pain and mobility issues. She provided a light duty restriction of no lifting greater than 15 pounds. She diagnosed left shoulder strain. Dr. Hofmeister refilled Paxil, Seroquel XR, Quetiapine Fumarate, Meloxicam 15 mg, Cyclobenzaprine 10 mg, Albuterol Sulfate, Neurontin 800 mg, Norco 7.5/325 mg, and Hydroxyzine 10 mg. (RX 7 p. 96).

On November 19, 2013, Petitioner presented to Dr. Basil Jaradah at Crusader Clinic for follow up on her shoulder complaints. He diagnosed acute shoulder pain due to trauma, but noted no acute findings on MRI and no rotator cuff tear. Dr. Jaradah prescribed Naproxen 500 mg and Flexeril 10 mg. (RX 6, page 81).

Petitioner presented for a functional capacity assessment on December 9, 2013 at OSF Center for Health. The assessment was cancelled due to resting heart rate consistently above 100 bpm. (RX 6, p. 140). Petitioner presented to Dr. Troy Shaffer on December 10, 2013, complaining of chest pain since the evening prior. Dr. Shaffer ordered X-rays of the chest which showed no acute abnormality. He diagnosed chest wall strain and provided one tablet of Norco 10-325 mg.

On December 17, 2013, Petitioner presented to Dr. Scott Trenhaile, an orthopedic surgeon at Rockford Orthopedic Associates, complaining of left shoulder pain after a work injury. Dr. Trenhaile performed an examination, noting active forward flexion of the left shoulder at 90 degrees with passive forward flexion at 180 degrees. He appreciated a positive Hawkin's sign and positive Neer. He also reviewed the September 5, 2013, MRI from Swedish American Hospital which was negative. He reviewed X-rays of the left shoulder, which demonstrated a Type I acromion and no fractures or dislocations. He diagnosed impingement syndrome and administered a Depo-Medrol and Lidocaine injection into the subacromial space. He recommended a follow up in four to six weeks with Dr. Borchradt. (PX 3, pp. 164-166).

Petitioner presented to Dr. Hofmeister on December 24, 2013, indicating that she

was unable to complete her functional capacity exam for disability purposes due to tachycardia. She complained of chest wall pain. (RX 7, p. 78). Dr. Hofmeister refilled the Norco 7.5/325 prescription.

Petitioner returned to the Emergency Department at Rockford Memorial Hospital on January 9, 2014, complaining of a two-day history of increasing dull aching pain to the left side of her neck and left shoulder area. She reported pain that had been present for an extended period of time, but had worsened over the past two days. (RX 4, p. 38). Dr. David Thompson noted no new or inciting event. He did note essentially normal range of motion of the cervical spine, but noted increased pain with left side bending, left rotation, and axial loading. (RX 4, p. 42). He prescribed 20 tablet of Hydrocodone 10/325 mg. (RX 4, p. 46).

Petitioner presented to Dr. Robin Borchardt at Rockford Orthopedic Associates on January 30, 2014, complaining of left shoulder pain. She complained of pain at rest at a 7/10 and with activity at 10/10. Petitioner reported that physical therapy was beneficial, but that the injection provided by Dr. Trenhaile was not beneficial. Petitioner claimed she was working with restrictions. (PX 3, p. 152). Dr. Borchardt diagnosed impingement syndrome and shoulder pain. As she was complaining of weakness in her left hand and glove-like numbness of her left hand, he recommended confirming that there were no cervical issues. He ordered a cervical spine MRI. He also noted that there were inconsistencies noted in clinical examination. (PX 3, p. 153).

Petitioner returned to Dr. Borchardt on February 11, 2014, for follow up on a cervical MRI. Dr. Borchardt noted that the MRI conducted on February 7, 2014, showed minimal/early degenerative disease within the lower cervical spine without any evidence of neural impingement. (PX 3, pp. 146-147). Dr. Borchardt recommended that Petitioner finish her physical therapy and that she would be released in three weeks. (PX 3, p. 147).

Petitioner underwent a course of physical therapy at Rockford Orthopedic Associates. As of her last visit on March 6, 2014, she reported she was not ready to return to work and complained on a 9/10 pain. (PX 3, p. 139). Interestingly, Petitioner demonstrated active forward flexion of the left shoulder at 150 degrees. The therapist discharged her due to lack of continued progress. (PX 3, p. 140).

Petitioner returned to Dr. Borchardt on March 11, 2014, for evaluation of left shoulder pain. She continued to complain of pain at rest at 8/10 with activity 9/10. (PX 3, p. 136). Dr. Borchardt noted active flexion of 90 degrees of the left shoulder with passive forward flexion at 165 degrees. Petitioner demonstrated a positive Hawkin's and Neer sign. Dr. Borchardt noted a full cervical range of motion exam with pain to the left. He diagnosed left shoulder pain and impingement syndrome, as well as cervical radiculitis. Dr. Borchardt indicated that the shoulder MRI was normal, the cervical MRI did not show any pathology, and that Petitioner limited her examination and moved her arm on her own without difficulty. (PX 3, p. 137). He concluded that her subjective

findings did not correlate with the objective findings. While he noted that she had been in physical therapy, he indicated that Petitioner continued to self-limit herself. He discharged her from care. (PX 3, p. 137).

Petitioner returned to Dr. Hofmeister on March 14, 2014 reporting that she needed a second opinion for work restrictions but that her referral to Lundholm had been rejected. She reported that she lost her job and could not work, that the MRI imaging was normal and that she was not progressing with physical therapy. (RX 7, p. 69). Dr. Hofmeister prescribed Norco 7.5/325 mg and provided a referral to Midwest Orthopedic Institute.

Petitioner presented to Dr. Sabrina Hofmeister at Crusader Clinic on May 13, 2014 complaining that she had a recent seizure in which she bit her tongue hard, as well as right ankle complaints. Dr. Hofmeister refilled Neurontin 800 mg, recommended continued Clonazepam 0.5 mg and Carbamazepine 200 mg. She indicated with regard to her left shoulder complaints, no one in Rockford would accept her referral as she had a normal MRI and basically full function. Dr. Hofmeister recommended that she go to Loyola or to Chicago for further evaluation. She also indicated that there was not a diagnosis or reason for Petitioner to continue to be on Norco, so she would taper the Norco prescription over the next four days. (RX 7, p. 60). These records also contain a note regarding a telephone encounter dated May 1, 2014, in which the Lundholm Surgical Group reviewed a referral for an orthopedic consultation. All the doctors declined the request. (RX 7, p. 64).

Petitioner presented to Dr. Jan DeRoos on May 16, 2014, complaining of left shoulder pain. (PX 6, p. 256). She reported that she was pushed over and fell very hard onto her outstretched left hand and arm, then experienced marked discomfort in the left shoulder area that had never resolved. (PX 6, p. 256). She reported physical therapy with no improvement and complained of persistent stiffness and tightness in the left shoulder, as well as referred pain up into the neck area and referred pain and numbness down her left hand and arm. She denied any prior injuries to her left arm. She also denied having undergone any imaging studies other than X-rays. (PX 6, p. 256). The medical report contradicts Petitioner's testimony on cross-examination that Dr. DeRoos wished to obtain new MRI studies but had access to the old studies.

Dr. DeRoos indicated that Petitioner resisted passive motion to the left shoulder, and that he could only get her up to about 45 degrees of abduction. (PX 6, p. 257). He noted tenderness around the anterior and posterior capsule of the shoulder. He diagnosed significant sprain and strain to the left shoulder with subsequent capsulitis and generalized pain, radicular symptoms in the left arm with possible carpal or cubital tunnel syndrome, and seizure history. Dr. DeRoos recommended a MRI scan of the shoulder as well as an EMG of the left upper extremity. He provided her 24 Vicodin tablets to be used sparingly. He imposed restrictions of no lifting above shoulder level and no lifting greater than two pounds. (PX 6, pp. 256-257).

Petitioner underwent an EMG/NCV of the left upper extremity on June 17, 2014. (PX 6, pp. 216-218). Dr. K. Goetzen noted borderline C5-C6 left-sided radiculopathy which could be considered based on left deltoid muscle slight denervation. On June 18, 2014, Dr. Matloob called Petitioner and advised that she should go to the emergency department for her increase in left shoulder/arm symptoms after the EMG on the day before. He did not believe her symptoms were caused by the EMG. (PX 6, p. 245).

Petitioner returned to Dr. DeRoos on July 8, 2014. He reviewed the MRI conducted on May 28, 2014, which showed minor infraspinatus tendinopathy but no obvious cysts, capsulitis, or tendon ruptures. (PX 6, p. 275). Dr. DeRoos recommended a screening X-ray of the neck as well as an ultrasound and a referral to an anesthesiologist for a C5-6 epidural injection due to the nerve root irritation at the C5-6 level. (PX 6, p. 276). He also provided a Norco 5/325 mg prescription, and maintained the same work restrictions. (PX 6, pp. 275-276).

On July 25, 2014, Petitioner presented to Dr. Lianne Halloway at Rockford Memorial Hospital complaining of left shoulder pain, noting that she had a "pinched nerve" in her neck which caused arm and shoulder pain. She reported waking up with pain in her left shoulder into her arm with no recent history of injury. Petitioner reported that her primary care physician told her that she could not get in for a visit today and to come to the emergency department for some pain medication. (RX 4, p. 67). She admitted to worsening of her shoulder complaints, and noted that her symptoms were relieved by narcotics. Dr. Halloway prescribed twenty tablets of Prednisone 20 mg, as well as five tablets of Flexeril 10 mg. (RX 4, p. 71).

Petitioner next presented to OSF St. Anthony Medical Center's Emergency Department on August 15, 2014, complaining of left back pain that radiated from her neck all the way down to her buttocks. Dr. Jermaine Bridges indicated that Petitioner was sitting Indian-style in bed while leaning over, and did not appear to be in any acute distress. (RX 6, p. 106).

On July 14, 2015, Petitioner presented to Jeanne Dall, APN requesting medication refills as well as a referral for a neurologist. The Arbitrator notes that Petitioner made no reference to left shoulder pain during this visit. APN Dall diagnosed bipolar disorder, seizure disorder, and lumbago. She ordered a urine toxicology examination. (RX 6 p. 53).

In a telephone encounter on August 14, 2015, Petitioner's failed drug test was addressed. Petitioner advised that she had been given Norco by a dentist at Dental Dreams. Nurse Practitioner Dall indicated that any further infractions would result in no further narcotics or no more prescriptions for narcotics or Benzodiazepines in the future. (RX 7, p. 45).

Petitioner returned to Dr. DeRoos on August 20, 2014. As Petitioner had experienced a seizure just before the epidural injection, the anesthesiologist would not

administer the injection prior to clearance from a neurologist. Dr. DeRoos did review an MRI of the cervical spine which showed loss of normal cervical lordosis but no evidence of significant compression of a cervical nerve or herniated disc. (PX 6, p. 277). Dr. DeRoos provided her a cervical collar and noted that Petitioner was not a surgical candidate. He again renewed her Norco prescription but noted that she was not to take more than three pills per day. (PX 6, p. 277). The Arbitrator notes that Petitioner only underwent one session of physical therapy of Beloit Clinic on September 16, 2014.

On October 6, 2014, Petitioner presented to Dr. Maria Vela at Beloit Clinic, complaining of chronic neck and left shoulder pain with numbness and tingling going down the left arm. She reported that her orthopedic surgeon told her to have her primary care physician refill pain medications. Dr. Vela explained that she would provide a referral to a pain clinic and neurology, but would only provide a few tabs of Norco. (PX 6, p. 287). Dr. Vela recommended finishing physical therapy and provided 20 tablets of Norco 5/325 mg. (PX 6, p. 291).

Petitioner had not commenced treating at any pain clinic as of November 6, 2014, so she was provided one last prescription from Dr. Vela for 30 tablets of Norco 3/325. (PX 6, p. 219).

Petitioner returned to Dr. DeRoos on February 17, 2015, complaining of pain that either started in her left shoulder or her neck area, and that "one seems to work off the other one." (PX 6, p. 322). Dr. DeRoos indicated he was at a point where has not been able to help Petitioner partly because she was "lost in the medical system" and partly because she did not fulfill her appointments. He again recommended an epidural injection in the neck area, and recommended a neurosurgical consultation. He indicated that he would not be her pain doctor and hoped to get a neurology evaluation and neurosurgical evaluation. (PX 6, p. 323). He maintained a restriction of lifting no greater than two pounds and no lifting above shoulder level. (PX 6, p. 322). Petitioner returned for a therapy evaluation on February 27, 2015.

Petitioner returned to Dr. DeRoos on April 2, 2015, reporting that she was unable to see anyone in Rockford. She again complained of pain from the base of her neck down to the left shoulder and down the left arm, with paresthesias on both the volar and radial side of the hand. (PX 6, p. 344). He again recommended the epidural steroid injection and indicated that she should only return as necessary, as he cannot help much due to her being on Illinois Medicaid. He authored correspondence to Dr. Monica Simionescu, indicating that she was in need of cervical epidural steroid injection and follow up therapy, but that she was not a surgical candidate at this point. (PX 6, p. 345).

On November 4, 2015, Petitioner presented to Jeanne Dall, APN at Crusader Clinic. She complained that her insurance would not approve the MRI previously recommended for low back pain, and also complained of left shoulder pain, noting that an orthopedic doctor imposed a two-pound lifting restriction. She provided a referral to pain management. (RX 7, p. 43).

Petitioner presented to Dr. Monica Simionescu on November 19, 2015, complaining of a history of seizures as well as chronic back and neck pain. She reported having a neck injury while at work in 2013 with neck pain that radiated to the left upper extremity as well as intermittent tingling in her fingertips. Dr. Simionescu recommended an EMG/NCV of the upper extremities, starting Lyrica 50 mg, and stopping Neurontin. (RX 7, pp. 38-39).

On December 16, 2015, Petitioner presented to Tamara Wojciechowski, CRNA at Crusader Clinic for an initial pain management appointment. She complained of chronic axial low back pain and left shoulder/upper extremity pain. Petitioner had a positive urine toxicology result for Hydrocodone in July 2015 without a valid prescription. (RX 7, p. 34). She was diagnosed with mid-line low back pain without sciatica, bipolar disorder, seizure disorder, and left shoulder pain.

Petitioner presented to Dr. Evelyn Oteng-Bediako on October 24, 2016, complaining of back pain which had increased since a motor vehicle accident on September 29, 2016. Petitioner complained of worsened cervical spine pain that was an 8/10 at rest and a 19/10 with activity since the motor vehicle accident. She reported that the pain radiated down into her left arm. (RX 4, p. 94). Dr. Oteng-Bediako diagnosed exacerbation of chronic low back pain, lumbar and cervical sprain/strain, chronic pain syndrome, and bilateral low back pain with left-sided sciatica. She once again noted the risks of chronic narcotic intake, including increased vestibular sensitivy and addiction amongst other side effects. She recommended a consultation with Lindsay Cozzi. (RX 4, p. 98).

On November 21, 2016, Petitioner returned to Dr. Oteng-Bediako complaining of back pain as well as neck pain and hip pain. She reported she wanted to see a surgeon. (RX 4, p. 114). Dr. Oteng-Bediako diagnosed chronic pain syndrome, cervicalgia, and chronic left-sided low back pain with left-sided sciatica. (RX 4, p. 117). She again prescribed 30 tablets of Flexeril 10 mg and 30 tablets of Norco 5/325 mg.

On December 13, 2016, Petitioner presented to Lindsay Pozzi, Licensed Clinical Social Worker, for coping skills. Petitioner admitted to chronic low back pain since she was 18 to 19 years old, and that she had been involved in a car accident on September 29, 2016. She reported, "I have more mid- to low back pain, more upper left shoulder pain and I have a new pain. My left hip hurts. I have seizures and now since my accident, they are worse." (RX 4, pp. 131-132). Ms. Pozzi listed several past medical providers for mental health treatment, with various reasons for suspension of treatment. (RX 4, p. 132). She indicated that Petitioner had a euthymic mood and congruent affect. She recommended therapy sessions. Of note, Petitioner scored a 78% in a revised Oswestry low back pain disability questionnaire, which indicates the individual is "crippled." (RX 4, p. 134).

Petitioner returned for her second cognitive behavioral therapy session with Ms.

Pozzi on December 20, 2016. Ms. Pozzi called Petitioner's PCP office and spoke with his nurse, Tina, who indicated that a referral would be made to orthopedics for left hip and left shoulder complaints. (RX 4, p. 143). When Ms. Pozzi attempted a case management phone session on December 27, 2016, but Petitioner's fiancée advised that Petitioner was unavailable. (RX 4, p. 152).

On January 12, 2017, Petitioner presented to Dr. Marko Krpan, an orthopedic surgeon at Rockford Memorial Hospital. She complained that her left shoulder had been painful since a work injury in 2013, and that workers' compensation stopped paying and she has not had any treatments. She reported physical therapy and use of anti-inflammatories. She reported that she had not undergone injections because of her seizure disorder. She also complained of left hip pain since a motor vehicle accident in September 2016. (PX 8, p. 385). Dr. Krpan conducted an examination noting a positive Hawkins and Neer sign, with a minimally positive Speed's and Yergason's tests. He ordered X-rays of the left hip with no evidence of fracture boney abnormality. The left shoulder X-rays were interpreted as showing a Type 2 acromion process. Dr. Krpan recommended a MRI of the left shoulder to evaluate impingement. (PX 8, p. 386).

On January 26, 2017, Petitioner underwent an MRI of the left shoulder without contrast at Rockford Health System. The only prior study for comparison purposes available was a shoulder X-ray dated January 12, 2017. The radiologist noted linear T2 hyperintensities at the myotendinous junction of the supraspinatus and infraspinatus tendons. The radiologist indicated that these were probably vascular structures rather than a laminar tear. They noted no evidence of tear in the footprint of the supraspinatus and infraspinatus tendons. (RX 4, p. 193).

Petitioner returned to Dr. Krpan on March 23, 2017, who had an opportunity to review the most recent MRI study from January 26, 2017. He interpreted the MRI study as showing evidence of a labral tear, as well as impingement of the shoulder and acromioclavicular arthritic changes. He recommended arthroscopic debridement of the shoulder with possible open rotator cuff repair. (PX 8, p. 386).

Petitioner returned to Dr. Krpan on May 30, 2017, complaining of increasing discomfort in the left shoulder. Dr. Krpan tentatively set surgery for June 30, 2017, but requested clearance from Dr. Prathipati, her primary care physician. (PX 8, p. 387).

Petitioner returned to Dr. Krpan on November 10, 2017, complaining of continued left shoulder pain. Dr. Krpan again reviewed the MRI, which he interpreted as showing in impingement and labral tears. (PX 8, p. 396). He set surgery for December 4, 2017. (PX 8, p. 397).

On December 4, 2017, Dr. Krpan performed arthroscopy of Petitioner's shoulder with debridement of lateral tears and subacromial decompression and acromioplasty. Intraoperatively, Dr. Krpan documented complex tearing of the anterior labrum from the ten o'clock position to the seven o'clock position. He debrided the tears to stable tissue

using an arthroscopic shaver and ArthroCare radiofrequency wand. He noted a large anterior hook to the acromion and took down the acromion until there was no further impingement. (PX 8, p. 402).

Petitioner returned to Dr. Krpan for her post-operative visit on December 19, 2017. Dr. Krpan indicated that Petitioner was very reticent to move the shoulder or the arm. He recommended that she begin taking Flexeril twice a day to relieve the muscle spasm, and recommended starting physical therapy and home exercises. (PX 8, p. 397).

The Arbitrator reviewed Petitioner's post-operative physical therapy evaluation dated January 18, 2018, by Kelly Hix at Rockford Health Physicians. Petitioner admitted she was very apprehensive about coming to physical therapy as it did not help in the past. (PX 9, p. 441). PT Hix indicated that Petitioner was very emotional throughout the session "crying about pain meds, pain, and not having custody of children." (PX 9, p. 441). Petitioner underwent physical therapy through February 5, 2018, based on PX 9.

Petitioner returned Dr. Krpan on February 9, 2018, complaining of pain in the left shoulder to the point where she went into a seizure while performing exercises. Dr. Krpan recommended holding off on physical therapy for four weeks to allow the shoulder to calm down. (PX 8, p. 398).

On March 9, 2018, Petitioner returned to Dr. Krpan, complaining of continued left shoulder pain, but demonstrating significant improvement in range of motion. Dr. Krpan again noted positive Hawkin's and Neer signs for discomfort, but did not note any instability of the joint. Petitioner had regained near full range of motion. (PX 8, p. 398). Dr. Krpan recommended generally increasing activities and returning to physical therapy once per week. He indicated that with her seizure disorder and longstanding use of pain medications, Petitioner had an inaccurate pain perception. (PX 8, p. 399). He recommended that she talk to her PCP regarding a different pain specialist.

Petitioner returned to Dr. Krpan on April 20, 2018 complaining of 9/10 shoulder pain. Dr. Krpan noted limitation in active range of motion by approximately 180 degrees. He diagnosed adhesive capsulitis of the left shoulder. He indicated that Petitioner's perception of pain was different than most patients. He provided a new Norco prescription as she had been pursuing this. He recommended continuation of therapy once per week and daily home exercises. (PX 8, p. 407).

Petitioner presented to Dr. Randall Nemerovski of Mercy Harvard Hospital on May 14, 2018 with complaints of low back pain and neck pain. She also complained of left shoulder pain. (PX 10, p. 492). Dr. Nemerovski reviewed a March 12, 2018, lumbar MRI which showed moderate disc bulging in L3-4 and L4-5, with mild spinal stenosis at L2-3 and mild diffuse disc bulging at L5-S1. Dr. Nemerovski diagnosed chronic pain syndrome, chronic left shoulder pain, degeneration of the lumbar spine, and long-term prescription opiate use. (PX 10, p. 495). He prescribed Norco 5/325 – 60 tablets.

Petitioner returned Dr. Krpan on May 31, 2018, complaining of numbness and tingling radiating through the entirety of the left upper extremity including all the digits. She also reported numbness into the left side of her face and her left leg. Dr. Krpan noted a positive Tinel's and Phalen's over the wrist, a positive Tinel's and elbow flexion test at the elbow. She demonstrated dizziness with cervical compression and cervical motion with radiation into the left upper and lower extremities. Dr. Krpan diagnosed left upper and lower extremity radiculopathy. He recommended EMGs to the left upper and lower extremities and requested that she bring in her cervical spine MRI. He recommended continued physical therapy. (PX 8, p. 410).

Petitioner presented to Deborah Bertram, NP on June 19, 2018, complaining of continued left shoulder and bilateral low back pain. She reported that the left sided neck pain and left shoulder pain became worse with "everything." (PX 10, p. 532). Petitioner reported to Nurse Practitioner Bertram that she had no improvement since her surgery on her left shoulder. She also noted no improvement in her symptoms with physical therapy, and that the therapist told her she did not need to return. (PX 10, p. 532). Petitioner complained that she lost custody of her children shortly after the loss of her job. She indicated that she had seen a therapist, who told her that she "needs to get over it and get on with her life." (PX 10, pp. 532-533). Petitioner advised she did not wish to undergo repeat injection therapy or physical therapy. She complained that her pain has not been well controlled and was still relying on her two Norco tablets which Dr. Nemerovski had weaned down from four tablets per day. (PX 10, p. 533). Petitioner reported that she had injections of both the shoulder and three injections for the back which made her symptoms worse. (PX 10, p. 532).

Petitioner presented to Dr. Krpan on July 10, 2018, noting that she was not making any significant improvement with physical therapy and was discharged due to lack of progress. Dr. Krpan reviewed EMG results which demonstrated left cubital tunnel and carpal tunnel syndrome. He diagnosed left shoulder impingement syndrome, left cubital tunnel syndrome, and left carpal tunnel syndrome. He felt she had reached maximum medical improvements with respect to the left shoulder and imposed a permanent restriction of no lifting, carrying, pushing, or pulling. He also prohibited any type of overhead work with the left shoulder. He recommended use of a cockup splint for the cubital and carpal tunnel symptoms. He discussed the possibility of an ulnar nerve decompression at the elbow with interior transposition as well as a carpal tunnel release. (PX 8, p. 417).

D. Expert Opinions and Testimony

i. Deposition Testimony of Dr. Jeffrey Coe, Petitioner's IME

The parties deposed Dr. Jeffrey Coe on March 7, 2016. Dr. Coe testified that he was a Board-certified specialist in occupational medicine. (PX 11, p. 3). He testified that occupational medicine was the specialty within medicine that dealt with the health of

people at work. (PX 11, p. 4).

Dr. Coe testified that he had an opportunity to evaluate Ms. Allen on November 17, 2015. He relied upon his report (PX 11, Dep. Ex. 2) to reflect his recollection. Dr. Coe testified that Petitioner reported a history of tripping and falling forward onto her left arm and knees. (PX 11, p. 10). Dr. Coe then testified as to his analysis of the medical records.

Dr. Coe testified that Petitioner complained of left shoulder pain in the front and back of her left shoulder which would occasionally radiate down her left arm to the elbow. (PX 11, p. 23). He testified that he performed an examination, noting that she was 5'2" tall and weighed 240 pounds. (PX 11, p. 24). Dr. Coe testified he used a goniometer to measure range of motion of the shoulders. He measured 100 degrees of abduction with the left shoulder, 110 degrees of forward elevation for the left shoulder, 30 degrees of external rotation with the left shoulder, and 25° of internal rotation. (PX 11, p. 26). He testified that he also performed impingement testing and noted a positive left shoulder impingement sign. (PX 11, p. 27). He did not appreciate any atrophy in her upper arms but did note some weakness of the left shoulder girdle musculature. (PX 11, p. 28).

Dr. Coe also testified that he examined Petitioner's cervical spine. He noted tenderness in the left side neck muscles which was myofascial pain. (PX 11, p. 29-30). Dr. Coe testified that there was not a cervical nerve root problem. He testified that she had left shoulder weakness, stiffness, and impingement. (PX 11, p. 30). Dr. Coe opined that Petitioner had inflammation in her left shoulder that he described as synovitis and capsulitis, which would be referenced as a frozen shoulder. (PX 11, p. 31).

Dr. Coe testified that there was a causal relationship between the work injury of July 31, 2013 and her condition of ill-being as of the date of her examination on November 17, 2015. He testified that he did not believe her ongoing symptoms were being caused by her cervical spine. (PX 11, p. 32-33). He opined that the medical treatment rendered was reasonable and necessary, and that Ms. Allen required pain control, physical therapy, and possibly manipulation of the left shoulder under anesthesia. (PX 11, p. 34). He also opined that the two-pound lifting restriction from Dr. DeRoos was reasonable until the additional treatment could be rendered. (PX 11, p. 35).

On cross-examination, Dr. Coe testified that he did review actual medical records, but it was his office custom to return the records to the referral source once the examination was completed. (PX 11, p. 38).Accordingly, he testified that all he knew about the records are what he deemed significant in his report.

Dr. Coe testified that he reviewed no diagnostic films for the independent medical evaluation. (PX 11, p. 40). He also testified that he did not order any studies for his IME. Dr. Coe testified that he was not a "surgical specialist," and that he was not a certified specialist in independent medical evaluations. (PX 11, p. 40). Dr. Coe testified that he was referred a few IMEs per month from Petitioner's attorney's office, and while he did not

keep a casebook of it, he believed he saw 40 to 50 of their clients in the past year. (PX 11, p. 42-43). He admitted that none of his publications dealt with frozen shoulder syndrome, or the diagnosis or treatment of shoulder conditions in general. (PX 11, p. 43).

Dr. Coe testified that he had not seen an addendum report from Dr. Gleason dated May 2015. Dr. Coe testified that his range of motion quantities in his examination were a combination of active and passive range of motion. (PX 11, p. 50). Dr. Coe admitted that he made a clinical diagnosis of synovitis and capsulitis because he actually did not see the MRIs. (PX 11, p. 53). He admitted that neither radiologist's report of left shoulder MRI noted anything relative to synovial fluid or a finding of capsulitis. (PX 11, p. 54).

Dr. Coe testified that he did not find it important that Petitioner had full range of motion during physical therapy as of October 25, 2013 for the left shoulder. (PX 11, p. 56). He also did not find it important that Dr. Trenhaile noted full passive range of motion in the left shoulder as of December 17, 2013. He also did not find that it was important that Dr. Borchardt noted inconsistencies on examination of Ms. Allen on January 30, 2014. (PX 11, p. 56-57). Dr. Coe did not find it important that Petitioner had full passive range of motion on February 11, 2014. (PX 11, p. 57).

Dr. Coe admitted that he did not include Dr. Borchardt's indication that Petitioner's subjective findings did not correlate with the objective injury. He testified that he did note that the subjective complaints were actually a little worse. (PX 11, p. 58). Dr. Coe testified that being pushed over and falling on her outstretched left shoulder and tripping are different mechanisms, but that Petitioner would have fallen onto her left arm either way. (PX 11, p. 59).

Dr. Coe testified that he used the term "disability" on page 9 of his report from a medical perspective, not a legal conclusion. (PX 11, p. 63). He admitted that the impingement itself could be a degenerative development. (PX 11, p. 63-64). On redirect examination, Dr. Coe testified that frozen shoulder occurs when an individual limits the use of her shoulder because of pain and inflammation. (PX 11, p. 66).

ii. **Testimony and Reports of Dr. Thomas Gleason, Respondent's IME**

The parties deposed Dr. Thomas Gleason on April 12, 2016. (RX 1). Dr. Gleason testified that he is a Board-certified orthopedic surgeon. (PX 1, p. 6). He testified that he examined Petitioner on June 3, 2014 on the request of Respondent. (PX 1, p. 6-7). He testified that he did not have an independent recollection of Petitioner and would need to refresh his recollection with his IME reports and addenda.

Petitioner denied any complaints or injuries to her neck or left arm prior to July 31, 2013. (PX 1, p. 9). Dr. Gleason testified that when he examined the Petitioner on June 3, 2014, she complained of neck pain with radiation down the posterior shoulder, the back of the outer forearm, with numbness in the left hand and fingers. (PX 1, p. 10). Dr. Gleason testified that on range of motion testing of the bilateral shoulders, Petitioner

demonstrated 160 degrees of abduction on the left and 170 degrees on the right. (RX 1, p. 11). He also noted bilateral flexion at 230 degrees. (RX 1, p. 11). Dr. Gleason testified that Petitioner demonstrated a negative impingement test bilaterally for the shoulders. (RX 1, p. 12). He noted that the circumference of the bilateral arms were relatively symmetric and unremarkable. Dr. Gleason testified that Petitioner demonstrated 4+ out of 5 strength in the left shoulder. (RX 1, p. 13). Dr. Gleason testified that the difference in abduction and external rotation of 10 degrees of motion was not unexpected in someone who was right-hand dominant. (RX 1, pp. 14-15). Dr. Gleason testified that he noted a positive Tinel's testing for the left wrist but that Petitioner made complaints in a retrograde fashion. (RX 1, p. 16). He testified that there was no explanation anatomically for Petitioner's sensation on Tinel's testing.

Dr. Gleason testified that he reviewed the left shoulder MRI from September 5, 2013 which was unremarkable. (RX 1, pp. 17-18). He also reviewed the cervical MRI from Forest City Diagnostics which showed minimal cervical spondylosis at C4-5 and C6-7 with mild bulging at C5-6 without central canal or foraminal encroachment. While he appreciated the absence of lordosis, he testified that the remainder of the exam was unremarkable. (RX 1, p. 18). Dr. Gleason testified that tendinopathy related to wearing changes, whereas tendonitis was an inflammatory process of the tendon. He testified that tendonitis and tendinopathy would be identified and differentiated in an MRI scan to the shoulder. (RX 1, p. 18-19). He did not appreciate either tendinopathy or tendonitis in the September 5, 2013 MRI study, which was more than one month after the alleged date of accident. (RX 1, p. 19).

Dr. Gleason testified that Petitioner's subjective complaints outweighed the objective findings on examination. (RX 1, p. 19). Dr. Gleason then testified to the various inconsistencies on shoulder exam as well as the cervical spine exam. Dr. Gleason testified that he provided diagnoses that included the findings in the diagnostic studies, the absence of positive objective findings on physical examination relative to the cervical spine and upper extremities. (RX 1, p. 21). He testified that Petitioner had no current condition of ill-being with regard to her left shoulder caused by the alleged accident of July 31, 2013 as the date of his examination on June 3, 2014. (RX 1, p. 22). He also testified that there was no condition of ill-being relative to the cervical spine that was causally related to the alleged July 31, 2013 accident. (RX 1, p. 23). Dr. Gleason testified that Petitioner was capable of working in a full duty capacity as of the date of his examination on June 3, 2014. (RX 1, p. 23). He testified that the medical treatment rendered for the left shoulder as of that time while reasonable was largely unnecessary and excessive. (RX 1, p. 23). He concluded that Petitioner had reached maximum medical improvement as of the date of his examination.

Dr. Gleason testified that he authored an addendum report on May 10, 2015 after the review of additional medical records. (RX 1, Dep. X 3). He testified that he reviewed records of the Beloit Clinic and Beloit Hospital, in addition to an additional MRI of the left shoulder on May 28, 2014 as well as another cervical spine MRI. (RX 1, p. 25). Dr. Gleason testified that the May 28, 2014 left shoulder MRI showed minor changes

consistent with infraspinatus tendinopathy, but where otherwise identical to the prior study. (RX 1, p. 25). He testified that the cervical MRI from August 21, 2014 did not demonstrate any changes relative to the previous study in February 2014. (RX 1, pp. 25-26). He testified that his opinions did not change from his previous report dated June 3, 2014 despite the additional medical documentation. He noted that he examined Petitioner after Dr. DeRoos did on May 16, 2014, and that he did not find evidence of crepitus in the left shoulder. (RX 1, p. 26). He also did not note any evidence of significant diminished range of motion in the left shoulder, and that there was no evidence of any radiculopathy. (RX 1, pp. 26-27). Dr. Gleason testified that there was not any indication for cervical epidural steroid injection. He also disagreed with the two-pound lifting restriction. He testified that any additional medical treatment was both unnecessary and unrelated to the accident of July 31, 2013. (RX 1, pp. 27-28).

Dr. Gleason also had an opportunity to review Dr. Coe's IME report. Dr. Gleason disagreed with Dr. Coe's combination of active and passive range of motion findings during an examination, and indicated that he would certainly differentiate one from the other. (RX 1, p. 30). He indicated that combining active and passive range of motion without differentiating the difference did not really provide any significant information. He could not recall ever seeing that before. (RX 1, pp. 30-31). Dr. Gleason testified that he did not see any evidence of frozen shoulder syndrome on his examination 10 months after the date of accident, and that there were no suggestions of adhesions or capsular thickening or other findings that could be expected in either of the MRI scans he reviewed. (RX 1, p. 31). He also noted no evidence of frozen shoulder syndrome in the records of Dr. Trenhaile, Dr. Borchardt, or physical therapy records.

On cross-examination, Dr. Gleason testified that he felt Petitioner reached maximum medical improvement from a strain/contusion type of injury as of December 2013. (RX 1, pp. 34-35). Dr. Gleason admitted that inflammation of the shoulder capsule could be pain producing. He also testified that capsulitis could cause a Petitioner to self-limit range of motion. (RX 1, p. 36). Dr. Gleason testified that he disagreed that Dr. DeRoos' diagnosis of capsulitis was accurate, as he examined Petitioner two weeks after Dr. DeRoos. (RX 1, p. 38).

On redirect, Dr. Gleason reviewed the May 16, 2014 report from Dr. DeRoos and noted that Dr. DeRoos did not have the benefit of an MRI scan at the time of his examination. (RX 1, pp. 39-40). He testified that a physician can see adhesive capsulitis on an MRI. (RX 1, p. 40). Additionally, after review of the July 8, 2014 report from Dr. DeRoos, Dr. Gleason testified that there was no obvious cyst, no capsulitis, and no tendon ruptures on MRI. Dr. Gleason testified that Dr. DeRoos actually dropped the diagnosis of adhesive capsulitis as of that report. (RX 1, p. 41).

Dr. Gleason's October 31, 2017 independent medical evaluation report was entered into evidence. (RX 2). Dr. Gleason testified that as of his last examination of Petitioner, surgery had been recommended for Petitioner's left shoulder condition. Dr.

Gleason again performed an examination, noting left shoulder forward flexion at 150 degrees on the left versus 170 degrees on the right, with left shoulder abduction at 110 degrees on the left versus 140 degrees on the right, in addition to external rotation on the left at 70 degrees versus 80 degrees on the right. (RX 2, p. 2). Dr. Gleason again noted a negative impingement test bilaterally and diffuse complaints distally into all of the digits on the left on Tinel's testing. He again noted identical circumferences of the upper extremities. He did appreciate greater than 4/5 strength in the left shoulder. (RX 2, p. 3). Dr. Gleason reviewed a cervical CT scan dated September 26, 2016 from Mercy Health. He appreciated minimal grade I spondylolisthesis at C4-5 and mild cervical spondylosis at C5, C6 and C7. He reviewed a September 29, 2016 cervical MRI from Mercy Health, noting the absence of lordosis, a hemangioma at C3 with mild cervical spondylosis and a posterior spur disc complex at C5 through C7.

Dr. Gleason reviewed an MRI scan dated January 26, 2017 of the left shoulder, which showed increased T2 signal within the myotendinous junction of the supraspinatus and infraspinatus tendons, which were not previously seen on the prior MRI of May 28, 2014, which suggested new findings. He opined that the findings could be consistent with a partial thickness laminar tear.

Dr. Gleason opined that there was no current condition of ill-being with regard to her left shoulder caused by the accident of July 31, 2013. He again noted that the possible laminar tear on the most recent MRI scan did not exist on the September 3, 2013 study or on the May 28, 2014 study. (RX 2, p. 6). Dr. Gleason opined that none of the additional medical treatment was reasonable or necessary for purposes of the July 31, 2013 accident. He disagreed with Dr. Krpan's recommendation of left shoulder arthroscopy due to the inconsistent contradictory findings on physical examination and mid suspicious findings on the MRI scan of the left shoulder. Dr. Gleason did not believe that the Petitioner had a labral tear, but possibly a partial thickness laminar tear. He again noted no evidence of impingement. (RX 2, p. 7).

Dr. Gleason opined that if the left shoulder arthroscopy is performed, he felt it would most likely be related to the motor vehicle accident of September 29, 2016 rather than any other incident given the increased complaints to the left shoulder after the motor vehicle collision and the new findings on the MRI scan. (RX 2, p. 7). He again opined that Petitioner likely reached maximum medical improvement by the beginning of December 2013 for the accident of July 31, 2013. Dr. Gleason opined that the motor vehicle accident of September 29, 2016 may have temporarily exacerbated the Petitioner's preexisting cervical spine condition. (RX 2, p. 8). He opined that Petitioner was capable of working in a full duty capacity relative to any complaints from the accident of July 31, 2013. (RX 2, p. 8).

iii. <u>Impairment Rating by Dr. Michael Kornblatt, Respondent's IME</u>

On November 16, 2017, Petitioner presented to Dr. Michael Kornblatt for an AMA impairment rating ordered by Respondent. Dr. Kornblatt reviewed medical records

including Dr. Gleason's IME reports, and also reviewed numerous diagnostic studies. He appreciated a tiny central disc osteophyte complex at C5-6 on the September 29, 2016 cervical spine MRI. He noted that the MRI scan of the cervical spine from February 7, 2014 was within normal limits. (RX 3, p. 2). Dr. Kornblatt reviewed the left shoulder MRI dated September 5, 2013, which showed no abnormalities involving the rotator cuff. He also reviewed the September 26, 2017 left shoulder MRI, which noted some tendinosis change involving the supraspinatus and infraspinatus tendons, with the rotator cuff appearing to be intact. (RX 3, p. 2). Petitioner complained of constant pain in her left shoulder with throbbing and numbness into her left arm and neck pain. She reported that she was utilizing no medications for pain as she had been cut off from her pain medicine. (RX 3, p. 2).

On examination, Dr. Kornblatt noted full range of motion in the cervical spine. He noted complaints of discomfort with light palpation of all cervical spinous processes, left trapezius muscle, and the medial border of the left scapula. (RX 3, p. 3). He noted functional range of motion of the bilateral shoulders. He appreciated no atrophy of the upper extremities, despite sensory examination being subjectively diminished at the left upper extremity versus the right.

Dr. Kornblatt noted diffuse tenderness to palpation of the left shoulder with full passive range of motion in all directions. (RX 3, p. 3). He noted active range of motion to about 150° of forward flexion, with abduction to approximately 120 degrees. He appreciated no impingement sign and no apprehension test.

Dr. Kornblatt opined that Petitioner had reached maximum medical improvement for the accident of July 31, 2013. He placed Petitioner in class 0 of the cervical spine regional grid on table 17-2 for soft tissue and non-specific conditions with a documented history of sprain/strain type injury, now resolved or occasional complaints of neck pain with no objective findings on examination. As a consequence of the class determination of 0, Dr. Kornblatt noted that grade modifiers were inapplicable, and that the finding resulted in 0% whole person impairment. (RX 3, p. 3).

Dr. Kornblatt also placed Petitioner under class 0 of table 15-5 of the shoulder regional grid under sprain/strain with no residual instability or loss of motion but persisting pain at MMI with no significant objective abnormal findings. As a consequence, grade modifiers were inapplicable. Dr. Kornblatt opined that Petitioner had a 0% upper extremity impairment and subsequently 0% whole person impairment based on the Sixth Edition of the AMA Guides to the Evaluation of Permanent Impairment. (RX 3, p. 3).

E. Findings related to Evidence of Wages

With regard to the average weekly wage issue, Petitioner received three paychecks from Respondent on July 17, 2013, July 31, 2013, and August 9, 2013. (RX 10). The W-2 form from Respondent confirms this amount. (PX 14). The Arbitrator also reviewed a

Walmart W-2 for Petitioner from 2013 indicating earnings of $1,484.21. The Arbitrator notes that no evidence exists on the record to confirm when Petitioner received these benefits.

Conclusions of Law

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

After reviewing the testimony of Petitioner and the evidence presented at trial, the Arbitrator concludes that Petitioner proved by a preponderance of the credible evidence that she sustained accidental injuries that arose out of and in the course of her employment with Respondent on July 31, 2013. While Respondent provided substantial circumstantial evidence that Petitioner's balance may have been influenced by her taking of a Norco tablet hours before the fall, Petitioner's testimony that she tripped at work on a pallet while walking with a box went unrebutted. Outside of an inconsistency in the record from Dr. DeRoos, Petitioner's history of accident was consistent in the medical records. As a consequence of the foregoing, the Arbitrator concludes that Petitioner proved she sustained accidental injuries to her left shoulder that arose out of and in the course of her employment on July 31, 2013.

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

After a review of the testimony of Petitioner and the evidence presented in the exhibits from both parties, the Arbitrator finds that Petitioner failed to meet her burden of proof that her current condition of ill-being relative to her left shoulder was caused by the accident of July 31, 2013.

Moreover, the Arbitrator notes that no physician found any pathology on the September 3, 2013 or May 28, 2014 MRIs of the left shoulder. Only after the motor vehicle accident on September 29, 2016 is there a change in MRI findings, with an interlaminar tear noted on the January 26, 2017 study ordered by Dr. Krpan. The Arbitrator notes that the only physician to review all three left shoulder MRIs in this matter is Dr. Thomas Gleason. The Arbitrator concludes that the testimony by Petitioner that she did not hurt her left shoulder in the motor vehicle accident is belied by (1) her admission that she lost consciousness due to the force of the accident and her epileptic seizure, and (2) that the post-accident records from Dr. Oteng-Bediako and social worker Pozzi reference worsening neck and arm pain after the motor vehicle accident. Moreover, Petitioner sets forth no plausible explanation as to why her two pre-September 29, 2016 MRIs show no labral pathology, but that the January 26, 2017 MRI shows a tear.

The Arbitrator finds the opinions and testimony of Dr. Thomas Gleason to be more persuasive than the opinions and testimony of Dr. Jeffrey Coe, as well as the opinions of Dr. Krpan. The Arbitrator finds that the lack of documented adhesive capsulitis in the

MRI from May 28, 2014 to be sufficient to discount the opinions of Dr. Coe, who testified that he did not even review the diagnostic studies, and admitted he was not a surgeon.

With regard to Dr. Krpan's opinions, the Arbitrator notes that he never reviewed the treatment records or diagnostic studies prior to January 2017, nearly three and a half years' worth of treatment. His opinions on causation are clearly diminished as a consequence. More importantly, Petitioner's own testimony that the left shoulder arthroscopy provided no relief in her symptoms points to a non-organic basis for Petitioner's pain complaints. The Arbitrator finds it more likely than not that the motor vehicle accident of September 29, 2016 was an intervening accident that broke the causal chain relative to Petitioner's left shoulder condition.

Finally, the Arbitrator concludes that the video surveillance of Petitioner moving her left arm without pain behavior and carrying a computer bag reinforces concerns that her pain complaints are questionable.

Based on all of the above, the Arbitrator concludes that Petitioner's testimony as to her current condition of ill-being relative to her left shoulder was not credible, and that she failed to prove that her current left shoulder condition was causally related to the accident of July 31, 2013. The Arbitrator also finds that the petitioner failed to prove her left shoulder condition after March 11, 2014 is causally related to her work injuries of July 31, 2013. The Arbitrator finds the petitioner did prove that her left shoulder condition and treatment between July 31, 2013 and March 11, 2014 was causally related to her work injuries of July 31, 2013.

G. *What were Petitioner's earnings?*

After a review of Petitioner's testimony and the evidence presented at trial, the Arbitrator concludes that Petitioner's average weekly wage was $359.80, which represents only Petitioner's earnings from Respondent Stateline Staffing. Based upon a review of the documentation provided, it appears that Petitioner earned $719.63 working a total of 8 days (75.75 hours worked) over the course of 3 weeks at an hourly rate of $9.50 per hour. As it appears that Petitioner worked full time, 4 days per week at 10 to 11 hours per day, the Arbitrator concludes that Petitioner earned two weeks of earnings based on the W-2 from Stateline Staffing (PX 14) and the email from Sherri Moll (RX 10). As a consequence, the Arbitrator arrives at an AWW of $359.80 per week.

The Arbitrator does not find Petitioner's testimony pertaining to concurrent employment to be persuasive. First, Petitioner could not confirm when she earned wages with Walmart in calendar year 2013, and admitted that much of the earnings could have predated her employment with Respondent. Additionally, Petitioner testified that she worked for Walmart in a sling, which would post-date the accident in question and also contradicted her testimony that she has not worked since the date of accident in any capacity. Finally, the Arbitrator finds that Petitioner's allegation of working two full-time jobs, when she only earned $2,203.84 during the entire calendar year, strains all credulity.

As such, the Arbitrator concludes that the appropriate AWW in this matter is $359.80 per week.

I. *What was Petitioner's marital and dependency status at the time of the accident?*

After a review of Petitioner's testimony and the evidence presented at trial, the Arbitrator concludes that Petitioner was single and had 4 dependent children as of the date of accident. Despite admitting losing physical custody of her children in 2010, Petitioner unrebutted testimony is that she maintained legal custody of all four children until after the date of accident. Without any contradictory evidence, the Arbitrator accepts Petitioner's testimony as a fact. As such, for purposes of this claim, Petitioner had 4 dependent children under the age of 18 as of the date of 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?*

After a review of Petitioner's testimony and the medical evidence and testimony presented at trial, the Arbitrator concludes that none of the medical treatment rendered to Petitioner after March 11, 2014 was reasonable and necessary for her left shoulder condition. Petitioner was deemed to have reached MMI for her left shoulder sprain by Dr. Robin Borchardt as of March 11, 2014, who also ruled out any cervical condition upon review of the cervical MRI. The Arbitrator adopts the medical opinion of Dr. Borchard. The Arbitrator notes that petitioner's diagnostic testing prior to March 14, 2014 was all negative. The petitioner's diagnosis by Dr. Borchard was a left shoulder strain. The petitioner received extensive treatment including physical therapy and an injection during the 7 months and 11 days between the date of accident and Dr. Borchard placing her at maximum medical improvement. The Arbitrator further notes that none of the subsequent medical treatment rendered to Petitioner after March 11, 2014 provided her subjective complaints with any relief.

The Arbitrator notes that the medical opinions of Dr. Borchard are substantiated by Dr. Gleason. Dr., Gleason examined petitioner on June 3, 2014 and believed petitioner was at maximum medical improvement.

Based on the above, the Arbitrator finds that Respondent is responsible for and shall pay all medical bills for the petitioner's treatment between July 31, 2013 and March 11, 2014 pursuant to the Illinois Medical Fee Schedule.

K. *Is Petitioner entitled to TTD benefits?*

After reviewing Petitioner's testimony and the evidence presented at trial, the Arbitrator concludes that Petitioner was temporarily totally disabled from August 1, 2013 through March 11, 2014, a period of 31-6/7 weeks, payable at a minimum rate of $330.00

per week. The Arbitrator finds that Petitioner could have returned to full duty work as of the date of Dr. Borchardt's full duty release and MMI declaration on March 11, 2014.

L. *What is the nature and extent of Petitioner's injuries?*

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 0% of the whole person as determined by Dr. Michael Kornblatt, 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 that Petitioner sustained only strains to the left shoulder and cervical spine, which fall within Class 0. Petitioner did not set forth an impairment rating. The Arbitrator therefore finds that weighs in a finding of decreased permanence.

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 general laborer at the time of the accident. The Arbitrator has adopted the conclusions of the medical physician and expert who opined petitioner could return to work without restrictions. The Arbitrator notes that the petitioner's occupation of a general laborer usually requires a moderate amount of lifting, exertion and repetitive use of the left arm. The Arbitrator finds this weighs in favor of increased permanence.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 27 years old at the time of the accident. The Arbitrator notes that the petitioner's age places her closer to the beginning of her work career and that she will have to work longer with any residuals of this injury. The Arbitrator this weighs in favor of increased permanence.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner was working at a near minimum wage hourly rate at the time of the injury. The Arbitrator has adopted the medical opinions of doctors who have concluded that petitioner can return to full duty work. The Arbitrator finds this weighs in favor of decreased permanence.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner underwent extensive conservative treatment between July 31, 2013 and when she was discharged by Dr. Borchardt on March 11, 2014. This treatment included diagnostic testing, physical therapy and injections into her shoulder. The petitioner testified that this treatment did not resolver her symptoms. The Arbitrator finds this weighs in favor of increased permanence.

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 2.5% loss of the person as a whole pursuant to §8(d)2 of the Act.

N. ***Is Respondent entitled to a credit?***

The parties stipulated that Respondent is entitled to a credit of $9,475.71 in TTD benefits paid, as well as $4,977.09 in medical expenses paid. (AX 1).

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC007554
Case Name	BONDS-DONALD,DEBRA v. COMMUNITY ECOMONIC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0248
Number of Pages of Decision	14
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Michael Casey
Respondent Attorney	Tiana Muntner

DATE FILED: 5/24/2021

/s/ Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DEBRA BONDS-DONALD,

Petitioner,

vs. NO: 14 WC 7554

COMMUNITY ECONOMIC
DEVELOPMENT ASSOCIATION,

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, 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 April 16, 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.

MAY 24, 2021

/s/ *Christopher A. Harris*
Commissioner

/s/ *Barbara N. Flores*
Commissioner

/s/ *Marc Parker*
Commissioner

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0248
NOTICE OF ARBITRATOR DECISION

BONDS-DONALD, DEBRA Case# **14WC007554**

Employee/Petitioner

COMMUNITY ECOMONIC DEVELOPMENT ASSOCIATION

Employer/Respondent

On 4/16/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.29% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2221 VRDOLYAK LAW GROUP LLC
MICHAEL P CASEY
100 N RIVERSIDE PLZ 2TH FL
CHICAGO, IL 60606

1139 DENNIS NOBLE & ASSOC PC
TIANA K MUNTNER
4355 WEAVER PKWY SUITE 340
WARRENVILLE, IL 60565

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

Debra Bonds Donald
Employee/Petitioner

v.

Community Economic Development Association
Employer/Respondent

Case # **14** WC **07554**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Elaine Llerena**, Arbitrator of the Commission, in the city of **Chicago**, on **February 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. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **February 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 $**57,999.76**; the average weekly wage was $**1,115.38**.

On the date of accident, Petitioner was **58** years of age, ***married*** 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 temporary total disability benefits of $743.58 per week for 10-5/7 weeks, commencing February 22, 2013 through May 8, 2013, as provided in Section 8(b) of the Act.

Respondent shall pay all reasonable and necessary medical services from February 22, 2013 through October 4, 2013 as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $669.22 per week for 17.2 weeks, because the injuries sustained caused the 8% loss of the right leg, as provided in Section 8(e)(12) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $669.22 per week for 50 weeks, because the injuries sustained caused the 10% 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

April 3, 2020
Date

APR 16 2020

STATEMENT OF FACTS:

On February 22, 2013, Petitioner had been a Center Director of the Early Childhood Program for Respondent Community Economic Development Association (CEDA) for 18 years. (T. 11) Petitioner testified that the school she worked at, CEDA St. James, was located at 9 West 21st Street in Chicago Heights, Illinois. (T. 11-12) Petitioner's job duties entailed supervising and monitoring the day-to-day operations of the early childhood center and programs, as well as attending monthly director meeting at CEDA's Central Office, located at 208 S. LaSalle in downtown Chicago. (T. 11-15) On February 22, 2013, Petitioner attended a monthly meeting at CEDA's Central Office. (T. 14-15) Petitioner attended monthly meetings at CEDA's Head Start Program on the 18th floor of CEDA's Central Office. (T. 17)

Petitioner testified that on February 22, 2013, between 12:00 and 12:30, the meeting broke for lunch. (T. 18-19) She testified that she and the other directors entered the elevator to go downstairs to get lunch at one of the many restaurants in the downtown Chicago area. (T. 19) Petitioner was engaged in conversation with one of her supervisors, Tasha Brown, and three other directors when the elevator reached the ground floor. (T.19-20) As Petitioner exited the elevator, she walked to the right towards the corridor in order to exit the building when she fell to the ground. (T. 20-22) Petitioner testified that she landed with her right knee under her and hit her knee, back and buttocks. (T. 21-22) Petitioner testified that she bounced when she fell and was in great pain and screaming. (T.21) A security guard came up to her and stated, "Oh my God it's water." (T. 20-23) Petitioner testified that she attempted to get up but was in so much pain that she was unable to do so. (T. 24) Petitioner was ultimately transported to Northwestern Memorial Hospital by ambulance. (T. 23-24, PX1) The history documented on the City of Chicago EMS report is that Petitioner slipped on a wet marble floor at 208 S. LaSalle, that Petitioner was not ambulatory at the scene and that she indicated that she did not strike her head. (PX1)

At the hospital, Petitioner reported slipping on a wet marble floor and complained of left hip pain. (PX2) Petitioner denied any head injury, neck pain or back pain. *Id.* Physical examination of Petitioner revealed an inability to tolerate active/passive range of motion of the left hip and no obvious knee or ankle trauma. *Id.* Petitioner underwent a CT of the left hip that demonstrated no acute fracture or dislocation and x-ray of the left hip that showed no acute fracture or malalignment. *Id.* Petitioner was diagnosed as having a left hip injury and the evaluating physician recommended admission for pain control and to obtain an MRI of Petitioner's left hip, however, Petitioner stated she wanted to leave and pursue an outpatient workup. *Id.*

Petitioner followed up with Dr. Rujuta Ghandi on February 27, 2013. (PX3) Petitioner complained of continued left hip pain and reported a pulling sensation at the back of her left leg, buttock and back. *Id.* Petitioner stated she could not lift her left leg due to pain. *Id.* Petitioner also reported that she stopped taking Norco because it made her nauseous and her head hurt. *Id.* Dr. Ghandi diagnosed Petitioner as having acute back pain and left hip pain. *Id.* Dr. Ghandi ordered x-rays and took Petitioner off work. *Id.*

The February 28, 2013 x-rays of Petitioner's left hip, pelvis, sacroiliac joints, thoracic spine and lower spine were interpreted as being negative for fracture or dislocation of the coccyx, pelvis and left hip, showing no evidence of thoracic and lumbar compression fractures and revealing mild to moderate degenerative disease throughout the dorsal spine and mild degenerative disease in the lower lumbar spine. (PX3, PX4)

Petitioner followed up with Dr. Ravi Barnabas on March 4, 2013. (PX5) Petitioner reported the accident and complained of lower back pain that radiated down her left leg with tingling and numbness. *Id.* Petitioner reported that walking was difficult and that her pain was worse when she sat, stood, coughed or sneezed, as well as with activity. *Id.* Petitioner also complained of left knee pain made worse by walking and weightbearing. *Id.* Dr. Barnabas diagnosed Petitioner as having a left knee contusion, lumbar sprain, lumbago, thoracic or

lumbosacral neuritis or radiculitis and displacement of lumbar intervertebral disc without myelopathy. *Id.* Dr. Barnabas ordered an MRI and chiropractic therapy, prescribed pain medication and kept Petitioner off work. *Id.* Dr. Barnabas explained that Petitioner would be referred to orthopedic and/or a pain specialist depending on the MRI results. *Id.*

Petitioner underwent MRIs of the lumbar spine and left knee on March 7, 2013. (PX7) The lumbar spine MRI revealed posterior and left-sided disc herniation at L5-S1 indenting the ventral and left side of the thecal sac with mild left-sided spinal stenosis and left lateral recess narrowing which appeared to be exacerbated by facet arthrosis and ligamentum flavum hypertrophy. *Id.* The left knee MRI revealed generalized osteoarthritic changes, especially severe involving the medial compartment; degenerative medial meniscal tear; lateral meniscus horizontal tear involving the midbody; slightly irregular and attenuated ACL, interpreted as probably an old chronic partial-thickness tear; and joint effusion with a small Baker's cyst in the popliteal fossa. *Id.*

Dr. Barnabas reviewed the MRIs on March 14, 2013 and referred Petitioner to Dr. Gregory Primus and a pain specialist. (PX5) Petitioner also started therapy that day at Alivio Physical Therapy and Chiropractic. (PX8)

Petitioner saw Dr. Michel Malek, board certified in neurological surgery, on March 15, 2013. (PX9) Petitioner reported the February 22, 2013 accident and indicated that she initially had low back pain into the hip and over the next couple of days started having shooting pain down her left side and the left side of her foot. *Id.* Petitioner also complained of right knee pain and numbness in her hands. *Id.* Dr. Malek reviewed the MRIs, examined Petitioner and diagnosed her as having a lumbar musculoligamentous sprain/strain, bilateral hand numbness, left lumbar radiculopathy and right knee pain. *Id.* Dr. Malek recommended an orthopedic evaluation regarding Petitioner's right knee pain and epidural steroid injections for her back at the left L5-S1 level. *Id.* As for Petitioner's neck, Dr. Malek recommended an MRI and a bilateral upper extremity EMG/NCV. *Id.* Dr. Malek noted Petitioner's history of diabetes and indicated that Petitioner had to monitor her blood sugar closely after her injections. *Id.* Petitioner testified that she was referred to Dr. Malek by Dr. Barnabas. (T. 30-31) Dr. Malek cc'd Dr. Barnabas in his records regarding Petitioner. (PX9)

Petitioner never underwent the lumbar injections due to a fear of negative interaction with her diabetes. (T. 78) Petitioner testified that she did not agree to undergo the injections due to her diabetes. (T.33) Petitioner admitted that none of her treating doctors raised this as a concern. (T. 78-79). Petitioner refused injections as a form of treatment based on her own research. (T. 79)

The physical therapy notes from March 20, 2013 documented that Petitioner had low back pain, 7/10, right knee pain and stiffness, 8/10, that left leg pain and neck and upper back discomfort was much improved. (PX8)

Petitioner saw Dr. Gregory Primus, an orthopedic surgeon, regarding her right knee on March 21, 2013. (PX10) Dr. Primus noted that Petitioner presented for right knee pain which was generalized and related to an injury. *Id.* Dr. Primus also noted the injury mechanism as twisting and fall which occurred when Petitioner slipped on a slippery floor covered with water. *Id.* Petitioner reported that she believed she first hit the ground with her knee and the knee hyperflexed as she extended backwards. *Id.* Petitioner reported that her right knee had been a problem for the past month with episodic flareups of pain. *Id.* Petitioner complained of dull ache pain with stairs, pain with walking, pain with direct pressure, popping and clicking, giving away of the knee, effusions and crepitation. *Id.* Dr. Primus examined Petitioner's right knee and found trace effusion medial joint line tenderness, lateral joint line tenderness, positive McMurray along the medial joint line and negative McMurray along the lateral joint line, pain with patellofemoral compression, apprehension with lateral stress with firm end and pain and crepitus with active quadriceps extension. *Id.* Dr. Primus noted no tenderness to

palpation, full active passive flexion and extension, and no pain with compression in the left knee with no evidence of any effusion with an absent fluid wave. *Id.* Dr. Primus also reviewed all the diagnostic exams and diagnosed Petitioner as having right knee pain, medial meniscus tear and chondromalacia patellae. *Id.* Dr. Primus continued physical therapy, discussed a trial of intraarticular steroid injections and ordered the following restrictions: avoid cutting and pivoting, no jumping, decrease impact and decrease squatting and kneeling. *Id.* Dr. Primus indicated that if there was no improvement over time, Petitioner might require surgical intervention. *Id.*

On April 4, 2013, Petitioner underwent an EMG/NCV study that revealed evidence of moderately acute L5-S1 radiculopathy on the left. (PX11)

On May 7, 2013, Dr. Barnabas noted that Petitioner's back pain was zero and the pain level in her knees was 2/10. (PX5) Physical exam revealed that range on motion in her knee was still painful in flexion and extension. *Id.* Petitioner reported that she was feeling much better and wanted to go back to work. *Id.* Dr. Barnabas released Petitioner to return to work light duty with the following restrictions: no carrying, lifting or pulling more than 10 pounds and no stooping or bending. *Id.* Petitioner testified she returned to work on May 9, 2013. (T. 38)

Petitioner returned to Dr. Barnabas on May 21, 2013, at which time Dr. Barnabas declared Petitioner to be at maximum medical improvement (MMI) and explained that Petitioner was to follow up with the orthopedic surgeon of her choice and with Dr. Malek. (PX5) Dr. Barnabas provided Petitioner with three names (Dr. Snitvosky, Dr. Giannoullas and Dr. Tu) for follow up or anyone else Petitioner chose in the South Side. *Id.* Dr. Barnabas released Petitioner to return to work with the previously provided restrictions. *Id.*

On May 30, 2013, Petitioner underwent the cervical MRI ordered by Dr. Malek, the results of which revealed abnormal straightening and reversal of the usual cervical curvature, interpreted as possibly representing muscular spams and mild subligamentous posterior disc bulges/protrusions at C5-C6 and C6-C7 levels, indenting the ventral surfaces of the thecal sac with mild central stenosis, but no significant neuroforaminal narrowing. (PX7)

Petitioner did not treat for her injuries from October 2013 through September 2014. (T. 77)

Petitioner returned to Dr. Malek on October 4, 2013. (PX9) Dr. Malek noted that Petitioner did not have any of the recommended injections and reviewed the April 3, 2013 EMG/NCV and May 30, 2013 cervical MRI. *Id.* Dr. Malek explained that if her pain was at the level that she was not willing or capable of living with the pain, then his recommendation was an epidural steroid injection. *Id.* Dr. Malek noted that Petitioner did not want to consider an injection or that her symptoms were not to the point where she would consider intervention. *Id.* Petitioner testified she did not agree to undergo the injections recommended by Dr. Malek because of her diabetes and fear. (T. 36-37) Therefore, Dr. Malek declared Petitioner to be at MMI and noted that Petitioner had returned to work. (PX9)

On September 8, 2014, Petitioner presented to Dr. Scott Glaser, a pain specialist. (PX12) Petitioner complained of bilateral low back pain and right knee pain following a slip and fall accident. *Id.* Dr. Glaser noted that injections had been recommended but that Petitioner had failed to undergo them due to her fear of complications due to her diabetes. *Id.* Dr. Glaser noted that Petitioner developed left neck pain due to favoring her back over time. *Id.* Physical examination revealed limited and painful range of motion in the lumbar spine and tenderness in the lumbar spine and cervical spine. *Id.* Dr. Glaser recommended lumbar spine injections. *Id.* Petitioner again refused the injections. (T. 81)

Petitioner testified that she had no problems with her low back, right knee, left leg or right leg that required her to see a doctor for medical treatment prior to February 22, 2013. (T. 9-10) Petitioner also testified that she has not injured her back, right knee, right or left hip or right or left leg in any other accident. (T. 10-11) Petitioner further testified she developed pain in her neck shortly after undergoing chiropractic treatment. (T. 36) She had no pain in her neck prior to the accident. (T. 36)

Petitioner testified that she continues to have left low back pain and right knee pain. (T. 39-40) Petitioner stated that the low back pain occurs once or twice a week depending upon her activities. (T. 40) Petitioner testified that reaching and bending causes pain. (T. 40) Petitioner explained that she takes Ibuprofen once or twice a week for pain. (T. 39-41) According to Petitioner, due to the pain in her right knee, she walks with a limp on many occasions. (T. 41) Petitioner also explained that when she gets up from sitting, her right knee hurts. (T. 41) Petitioner testified that the pain in her right knee is constant. (T. 41-42) Petitioner stated that the pain is better on some days because she uses rubs like BenGay. (T. 42) Petitioner explained that when she is working with the preschoolers, which requires a lot of stretching, bending and walking, that will make her low back hurt but that her right knee hurts all the time. (T. 41-42.) Petitioner indicated that she has no problems with her left knee. (T. 42)

On cross-examination, Petitioner testified that she had a gap in treatment from October 2013 to September 2014 because Dr. Malek recommended an injection in 2013 and she didn't want the injection due to her fear of its effect due to her diabetes. (T. 77-78) Petitioner's fear of the injections was based on her own research of its effects. (T. 79) Petitioner explained that she went to Dr. Glaser in September 2014 because her pain had not subsided. (T. 79) Petitioner testified that Dr. Glaser was recommended by someone and was not a referral. (T. 80)

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner bears the burden of proving each element of her case by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 203 (2003). Petitioner must show by a preponderance of the evidence that she suffered a disabling injury which arose out of and in the course of her employment. *Id.* The phrase "in the course of employment" refers to the time, place, and circumstances surrounding the injury. *Id.* To satisfy the "arising out of" components, Petitioner must show that the injury "had its origin in some risk connected with, or incidental to, the employment." *Id.*

A traveling employee is one who is required to travel away from his/her employer's premises in order to perform his/her job. *Jensen v. Industrial Commission* 305 Ill. App. 3rd, 274, 278. 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 are applicable to other employees. *Hoffman v Industrial Commission*, 109. Ill. 2nd 194, 199. A traveling employee is held to be in the course of his/her employment from the time that he/she leaves home until he/she returns. *Urban v. Industrial Commission*, 34 Ill. 2nd 159, 162-163. The test for determining whether an injury to a traveling employee arose out of and in the course of employment is the reasonableness of the conduct in which he/she was engaged and whether the conduct might normally be anticipated or foreseen by the employer. *Howell Tractor & Equipment Company v. Industrial* Commission, 78 Ill. 2nd 576, 573-74 (1980). A traveling employee may be compensated for an injury so long as the injury was sustained while he/she was in an activity which was reasonable and foreseeable. *Wright v. Industrial Commission*, 62 Ill. 2nd 65, 71, (1975).

Applying these decisions and rules, the Commission held in *Thomas Dietrich v. Chicago Transit Authority*, 19 IWCC 0317 (2019) that the claimant, an acting Vice President of the employer, responsible for

performance and maintenance of all buses and railcars owned by employer, and whose job required that the claimant travel from different employer sites throughout the city to conduct inspections and participate in meetings was a traveling employee. The claimant in *Dietrich* had an office in the central office at the Chicago Transit Authority's (CTA) building at 567 Lake St., Chicago, Illinois. Petitioner arrived in his office in the morning and was scheduled to have a meeting later in the afternoon at the CTA Skokie location. He arrived at the Skokie building to attend the meeting which was scheduled on the 2nd floor of the building. He took a flight of stairs to the 2nd floor. As he walked up the left side of the stairs, he turned and went to step down when he felt his leg go out from under him, causing him to fall in the stairwell. The claimant did not recall whether he slipped on something or whether he simply mis-stepped. The Commission found that the claimant was a traveling employee because his job required him to travel from his office in the central office of CTA to the multiple other locales of the CTA. Even though the accident occurred while he was at one of those locales owned by CTA, he nevertheless was a traveling employee. On that basis, the only inquiry was whether his conduct at the CTA locale in Skokie was reasonable and foreseeable as he was taking the stairs at the CTA Skokie locale. The Commission found that his conduct in taking the stairs was reasonable and foreseeable and whether there was debris on the stairway or whether he mis-stepped was irrelevant since arising out of and in the course of are determined by whether his conduct was reasonable and foreseeable.

Similarly, in *Pearl Simon v. Illinois Department of Human Services-DORS*, 11 IWCC 946 (2011) the claimant was a home health aide whose job required her to go to a client's house to assist with activities of daily living for 7 hours, 7 days a week. She was required once every 2 weeks to drop off her timesheets at employer's office located at 420 S. Financial Court. The Commission found that the claimant was a traveling employee when she sustained accidental injuries when she went to drop off her timesheets at her employer's office. The Commission concluded that the claimant's injuries when she slipped and fell on ice on the sidewalk/walkway in front of the employer's office were compensable because her conduct was reasonable and foreseeable.

As in *Dietrich* and *Simon,* Petitioner in the case bar, Petitioner was required to go to sites other than her school, CEDA St. James, at certain times. Specifically, Petitioner was required to travel to the Central Office for monthly meetings and other administrative activities. However, she worked at her assigned school of St. James, located at 9 W. 21st St. in Chicago Heights, Illinois, five days per week, 7:30 a.m. to 5:00 p.m. Just as in *Dietrich*, travel was a required part of Petitioner's job and she was required to travel from one locale belonging to her employer to another locale belonging to her employer.

To attend her monthly meetings at CEDA's Central Office, Petitioner had to take the elevator to the 18th Floor, where the meetings were held. On February 22, 2013, the meeting was stopped for a lunch break and the attendees were allowed get lunch wherever they chose during the lunch break. The area where Petitioner slipped and fell is a common area of the building used by everybody to get to and from the elevator she was required to use to get to and from her meeting. It was reasonable and foreseeable that Petitioner would take the elevator downstairs and exit the elevator in order to get lunch at one of the many eateries located around downtown Chicago.

Therefore, based on the law and the credible evidence. the Arbitrator finds that Petitioner was a traveling employee at the time of her injury on February 22, 2013. Further, the Arbitrator finds that, as a traveling employee, Petitioner's activity of taking and exiting an elevator and walking to lunch during a scheduled lunch break was reasonable and foreseeable. As such, Petitioner's February 22, 2013 accident of slipping and falling in the lobby of the building where CEDA's Central Office was located after her meeting had broken for lunch arose out of and in the course of her employment.

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

Petitioner had no complaints or problems with her low back, left leg or right knee prior to the accident of February 22, 2013. The accident was described as a slip and fall on water with one leg going out from under her and the other leg going under her with immediate onset of disabling pain that required her to be removed from the scene by ambulance. The histories given by Petitioner of the accident and her reports of the onset of the symptoms to all her medical providers was consistent with her testimony at hearing. However, the Arbitrator notes that Petitioner's medical providers repeatedly recommended treatment, in the form of injections, which Petitioner chose to not undergo. While Petitioner may claim a fear of the effects of the injections based on her diabetes, the medical providers knew of her diabetes and still recommended the injections. Due to her failure to undergo the injections, Dr. Barnabas declared Petitioner to be at MMI on May 21, 2013. Petitioner returned to Dr. Malek on October 4, 2013, and he reiterated the recommendation of injections and, since Petitioner decided to not undergo the injections, found Petitioner had reached MMI. Petitioner then did not seek any treatment for her conditions until September 9, 2014, when Dr. Glaser, like all her other medical providers, recommended injections.

Based on Petitioner's own decision to not follow the recommendations of her medical providers, the Arbitrator finds that Petitioner has established that her low back and right knee conditions are causally related to the February 22, 2013 accident through October 4, 2013. Petitioner testified that she no longer has any problems with her left leg.

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

The Arbitrator finds that Respondent is liable for reasonable and necessary bills arising out of the treatment of Petitioner's injuries from February 22, 2013 through October 4, 2013. The Arbitrator finds that the bills identified in Petitioner Exhibit 14 through October 4, 2013 are for reasonable and necessary medical treatment provided to treat Petitioner's work injuries and Respondent is ordered to pay those bills pursuant to the fee schedule or negotiated rate, whichever is less.

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

Respondent stipulated in Arbitrator's Exhibit 1 that if Petitioner's claim was found to be compensable, the temporary total disability (TTD) period was from February 22, 2013 through May 8, 2013 representing 10 5/7 weeks. Petitioner also stipulated to that time period. (AX1) Therefore, the Arbitrator finds that Petitioner is entitled to TTD from February 22, 2013 through May 8, 2013, representing 10 5/7 weeks. Respondent is ordered to pay TTD to Petitioner at the rate of $743.58 per week from February 22, 2013 through May 8, 2013 representing 10 5/7 weeks accruing from February 22, 2013.

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

Pursuant to Section 8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an

evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's (AMA) "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors;

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of Section 8.1b(b), the Arbitrator notes that neither party presented an AMA permanent partial impairment rating or report into evidence. Therefore, this factor carries no weight in this permanency determination.

With regard to subsection (ii) of Section 8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a Director of Early Childhood Programming at the time of the accident and that she was able to return to work in her prior capacity on May 9, 2013. Petitioner described the job as involving the supervision of staff, ensuring the safety of the children in the program, monitoring the nutrition program, monitoring the classrooms and monitoring the internal and external building. Additionally, Petitioner's job required her to travel between her school and the CEDA Central Office at least once a month. The Arbitrator gives this factor some weight.

With regard to subsection (iii) of Section 8.1b(b), the Arbitrator notes that Petitioner was 58 years old at the time of the accident. The Arbitrator gives this factor some weight.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that there is no evidence that Petitioner's future earning capacity was diminished by the work accident. The Arbitrator gives this factor great weight.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator finds that the medical records corroborate that Petitioner sustained injuries to her low back and right knee on February 22, 2013. The medical records document Petitioner's complaints of significant pain in both the right knee and the low back. The records also show that she underwent extensive therapy for both her low back and right knee. Petitioner's medical providers recommended injections for her right knee and low back but were declined by Petitioner because of her fear of complications from her diabetes. The diagnostic exams showed a tear of the posterior horn of the medial meniscus, L5-S1 left sided disc herniation with mild left sided spinal stenosis and left lateral recess narrowing. Additionally, the EMG/NCV revealed moderately acute L5-S1 radiculopathy on the left. The Arbitrator also finds that Petitioner credibly testified at hearing that she continues to have low back and right knee pain. The low back pain occurs once or twice a week, depending on her activities, and is worsened by reaching and bending. Her right knee pain is to the point where she walks with a limp on many occasions and is constant. Petitioner testified that she uses

topical rubs to help with the pain. Additionally, Petitioner testified that her job requires a lot of stretching, bending and walking that make her back and right knee hurt. The Arbitrator gives this factor great weight.

Based on the above factors, the record taken as a whole and a review of prior Commission awards with similar injuries and similar outcomes, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 8% loss of use of the right leg pursuant to Section 8(e)(12) of the Act and 10% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC033809
Case Name	MAGGIORE, DONALD v. S & L TOWING
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0249
Number of Pages of Decision	11
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Patrick Brooks
Respondent Attorney	Danielle Curtiss

DATE FILED: 5/25/2021

/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

Donald Maggiore,

Petitioner,

vs. NO: 13 WC 33809

S & L Towing, and The Illinois State Treasurer as Ex-Officio Custodian of The IWBF & Jesus Macias,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of permanent partial disability, wages, rate, causal connection, medical expenses, employment relationship, liability of 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-Employment that are paid to the Petitioner from the Injured Workers' Benefit Fund.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 1, 2019, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that 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 $11,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 25, 2021

/s/ *Marc Parker*
Marc Parker

MP:yl
o 5/20/21
68

/s/ *Barbara N. Flores*
Barbara N. Flores

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

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0249
NOTICE OF ARBITRATOR DECISION

MAGGIORE, DONALD Case# **13WC033809**
Employee/Petitioner

S & L TOWING THE ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE IWBF & JESUS MACIAS
Employer/Respondent

On 11/1/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.61% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4974 SHEA LAW GROUP
PATRICK BROOKS
2400 N WESTERN AVE 2ND FL
CHICAGO, IL 60647

0000 S&L TOWING
JESUS MACIAS
6621 W 89TH PL
OAK LAWN, IL 60453

6149 ASSISTANT ATTORNEY GENERAL
DANIELLE CURTISS
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Donald Maggiore
Employee/Petitioner

v.

S & L Towing,
The Illinois State Treasurer, as ex-officio custodian of IWBF
and Jesus Macias
Employer/Respondent

Case # **13** WC **33809**

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 Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **08-13-19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **08-25-13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**42,000.00**; the average weekly wage was $**807.69**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

Medical Expenses
Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $1,579.00 to West Suburban Medical Center, as provided in Sections 8(a) and 8.2 of the Act.

Permanent Partial Disability
Respondent shall pay Petitioner permanent partial disability benefits of $484.61 per week for 20 weeks, because the injuries sustained caused disfigurement of the head and face, as provided in Section 8(c) of the Act. Additionally, Petitioner is entitled to 10% loss of use of a person as a whole (50 weeks) for the subsequent emotional trauma after suffering a gunshot injury to face.

The Illinois State Treasurer, as ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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

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

Signature of Arbitrator

10-31-19
Date

NOV - 1 2019

State of Illinois)
)
County of Cook)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Donald Maggiore,	)	
Petitioner,	)	
	)	
	)	
v.	)	**No. 13 WC 33809**
	)	
	)	
S & L Towing, Illinois State Treasurer	)	
As ex-officio custodian of the IWBF and	)	
Jesus Macias,	)	
Respondents.	)	

MEMORANDUM OF DECISION OF ARBITRATOR

The medical records submitted from West Suburban Hospital(PX 1) and the testimony from Petitioner establish the following in this case:

On August 25, 2013 Petitioner was employed as a tow truck driver. Petitioner testified that he worked for a sub-contractor whom had a contract with the City of Chicago to tow vehicles which needed to be impounded. In the early morning hours of 8/25/13, Petitioner and his partner were dispatched to tow two vehicles at the same location. While seated in his tow truck, Petitioner testified that an unknown offender pressed a gun against his head and demanded his phone and money. At some point, Petitioner testified that he turned his head and he heard the sound of a gun shot and passed out. Petitioner testified that the next thing he remembers is his partner speaking to him in the tow truck and feeling blood run down his face. Petitioner testified he was taken by ambulance to West Suburban Hospital.

The medical records from West Suburban Hospital establish that Petitioner, age 47, was admitted for a "graze wound to the face(PX 1)." The medical history provided states that: "PT is a tow truck driver, accosted at gun point. Perpetrator took a shot at patient, who turned his head to the left. The bullet grazed the bridge of his nose and the left eyebrow(PX # 1). Petitioner received 7 sutures in the eyebrow and 6 sutures for his nose(PX 1). Petitioner was discharged in "stable" condition(PX 1).

The Arbitrator finds the testimony of Petitioner as to this occurrence not only credible but also a vivid and harrowing account of a gunshot wound that occurred while in the course of his employment on 8/25/13. Petitioner testified that he spoke to his "boss" named Sam whom he referred to throughout his testimony as the owner of S & L Towing about this occurrence. Petitioner testified that he briefly went back to work as tow truck driver following this occurrence but that Sam eventually "let him go." Petitioner also testified that he is afraid to return to work as tow truck driver because of what happened to him during this incident. Petitioner admitted, however, that health problems pertaining to his diabetic condition have prevented him from returning to gainful employment.

Petitioner testified and the Arbitrator observed a scar of approximately two inches across the bridge of his nose. Petitioner also has a scar of similar length on his left eyelid but the scar is not visible unless the eyelid is closed. Although the Arbitrator finds Petitioner's emotional testimony credible and compelling as to the psychological trauma that this near death experience has and continues to have on Petitioner's mental well-being, there is no medical evidence submitted in this case to establish any diagnosis or treatment for any post-traumatic stress or other mental condition that can be associated with this occurrence. That being said, the Arbitrator does make findings on the following issues:

A. WAS RESPONDENT OPERATING UNDER AND SUBJECT TO THE ILLINOIS WORKERS' COMPENSATION OR OCCUPATIONAL DISEASE ACT?

Based upon the testimony presented, the Arbitrator finds that on 8/25/13 the Respondent, S & L Towing, was subject to the Illinois Workers' Compensation Act.

B. WAS THERE AN EMPOYEE-EMPLOYER RELATIONSHIP?

The Arbitrator finds that on 8/25/13 an employee-employer relationship existed between Petitioner and S & L Towing. Although Petitioner testified that he would usually receive his work assignments from a dispatcher employed by another tow tuck company, the greater weight of the evidence provided by Petitioner establishes that S & L Towing exercised a greater degree of control over Petitioner's work. Most importantly, S & L provided the tow truck that allowed Petitioner to perform his essential job duties(i.e. tow cars). Furthermore, Petitioner testified that he was paid by S & L, wore an S & L uniform and was provided a business cell phone by S & L. As such, the manifest weight of the evidence establishes that Respondent, S & L Towing, was in the best position to

control the means and manner of how Petitioner performed his job duties. **Wenholdt v. Industrial Comm'n, 95 Ill. 2d 76 (1983).**

C & D DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT WITH RESPONDENT? AND WHAT WAS THE DATE OF THE ACCIDENT?

Based upon the testimony and medical records submitted, the Arbitrator finds that on 8/25/13 Petitioner was involved in an accident that arose out of and in the course of his employment with S & L Towing.

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

Based upon Petitioner's testimony that he spoke to his boss, Sam, at S & L Towing about this occurrence, the Arbitrator finds that timely notice was provided to Respondent.

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

The Arbitrator finds that the scars displayed by Petitioner on his notice and Left eyebrow represent permanent disfigurements that are causally related to the injury sustained on 8/25/13. The medical records from West Suburban Medical Center(PX #1) document sutures applied to both these areas following Petitioner's facial injuries after receiving a graze wound (PX #1). The Arbitrator at hearing observed scars present at both of these locations. For reasons stated above, the Arbitrator finds that Petitioner has met his burden of proof both regarding disfigurement and emotional trauma.

G. WHAT WERE PETITIONER'S EARNING?

The credible testimony of Petitioner established that he was paid $15.00 per car that he towed and that he on average would tow 54 cars a week. Applying these numbers would produce an average weekly wage of $810.00. Here Petitioner is alleging an average weekly wage of $807.69 (Arbitrator Exhibit #1). Even though Petitioner's testimony as to earning was unrebutted, in the absence of tangible written evidence of earnings, the Arbitrator finds that the lower figure of $807.69 listed on the Request For Hearing form (Arbitrator's Exhibit #1) is determined to be Petitioner's average weekly wage in this case.

H & I. WHAT WAS PETITIONER'S AGE AT THE TIME OF THE ACCIDENT & WHAT WAS PETITIONER'S MARITAL STATUS A THE TIME OF ACCIDENT?

The Arbitrator finds that at the time of the accident Petitioner was 47 years old

and married based upon the medical records and testimony provided at hearing.

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

The Arbitrator finds that the emergency room treatment provided Petitioner at West Suburban Hospital was reasonable and necessary to treat him for a graze gunshot wound. Petitioner's wounds to his face were cleaned, irrigated and sutures were applied to his nose and left eyebrow area(PX#1). The Arbitrator further finds that the charges incurred for this treatment in the amount of $1,570.00 from West Suburban Hospital shall be paid by Respondent pursuant to the fee schedule and pursuant to Sections 8(a) and 8.2 of the Act.

L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Taking into account the 8.1(b) PPD factors, the medical records submitted and the testimony by Petitioner which show that Petitioner received two laceration wounds from being grazed by a gunshot. The Arbitrator observed a scar across the bridge of Petitioner's nose of approximately two inches in length. There is also a scar present on Petitioner's left eyelid of almost the same length; however, the eyelid scar is not visible unless Petitioner closes his eye. While testifying about the scar, the Arbitrator observed Petitioner become quite emotional. Although there was no testimony or medical evidence that the scars result in any physical discomfort or embarrassment to Petitioner, it was apparent to the Arbitrator while observing Petitioner during the hearing that the scars due serve as emotional reminders to Petitioner of what happened to him on 8/25/13 and how a fortunate turn of the head prevented even greater injury or death. Based on the foregoing, the Arbitrator awards Petitioner permanent partial disability benefits of $484.61 per week for 20 weeks of disfigurement to the head and face, as provided in Section 8(c) of the Act. Additionally, the Arbitrator awards 10% loss of use of a person as whole for the emotional trauma Petitioner suffered because of the occurrence. Petitioner stated that he rarely went out of the house, nor did he work for two years.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC012391
Case Name	GWALTNEY, JULIA v. MEMORIAL HOSPITAL OF
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) – Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0250
Number of Pages of Decision	19
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Kevin L. Mechler, D. Brian Smith

DATE FILED: 5/26/2021

DISSENT

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JULIA GWALTNEY,

Petitioner,

vs. NO: 19 WC 12391

MEMORIAL HOSPITAL OF CARBONDALE,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b)/8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, and prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 20, 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, 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 $32,500.00. 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.

MAY 26, 2021

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

o-4/6/21
KAD/jsf

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

DISSENT

I disagree with the majority's decision, in part. Based on the evidence presented, I would find that Petitioner failed to prove by a preponderance of the evidence that her current condition of ill-being, namely CTS, is causally related to the work accident of March 1, 2019, and, further, any medical expenses and permanency award relating to said condition should be vacated.

The claimant has the burden of proving, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of his employment. Included within that burden of proof is that his current condition of ill-being is causally connected to a work-related injury. *Sisbro, Inc. v. Industrial Comm'n.*, 207 Ill.2d 193, 797 N.E.2d 665, 278 Ill. Dec 70 (2003). "A medical expert witness may not base his opinion on guess, conjecture, or speculation. [Citation omitted]." *Soto v. Gaytan*, 313 Ill. App. 3d 137, 146, 728 N.E.2d 1126 (1999).

Petitioner suffered a compensable injury to her left shoulder and left elbow in the slip and fall accident on March 1, 2019. Her initial complaints were solely to the left upper extremity, specifically shoulder and elbow. There was no evidence or testimony suggesting Petitioner sustained a direct trauma to her left hand or wrist compressing the carpal tunnel. Therefore, Petitioner's described mechanism of injury is not consistent with an aggravation of her pre-existing CTS, described as "chronic."

Dr. Crandall examined Petitioner pursuant to §12 of the Act. He testified Petitioner specifically told him that she did not fall on her wrist or her hand. (RX2, T.7) She further reported she had continued pain in her left shoulder blade and a sensation of a catching feeling in her left elbow. He found the history she provided to him was internally consistent with the histories contained in the medical records he reviewed. He agreed with the diagnosis of left carpal tunnel syndrome however, testified there was no mechanism of injury on that date related to the median nerve findings. He explained:

> Carpal tunnel syndrome can occur from a single event, such as a crush injury, a radius fracture, a wrist dislocation. It has to be significant severe trauma to the wrist to cause median nerve compression at the wrist. Injuries to the shoulder, the neck, the elbow do not cause compression of the tendons in the carpal tunnel and subsequent crushing of the median nerve. That just does not happen. (RX2, T.8)

Dr. Crandall further testified the EMG/NCV study, performed September 10, 2019, demonstrated moderate chronic carpal tunnel and the findings indicate the amount of time they have been present. In Petitioner's case, the values of compression indicate they had been present for a while -- longer than the time distance between her fall and the date of the test. (RX2, T.9) He testified Petitioner's CTS predated her March 1, 2019, work injury and, further, the work injury did not change the condition of the carpal tunnel, did not change the median neuropathy, and did not cause the need for surgery. He stated definitively, "[I]t's not a cause and effect, and it's not an aggravation of a pre-existing condition." (RX2, T. 10) Dr. Crandall's opinion is well-reasoned and supported by the record. Dr. Crandall's opinion is even supported by Dr. Hagan who stated, "…[b]ut I think his comments regarding the carpal tunnel are -- are appropriate." (PX14, T.33) I would find Dr. Crandall's opinion more persuasive than the equivocal causation opinion of Dr. Hagan as noted below.

Dr. Hagan testified on behalf of Petitioner. He too agreed there is no evidence in the medical records Petitioner fell on her left wrist or her left hand. He further agreed that falling on one's shoulder is not a typical mechanism of injury for aggravation of carpal tunnel syndrome. (RX14, T.60) Notwithstanding the foregoing, Dr. Hagan stated that because Petitioner did not have CTS symptoms in the left wrist before the work accident but had symptoms after, her CTS condition was related to the accident. Based on a careful review of the contemporaneous treating medical records in evidence, Dr. Hagan's opinion is unsupported and not persuasive.

On the date of accident, Petitioner sought care at Memorial Hospital Carbondale (MCH) where she reported her chief complaint was "left arm injury." Her history of present illness was noted as, "[l]located in the left shoulder. She is right hand dominant. She denies any previous shoulder problems. Her pain level is a 5." Her left shoulder was examined and it was noted, "No pain with motion of her left wrist. No pain along the forearm/elbow…" X-rays of the left shoulder and left elbow revealed no fracture or dislocation. Notably, no x-rays were performed of the left wrist. Petitioner was given temporary work restrictions of no use of the left upper extremity for the left shoulder.

She returned to MHC on March 4, 2019, and reported pain along the posterior left elbow. Her left shoulder and elbow were examined and she was diagnosed with contusions of the left shoulder and left elbow. She was to work on ROM of the left shoulder and elbow on her own. Again there was no mention of wrist pain, no examination of the left wrist and no diagnosis of any condition relating to the left wrist. On March 8, Petitioner began complaining of popping in her left wrist. However, there was no report of pain, numbness or tingling in the left wrist. On March 27, Petitioner returned complaining of pain and popping in the left shoulder; she complained of pain throughout the shoulder to her elbow. There was no mention of numbness, tingling, pain, popping or any symptoms in the left wrist.

One month post injury, Petitioner saw Dr. Paletta, on April 3, 2019, where she complained of left shoulder pain radiating to the level of the elbow but not below. (PX5) Dr. Paletta noted, "There is no associated numbness, tingling or paresthesia." He diagnosed her condition as chronic left shoulder pain status post blunt trauma. Dr. Paletta agreed with restrictions of left hand for light activities such as paperwork or computer work only. He causally related the shoulder to the work injury but did not examine, evaluate or diagnose any condition of the left wrist. Significantly, he allowed her to work with her left hand performing computer work and light activities. Clearly, at one month post-accident, Petitioner was not experiencing symptoms of CTS as Dr. Hagan believed.

Two months post injury, on May 6, 2019, Petitioner completed an Athletico Patient Intake Paperwork form where she was asked to describe her pain. She reported, "Dull constant aching in armpit, in back of shoulder to mid upper arm." There is no mention of any symptoms in her left wrist.

Three months post injury, on June 19, 2019, she returned to Dr. Paletta and reported some radiation of pain down the arm but typically it does not go below the elbow. Sometimes at night she would have pain down the arm but she denied numbness and tingling. He again diagnosed left shoulder and periscapular pain of uncertain etiology. Again, there are no reports of symptoms of CTS three months post-accident.

Dr. Hagan's causation opinion is based on his belief her left wrist became symptomatic after the accident. The contemporaneous medical records show she did not complain of symptoms in the left wrist relating to CTS on the accident date and for at least three months post-accident. Thus, Dr. Hagan's opinion is not supported by the medical records, is reflective of mere speculation and conjecture and thus not persuasive.

Furthermore, during her course of care, it is clear Dr. Hagan viewed her CTS as not work-related. He noted in the medical records of April 9, 2020, "[t]his was deemed a non-work related injury and was performed under her private health insurance on March 11, 2020." His impression was: "2. Left Carpal Tunnel Syndrome (NOT WORK RELATED (*emphasis original*)." (PX9) On April 30, 2020, Dr. Hagan again noted, "Left Carpal Tunnel Syndrome (NOT WORK RELATED

(*emphasis original*), improving.)" (RX4) On June 19, 2020, Dr. Hagan issued an amended April 30, 2020, note. The amended note omitted the phrase, "NOT WORK RELATED." (PX9) Amending the medical records to remove a causation reference renders the medical opinion of Dr. Hagan unreliable and I would not afford it any weight.

Based on the foregoing, I would find Petitioner failed to meet her burden of proving a causal connection between her condition of CTS and the work-related accident and vacate the awards of medical benefits and permanent partial disability for said condition.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0250
NOTICE OF 19(b) ARBITRATOR DECISION

GWALTNEY, JULIA Case# **19WC012391**

Employee/Petitioner

MEMORIAL HOSPITAL OF CARBONDALE

Employer/Respondent

On 8/20/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.12% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0693 FEIRICH MAGER GREEN RYAN
D BRIAN SMITH
2001 W MAIN ST
CARBONDALE, IL 62903

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JULIA GWALTNEY
Employee/Petitioner

v.

MEMORIAL HOSPITAL OF CARBONDALE
Employer/Respondent

Case # 19 WC 12391

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Collinsville** on **June 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, **3/01/2019**, 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 **$72,212.63**; the average weekly wage was **$1,388.70**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of **$8,332.20** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$8,332.20**.

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

ORDER

The Arbitrator finds Respondent has not paid all charges relating to Petitioner's reasonable and necessary medical care. Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, totaling $32,257.37, equating to $3,973.57 due and owing SIH Memorial Hospital of Carbondale; $111.00 due and owing SIH MHC Emergency Department, $71.00 due and owing Cape Radiology Group; $622.00 due and owing SIH Workcare; $913.00 due and owing Dr. George Paletta; $5,460.12 due and owing MRI Partners of Chesterfield; $966.18 due and owing United Physician Group/Dr. Helen Blake; $6,877.81 due and owing Athletico Physical Therapy; $4,186.69 due and owing STL Plastic & Hand Surgery/Dr. Robert Hagan; $4,667.00 due and owing Professional Imaging; $2,625.00 due and owing NEI Inc. of Saint Louis/Dr. Daniel Phillips; $686.00 due and owing Patricia Zorn Center; and $1,098.00 due and owing Petitioner for reimbursement of medical expenses and prescriptions, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit. Respondent shall further hold Petitioner harmless from any and all subrogation claims that may or have been asserted by Health Alliance.

Respondent shall authorize and pay for the treatment recommended by Dr. Hagan, including but not limited to thoracic outlet syndrome surgery.

Petitioner is not entitled to temporary total disability benefits from March 11, 2020 through the date of the hearing (6/24/20).

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

8/14/20
Date

ICArbDec19(b)

AUG 2 0 2020

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JULIA GWALTNEY,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 19-WC-12391
	)	
MEMORIAL HOSPITAL OF CARBONDALE,	)	
	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on June 24, 2020 pursuant to Section 19(b) of the Act. The parties agree that on March 1, 2019 Petitioner was employed as a Cardiac Cath Lab Technician for Respondent. The issues in dispute are causal connection, medical bills, temporary total disability benefits, and prospective medical care. All other issues have been stipulated.

TESTIMONY

Petitioner is a Cardiac Cath Lab Technician for Respondent. She was 43 years old at the time of the accident. The parties stipulated that Petitioner suffered an accidental injury that arose out of and in the course of her employment on March 1, 2019. Petitioner testified that on that date she was exiting her vehicle that was parked on the fifth floor of the covered parking garage when she slipped on black ice and fell to the ground. She testified she landed on her left elbow and shoulder and felt immediate pain in both areas. Petitioner entered the hospital and reported the accident to her supervisor who told her to go to the emergency room department. Upon discharge, Petitioner's supervisor ordered her to go home. Petitioner was treated at Workcare on the day of the accident and she was placed on light duty work for one week.

Petitioner testified she underwent three weeks of physical therapy that did not alleviate her symptoms. She was referred to Dr. George Paletta who recommended additional physical therapy and an injection in her left shoulder. The conservative treatment did not help and Dr. Paletta referred Petitioner to Dr. Hagan. She reported tingling and numbness down her left arm into her pinky finger with the majority of pain in her shoulder. Dr. Hagan performed a left carpal tunnel

release and injected her left shoulder which provided only hours of relief. Petitioner testified Respondent did not authorize or pay for the carpal tunnel release and her health care provider also denied coverage. Petitioner testified she paid the medical bills related to the left carpal tunnel surgery herself.

Petitioner testified she had a right carpal tunnel release in approximately 2007 that alleviated her symptoms. She testified she has never had symptoms in her left hand and was never diagnosed with carpal tunnel syndrome in her left hand until her accident of 3/1/19.

Petitioner performs thoracic outlet syndrome exercises that help keep her left shoulder mobile; however, the pain in her deep shoulder is constant. She testified she desires to under left thoracic outlet surgery as recommended by Dr. Hagan.

Petitioner testified she has been working with light duty restrictions since the date of accident.

MEDICAL HISTORY

Petitioner presented to the emergency department at SIH Memorial Hospital of Carbondale and reported a consistent history of the accident. Emergency department personnel observed Petitioner held her left arm close to her body and had pain with movement. Radiographic studies were negative for fracture and Petitioner was diagnosed with a left shoulder strain. She was given a sling for her arm and referred to an orthopedic surgeon for evaluation.

Petitioner also reported to SIH Workcare the day of the accident where she presented with complaints of left shoulder and elbow pain. She was diagnosed with shoulder and elbow contusions and instructed to use ice and anti-inflammatories to reduce swelling. Petitioner was placed on light duty restrictions including no use of her left upper extremity. Petitioner followed up at Workcare on 3/4/19 and her instructions and restrictions remained the same.

Petitioner returned to Workcare on 3/8/19 with persistent left shoulder and left wrist pain. Petitioner reported popping in her wrist and pain along the superior aspect of her shoulder and scapula. She was having difficulty performing one-handed work duties. Occupational therapy was recommended. Petitioner reported that therapy helped with range of motion in her left shoulder but not the pain.

On 3/27/19, Petitioner reported no improvement with therapy and continued to have pain in her left shoulder through her elbow. Her restrictions remained the same and she was referred to an orthopedic surgeon. On 4/3/19, Petitioner was evaluated by Dr. George Paletta who noted pain in Petitioner's shoulder at the end ranges of motion and painful arc of motion. He believed the mechanism of injury was sufficient to cause a subluxation episode or labral pathology, and he opined her left shoulder symptoms and condition was causally related to her work injury. Dr. Paletta recommended an MR arthrogram, cautioned Petitioner against continuous use of the sling

that was provided by Workcare, and he restricted her to desk jobs only. An MR Arthrogram of Petitioner's left shoulder was obtained on 4/17/19 that revealed findings consistent with subacromial impingement syndrome with subacromial bursitis, with no evidence of rotator cuff or labral tears. Dr. Paletta recommended a comprehensive course of non-surgical treatment including an ultrasound guided injection followed by physical therapy. On 4/29/19, Dr. Helen Blake performed a left subacromial bursa injection and physical therapy was initiated on 5/5/19.

On 6/19/19, Petitioner reported no relief from the injection. Dr. Paletta noted Petitioner's pain was periscapular and located in the posterior aspect of the left shoulder, the cervical region, down the scalene, and into the anterior chest wall. Her pain also radiated down the left arm. Petitioner had trapezial muscle spasms and mild tenderness, tenderness in the supraclavicular region, minimal tenderness in the infraclavicular region, and over the pectoralis minor. Dr. Paletta referred Petitioner to Dr. Robert Hagan to rule out traumatic neurogenic thoracic outlet syndrome. Her work restrictions remained the same.

On 7/15/19, Dr. Hagan noted Petitioner presented with a nagging ache under her left armpit that radiated to her chest wall. The top of her shoulder and the posterior shoulder were tender to touch and radiated to her left elbow. Petitioner's left hand was weaker than her right hand and she had night numbness and tingling. Petitioner also reported headaches in the back of her neck since the accident. Dr. Hagan noted her scalene triangle and middle scalene were tender to palpation. Petitioner was symptomatic with Adson's Halstead test and supraclavicular test and occlusion test were positive. The upper limb tension test was positive and she was symptomatic with costoclavicular maneuver. With straight arm pull she reported pain in the biceps and was positive for pectoralis minor insertion tenderness. Dr. Hagan noted mild to moderate Tinel's on the scalene triangle. Dr. Hagan wanted to rule out cervical radiculopathy, intrinsic injury versus extrinsic irritation, and thoracic outlet syndrome, so he ordered an MRI of the chest, brachial plexus, axilla, and shoulder. He further recommended Petitioner be evaluated by physical therapist, Dr. Patricia Zorn, for conservative management, and undergo a nerve conduction study. Dr. Hagan deferred to Dr. Paletta for Petitioner's work restrictions.

Petitioner underwent an MRI and MR Arthrogram of the brachial plexus on 9/7/19, and an EMG/NCS on 9/10/19. Petitioner began physical therapy with Dr. Zorn on 9/10/19. Dr. Zorn noted Petitioner's findings were consistent with glenohumeral muscle imbalance and neurogenic thoracic outlet syndrome. Petitioner was instructed in thoracic outlet home exercises.

Petitioner followed up with Dr. Hagan on 9/23/19 with significant complaints consistent with left thoracic outlet syndrome. Dr. Hagan reviewed the electrodiagnostic study and noted moderate median neuropathy across the left wrist and compression behind the anterior scalene muscle at the level of the scalene triangle. He diagnosed Petitioner with left carpal tunnel syndrome and left neurogenic thoracic outlet syndrome. Dr. Hagan recommended a left carpal tunnel release and diagnostic/therapeutic injections for her thoracic outlet syndrome. He further recommended that she continue the same work restrictions, home exercise program, and medications.

On 11/20/19, Petitioner was evaluated by Dr. R. Evan Crandall pursuant to Section 12 of the Act. Dr. Crandall had an opportunity to review medical records from Dr. Paletta, Dr. Hagan, Athletico Physical Therapy, Dr. Daniel Phillips, Professional Imaging, and SIH Workcare. Dr. Crandall opined Petitioner has moderate and chronic left median neuropathy. However, he opined there was no mechanism of injury to the median nerve findings and Petitioner's left carpal tunnel syndrome and STT arthritis were chronic and pre-existed her accident of 3/1/19. Although Dr. Crandall opined carpal tunnel surgery was reasonable, it was not related to her accident. Dr. Crandall further opined there was no evidence Petitioner had thoracic outlet syndrome and he could not detect any abnormalities in her left elbow that would require injections, therapy, or surgery. He opined Petitioner did not require work restrictions with regard to her left hand/wrist and he deferred all opinions regarding Petitioner's left shoulder to orthopedics.

On 12/26/19, Petitioner was evaluated by Dr. Todd Silverman pursuant to Section 12 of the Act. Dr. Silverman's Section 12 report was not offered into evidence at arbitration. Dr. Silverman testified by way of deposition on 6/18/20 and although he referred to his Section 12 report and supplemental report, same were not attached to Dr. Silverman's deposition transcript that was admitted into evidence.

On 2/24/20, Petitioner followed up with Dr. Hagan with worsening shoulder symptoms. Dr. Hagan reiterated that Petitioner did not have any previous symptoms of numbness or tingling in her left hand prior to her accident. She continued to have lateral hypersensitivity, shooting pain radiating up towards the shoulder with elbow flexion, anterior shoulder pain, and muscle twitching. Home exercises did not alleviate her pain. Dr. Hagan again recommend a left carpal tunnel release and an injection for her left neurogenic thoracic outlet syndrome. She was placed on light duty restrictions of no lifting more than 15 pounds with the left extremity, limited repetitive movement, limited pushing and pulling, and no working above shoulder level.

Petitioner underwent ultrasound-guided injections to the brachial plexus, anterior and middle scalene muscles, and pectoralis minor muscle and insertion on 3/9/20 and a left carpal tunnel release on 3/11/20. Intraoperatively, Dr. Hagan noted the transverse carpal ligament was thickened. Postoperatively, Petitioner had improvement in her median digits including decreased numbness and tingling. The injection provided an immediate near total relief in her proximal symptoms for six hours due to the numbing agent, supporting Dr. Hagan's diagnosis of neurogenic thoracic outlet syndrome and the location of Petitioner's pathology.

Dr. Hagan testified by way of deposition on 3/13/20. Dr. Hagan is a board-certified plastic surgeon who devotes 80 to 85% of his practice to treating peripheral nerve injuries, such as thoracic outlet syndrome, and 20% of his practice to performing hand surgery. Dr. Hagan testified that Petitioner was referred to him by Dr. Paletta after Dr. Paletta did not identify significant intrinsic shoulder pathology and believed thoracic outlet syndrome may account for her continued symptoms and complaints. Petitioner provided him with a consistent history of accident and he reviewed her medical records up to the point that she reached his care. He noted persistent

symptoms since Petitioner's date of accident and various signs consistent with neurogenic thoracic outlet syndrome, including decreased and guarded range of motion, provocative Wright's and Adson's tests, tenderness in her scalene triangle and the middle scalene, and occipital headaches. Dr. Hagan recommended additional testing including an EMG/NCS to differentiate between thoracic outlet syndrome, cervical radiculopathy, brachial plexopathy, and "downstream" compression neuropathy because her symptoms were consistent with each of those conditions and her mechanism of injury could have caused any of those conditions. The electrodiagnostic study identified "downstream" carpal tunnel syndrome on the same side as her proximal injury and ruled out cervical radiculopathy. Dr. Hagan testified that Petitioner's symptoms may be overlapping between neurogenic thoracic outlet syndrome and carpal tunnel syndrome. He testified that her symptoms were classic double crush and he recommended a carpal tunnel release and injections of the scalene triangle, plexus, and pectoralis minor to identify what symptoms were related to which condition.

Dr. Hagan testified that Petitioner denied having symptoms of left carpal tunnel syndrome prior to her work accident and that the type of injury she sustained could aggravate carpal tunnel syndrome. He further stated that Petitioner's accident was the second most common mechanism of injury that causes neurogenic thoracic outlet syndrome, second only to traumatic motor vehicle accidents. He opined that her complaints and condition were related to her falling injury at work.

Dr. Hagan disagreed with Dr. Crandall's opinion that there was no evidence Petitioner had thoracic outlet syndrome. He opined that Dr. Crandall does not have experience treating patients for thoracic outlet syndrome, he mistakenly believed that thoracic outlet syndrome was a rare condition, and he did not perform any physical examination that would look for thoracic outlet syndrome.

On 4/9/20, Dr. Hagan noted the neurogenic thoracic outlet syndrome injections provided immediate and complete relief for six hours when her pain returned. Dr. Hagan noted Petitioner had appropriate decreased symptoms within the median nerve distribution of her hand following surgery. However, Petitioner continued to have symptoms in her hand related to the thoracic outlet syndrome, including no feeling in the tip of her small finger. Her elbow, shoulder, and neck symptoms remained unchanged. Her work restrictions remained the same. On 4/13/20, Dr. Zorn revised Petitioner's home exercise program.

On 4/30/20, Dr. Hagan noted improved range of motion in Petitioner's shoulder, with persistent pain, numbness, and tingling in her shoulder down to her small finger. Petitioner continued to have residual symptoms consistent with neurogenic thoracic outlet syndrome. Dr. Hagan noted the diagnostic block component of the injection gave her significant relief while the steroid offered minimal benefit. Dr. Hagan recommended decompression surgery for left thoracic outlet syndrome. Her restrictions remained the same and she was to continue home exercises and medication.

Dr. Crandall testified by way of deposition on 3/31/20. He is board-certified in plastic surgery. His testimony was consistent with his Section 12 report dated 11/20/19. He opined Petitioner's carpal tunnel syndrome was unrelated to her work accident because her shoulder injury had nothing to do with the level of compression she had at the wrist. He believed that it was a coincidence that carpal tunnel syndrome was diagnosed and he did not believe Petitioner was asymptomatic prior to the accident. He believed she was a candidate for a carpal tunnel release, but the procedure was not related to her work accident. Dr. Crandall did not review any medical records or documentation prior to Petitioner's accident. Dr. Crandall testified that Petitioner is not diabetic, does not have hypothyroidism, is not a smoker, does not have a bleeding disorder, and is not presently pregnant. Dr. Crandall believed Petitioner's left carpal tunnel syndrome was related to her pregnancy in 2007 and that she had been living with the symptoms for 13 years. Dr. Crandall testified he would defer to Dr. Hagan's opinion regarding thoracic outlet syndrome. He opined that all of Petitioner's symptoms could be explained by her carpal tunnel syndrome and that a carpal tunnel release would help resolve all of her symptoms. Dr. Crandall opined that Petitioner's work accident resulted in subacromial bursitis and the treatment by Dr. Paletta was reasonable and necessary. He testified he would defer to Dr. Paletta on the shoulder.

Dr. Silverman testified by way of deposition on 6/18/20. Dr. Silverman testified he did not find any evidence of objective neurologic deficits or electrodiagnostic abnormalities that would be consistent with "true" neurogenic thoracic outlet syndrome. Dr. Silverman opined there is a controversy in the medical community about the exact definition of neurogenic thoracic outlet syndrome and that there is a difference between what he refers to as "true" neurogenic thoracic outlet syndrome and "disputed" thoracic outlet syndrome. Dr. Silverman testified that he did not find any evidence of "true" neurogenic thoracic outlet syndrome in Petitioner due to no objective neurological deficits and she fit into the category of "disputed" neurogenic thoracic outlet syndrome. Dr. Silverman testified that an appropriate course of treatment for "disputed thoracic outlet syndrome" includes conservative management such as physical therapy, oral medication, anti-inflammatories, and injections. He testified that Dr. Hagan's surgical recommendation was an "exploratory expedition" because the outcome could not be predicted.

Dr. Silverman testified on cross-examination that he is not a surgeon and he does not have any experience with performing surgery for thoracic outlet syndrome. He did not believe that Petitioner was faking, malingering, or exaggerating her symptoms or complaints. It was his opinion that if her symptoms persisted and she continued to struggle despite pain management, her options would include doing nothing, undergoing exploratory surgery, or receiving additional pain management.

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?

Petitioner testified credibly and without rebuttal that prior to March 1, 2019 she was working full duty and did not have any pain in her left shoulder, arm, or hand. There was a sudden onset of pain in Petitioner's left elbow and shoulder following the accident that required work restrictions and significant conservative treatment for her left shoulder, arm, and hand complaints, including medications, physical therapy, and injections. Petitioner reported pain and popping in her left wrist when she returned to Workcare seven days following the accident. The history of Petitioner's mechanism of injury and her onset of complaints are consistent throughout the medical records, the depositions of Dr. Hagan, Dr. Silverman, and Dr. Crandall, and supportive of Petitioner's testimony.

The Arbitrator also relies on the credible opinion of Dr. Paletta and Dr. Hagan in finding a causal connection between Petitioner's left shoulder, arm, and hand conditions and the 3/1/19 work accident. Dr. Paletta opined the mechanism of injury was sufficient to cause a subluxation episode or labral pathology, and he opined her left shoulder symptoms and condition was causally related to her work injury. The Arbitrator finds the opinions of Dr. Hagan to be persuasive, given the fact that his practice is devoted to treating conditions related to the peripheral nervous system, including carpal tunnel syndrome and thoracic outlet syndrome. Moreover, Dr. Hagan is the only physician in the instant case who treats patients with thoracic outlet syndrome or performs surgery for that condition. As such, the Arbitrator finds the opinions of Dr. Hagan to be persuasive given the objective findings on Petitioner's diagnostic and electrodiagnostic studies, the consistent history in Petitioner's medical records, Petitioner's lack of any pre-existing symptoms or treatment to her left shoulder, arm, or hand before March 1, 2019, and her persistent complaints of pain since the accident.

Dr. Silverman testified that while Petitioner may not have what he refers to as "true" neurogenic thoracic outlet syndrome, she may have the more generally defined "disputed" thoracic outlet syndrome, for which treatment has been reasonable. Dr. Silverman testified he is not a surgeon and he does not have any experience with performing surgery for thoracic outlet syndrome. He did not believe that Petitioner was faking, malingering, or exaggerating her symptoms or complaints. It was his opinion that if Petitioner's symptoms persisted, which the record demonstrates they have, and she continued to struggle despite pain management, the options would include doing nothing, undergoing exploratory surgery, or receiving additional pain management. Dr. Hagan has recommended surgery.

The Arbitrator is not persuaded by Dr. Crandall's opinion that Petitioner's left shoulder, elbow, and hand complaints are entirely related to her carpal tunnel syndrome and related solely to a pregnancy thirteen years prior to the accident. There was no evidence presented at arbitration and Petitioner denies any pre-existing symptoms. The carpal tunnel release performed by Dr. Hagan did not relieve Petitioner of all of her symptoms. Dr. Crandall's opinion relies on his assumption that Petitioner was not truthful, and did, in fact, have symptoms related to carpal tunnel syndrome prior to March 1, 2019, which Petitioner denies. This assumption was not supported by Petitioner's credible and unrebutted testimony and the medical records. Moreover, Dr. Silverman testified that he found Petitioner to be honest and forthright about her complaints and condition. With respect to Petitioner's

thoracic outlet syndrome, Dr. Crandall testified he does not treat the condition and is even skeptical of it but would defer to Dr. Hagan's opinion.

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 on the opinion of Dr. Hagan and the credible testimony of Petitioner, the Arbitrator finds that Petitioner met her burden of proof regarding causal connection and orders Respondent to authorize and pay for the treatment recommended by Dr. Hagan, including, but not limited to, thoracic outlet syndrome surgery.

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 causal connection, the Arbitrator finds Petitioner is entitled to medical benefits related to her left shoulder, elbow and hand. 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 $32,257.37, equating to $3,973.57 due and owing SIH Memorial Hospital of Carbondale; $111.00 due and owing SIH MHC Emergency Department, $71.00 due and owing Cape Radiology Group; $622.00 due and owing SIH Workcare; $913.00 due and owing Dr. George Paletta; $5,460.12 due and owing MRI Partners of Chesterfield; $966.18 due and owing United Physician Group/Dr. Helen Blake; $6,877.81 due and owing Athletico Physical Therapy; $4,186.69 due and owing STL Plastic & Hand Surgery/Dr. Robert Hagan; $4,667.00 due and owing Professional Imaging; $2,625.00 due and owing NEI Inc. of Saint Louis/Dr. Daniel Phillips; $686.00 due and owing Patricia Zorn Center; and $1,098.00 due and owing Petitioner for reimbursement of medical expenses and prescriptions, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit. Respondent shall further hold Petitioner harmless from any and all subrogation claims that may or have been asserted by Health Alliance.

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

Petitioner testified she has worked light duty since her accident on 3/1/19. Respondent stipulated it paid temporary total disability benefits in the amount of $8,332.20. No evidence or testimony was offered to show what dates Petitioner received TTD benefits. Although Respondent

paid 9-0/7 weeks of TTD benefits, at no time was Petitioner taken off work by her treating physicians. Petitioner was given work restrictions of no use of her left upper extremity when she reported to SIH Workcare the day of the accident. On 4/3/19, Dr. Paletta restricted Petitioner's work to desk jobs only. Dr. Paletta continued those work restrictions on 6/19/19 until she was evaluated by Dr. Hagan. On 7/15/19, Dr. Hagan deferred to Dr. Paletta for Petitioner's work restrictions. On 9/23/19, Dr. Hagan recommended a left carpal tunnel release and ordered Petitioner to continue the same work restrictions. On 2/24/20, Dr. Hagan placed Petitioner on light duty restrictions of no lifting more than 15 pounds with the left extremity, limited repetitive movement, limited pushing and pulling, and no working above shoulder level.

Petitioner underwent a left carpal tunnel release on 3/11/20. Petitioner claims entitlement to TTD benefits from 3/11/20 through 6/24/20 (the date of arbitration). There are no work slips or office notes from Petitioner's treating physicians following 3/11/20 taking Petitioner off work. On 4/9/20, Dr. Hagan ordered Petitioner's work restrictions to remain the same. The record reflects the last restrictions were ordered on 2/24/20 as stated above. On 4/30/20, Dr. Hagan recommended decompression surgery for left thoracic outlet syndrome and ordered Petitioner's restrictions to remain the same.

Petitioner was asked at arbitration if she was kept off work for any periods of time following her accident. Petitioner replied she has been on light duty.

Based on the above findings, the Arbitrator concludes Petitioner is not entitled to temporary total disability benefits from 3/11/20 through 6/24/20.

Linda J. Cantrell

Arbitrator Linda J. Cantrell

8/14/20

DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC025650
Case Name	DONOHUE, JAMES v. AUTONATION - MERCEDEZ-BENZ
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0251
Number of Pages of Decision	16
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Michael Gravlin
Respondent Attorney	Cody Hartman, William A. Lowry, Sr.

DATE FILED: 5/26/2021

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES DONAHUE,

Petitioner,

vs. NO: 17 WC 25650

AUTONATION-
MERCEDES BENZ OF WESTMONT,

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, other-causal connection, temporary total disability, medical expenses, 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 June 26, 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $21,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 26, 2021

o-5/4/21
KAD/jsf

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

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

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

NOTICE OF ARBITRATOR DECISION

DONOHUE, JAMES Case# **17WC025650**

Employee/Petitioner

AUTONATION-MERCEDS BENZ OF WESTMONT

Employer/Respondent

On 6/26/2019, 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 2.03% 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:

4103 MICHAEL J GRAVLIN LLC
JAKUB D BANASZAK
134 N LASALLE ST SUITE 2020
CHICAGO, IL 60602

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

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

James Donohue
Employee/Petitioner
v.
Autonation-Merceds Benz of Westmont
Employer/Respondent

Case # **17** WC **25650**

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 M. Ory**, Arbitrator of the Commission, in the city of **Geneva**, on **June 18, 2018 and September 20, 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. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **August 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 a work accident.

In the year preceding the injury, Petitioner earned **$99,431.80**; the average weekly wage was **$1,912.15**

On the date of accident, Petitioner was **29** 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.

To date, Respondent has paid **$5,762.40** 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 **$5,762.40** for TTD and TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$5,762.40.**

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

ORDER

Medical Benefits

Respondent shall pay the sum of **$60,559.66** for medical bills in accordance with the fee schedule, §8 and §8.2 of the Act, with credit to be given for any payments made directly by respondent, or through the group insurance pursuant to §8 j of the Act.

Temporary Total Disability

Respondent shall pay temporary total disability benefits from **October 7, 2017 to April 5, 2018,** which is **25-6/7 weeks** at the rate of **$1,274.77 per week.**

Permanent Disability

Petitioner is entitled to **25** weeks' permanent partial disability, at **$790.64** per week, as petitioner's permanent disability has resulted in **5% loss of use of person as a whole under §8 (d) 2 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.

Christine MOny

Signature of Arbitrator

June 24, 2019

Date

JUN 2 6 2019

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Donohue	)	
Petitioner,	)	
vs.	)	**No. 17 WC 25650**
Autonation-Mercedes Benz of Westmont	)	
Respondent.	)	
	)	

ADDENDUM TO ARBITRATOR'S DECISION
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing in Geneva on June 18, 2018 and September 20, 2018. The parties agree that on August 10, 2017, 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 gave timely notice of the claimed accident. The parties agree petitioner earned $99,431.80 in the year predating the accident and that his average weekly wage, calculated pursuant to §10, was $1,912.15.

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 with respondent.
2. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
3. Whether respondent is liable for medical bills.
4. Whether petitioner is entitled to temporary total disability.
5. The nature and extent of petitioner's injury.

STATEMENT OF FACTS

Petitioner, James Donohue, Testimony

Petitioner's highest level of education achieved was a bachelor's degree in communication. Petitioner began his employment with respondent in May, 2011 as salesman. On August 10, 2017, he was the customer financial services manager. As such, he arranged financing with customers after sales were completed. He was paid on commission. He was to dress business professional. He wore dress shoes.

While at work on August 10, 2017, petitioner tripped over an outlet and fell. This occurred as he came from his office, walked across the showroom and was on his way to the general sales manager's office. According to petitioner, he was told by the general sales manager that they had a customer waiting for quite a while; he needed to hurry up to talk to them. He arrived at the general manager, Chris Creeden's office, grabbed the deal and was on his way to talk to the customer when he realized he had a question. He turned around to walk back into Chris' office along with Earl, a sales person. He followed Earl out of the office to interview the customer when he tripped over the outlet and fell down to the ground.

He caught his right foot. Petitioner identified the first phot of Petitioner's Exhibit 10, as a picture of Chris' office. The next three photos were of the outlet where he fell. Typically, these outlets are covered with automobiles on the showroom floor. His left arm was in a sling as he

had shoulder surgery a month or two before. He had papers in his hand for the deal. He described the fall as a whiplash type movement, with his body taking the brunt of the fall. He complained of a sore neck. He hit his foot, ankle area and his right pinky and his shoulder. He believed another salesperson, Yoshi, saw him fall, as well as the customer. Chris Creeden was the first person to come to petitioner's aid.

Petitioner went to Centegra or Concentra for treatment. He was driven by a porter. He was sent to the local hospital for X-rays of his ankle and hand; they checked his shoulder and took a CT scan of his head. The porter drove him to the hospital. He was nauseous.

He next received treatment from the orthopedic surgeon who had done his shoulder surgery; which was to get his shoulder checked out. The orthopedic surgeon recommended physical therapy and kept him off work. He was paid temporary total disability. He received physical therapy for his neck and shoulder. He returned to work two or three weeks later, but felt terrible.

He returned to the orthopedic surgeon, Dr. Moss. Dr. Moss recommended a cervical MRI. A month and a half after the accident, he still felt bad; had pain that went up his neck and up to his head.

He also saw Dr. Sokolowski. Dr. Sokolowski recommended that he discontinue physical therapy and have an injection into the disc. Eventually, Dr. Sokolowski took petitioner off work. The injection was performed by Dr. Kurzydlowski. The first injection did not help that much. He then had an occipital nerve block by Dr. Kurzydlowski; which was administered to the back of the head on the right side. It helped for a week or two. He had a burning in his head; which was completely different pain than he felt before. He then received two medial branch blockade injections. These injections were the only thing that helped at all. He also had a radiofrequency ablation in the C2 through C5 discs. It helped alleviate the neck pain and headaches.

He was then released to return to work by Dr. Sokolowski. Respondent took petitioner back to work as a sales person. He then went to respondent's Toyota store in Libertyville to work in finance.

He used his insurance to pay for medical bills and paid co-pays.

He was examined by Dr. Lieber at respondent's request. Dr. Lieber believed petitioner's symptoms related to a gunshot petitioner suffered to his head. He was shot in the back of the head and left shoulder at the shooting at Northern Illinois University in February, 2008. Petitioner testified the headaches he was having after the fall at work were different than the headaches he suffered from the shooting.

He believes he is at 70% of what he was before the work accident. The burning was much less. He will need another radiofrequency ablation in the near future. It depends upon whether the nerve grows back or if he develops scar tissue.

On cross-examination, petitioner confirmed he suffered head and neck pain, cervical herniated discs, and injuries to his finger and ankle.

Petitioner confirmed he had two head injuries; one from the gunshot wound and the other occurred when he was playing football in 2006 when he a stroke. He was seen by Dr. Hetal Shah on March 15, 2016, when he related these two prior head injuries. He received a CAT scan of his brain on April 21, 2016 at Northwest Community Hospital. He confirmed the records of Northwest Community Healthcare on July 8, 2016 that recited a history of head trauma in 2006 that caused a head stroke during football. He also related a neck injury he suffered in a vehicle accident in 2006. He agreed that he had a MRI on July 27, 2016 and July 27, 2016. He also agreed that on April 4, 2017, he gave a history of having memory issues for the past three to four

years. He was involved in a motorcycle accident on April 10, 2017 when he injured his shoulder. He had surgery to his shoulder on July 6, 2017 by Dr. Moss. He confirmed he returned to work within a week or two after the surgery.

Earl Sklar Testimony

Earl Sklar testified in behalf of respondent. He had been employed by respondent for six years in sales. Sklar witnessed petitioner's fall. Petitioner was walking in front of Sklar as they left the manager's office. Sklar saw petitioner slip and fall into a white car that was parked right outside of the office. Sklar could not recall if petitioner had anything in his hand. Sklar remembered petitioner was wearing Allen Edmonds' shoes that were very slippery. Sklar testified he remembered remarking that the shoes seemed slippery.

Sklar identified the floor outlet identified in Respondent's Exhibit 3. Sklar testified the outlet was under a vehicle. Sklar said petitioner did not tell him what he slipped on. He did not recall petitioner telling that he slipped on a floor plate. He did not recall him saying he tripped over his own feet. Although Sklar remembered feeling uncomfortable about the way others would laugh because petitioner shuffled his feet when he walked, he did not recall seeing petitioner shuffle his feet that day. He remembered other people in the office laughing because petitioner slipped and fell into the car.

On cross-examination, Sklar estimated there were 12 to 14 floor plates in respondent's show room. Sklar indicated in most cases the floor outlets would be covered by cars. Sklar looked at Petitioner's Exhibit 10-A and confirmed the floor plate was not covered.

Sklar confirmed employees were required to wear dress shoes; they would not be allowed to wear tennis shoes. Sklar testified he remembered petitioner slipping and trying to catch his balance; rather than tripping.

Petitioner, James Donohue, Rebuttal Testimony

Petitioner testified Sklar was slightly in front and to the right of petitioner as petitioner exited Chris' office. He also disputed that he outlet was covered by a vehicle. According to petitioner, the general manager, James Cheatham, came out and asked the porters to move the vehicle to cover the outlet. Petitioner was adamant that his right foot caught the outlet causing him to trip. He agreed the tile floor was slippery.

James Cheatham Testimony

James Cheatham testified in behalf of respondent. He has been employed by respondent since August 3, 2016 and as the general manager of respondent's Mercedes Benz location in Westmont on August 10, 2017.

Cheatham prepared a statement on June 23, 2018 (RX.10). Cheatham was not present at respondent's location when petitioner fell. He learned of petitioner's fall from Chris Creeden when he returned to respondent's location. He was told by Creeden that petitioner had done a pirouette on the showroom floor and fallen against one of the cars. He believed petitioner had left to take a drug test at the clinic when he returned.

He did not recall telling petitioner he had ordered the porters to move vehicle over the outlets so that no one else would fall. Cheatham testified there were no exposed outlets when he returned in the area where he was told petitioner fell. As Cheatham was not present when petitioner fell, he was not exactly sure where it was. He checked the car where petitioner fell to insure there was no damage to the car.

On cross-examination, Cheatham testified he believed he was at a luncheon meeting. Cheatham believed the vehicles where in the same position when he returned that they were in when he returned. Cheatham agreed the three photographs, identified as Petitioner Exhibit 12, accurately depicted respondent's showroom and that the picture showed exposed outlets. Cheatham agreed that if you walked into the showroom there would be an exposed outlet.

Good Samaritan Hospital Records and Bill (PX.1)

Petitioner was seen in the emergency room on August 10, 2017. The history recited was: "This 29-uyear old white male tripped and fell at work at 14:30 landing on his left shoulder-she (sic) was unable to protect this because his left is still in a slip status post labrum repair one month ago." He jammed his right fifth finger and he thinks he bumped his head without loss of consciousness. He had a fairly severe headache.

A CT-scans of head and cervical spine were negative; X-ray of left shoulder, right ankle and fifth right finger were negative. The diagnosis was acute cervical strain, acute sprain of right ankle and right fifth finger and acute left shoulder contusion with possible internal derangement status post recent labrum repair.

The total bill for services rendered is $6,841.00.

Orthopedic Associates/Dr. Brain Moss Records and Bill (PX.2)

Petitioner was seen by Dr. Brian Moss on August 11, 2017. The history contained in these records was: "29-year-old here for evaluation [of] left shoulder, neck, right fifth finger. He is 4-weeks post op left shoulder SLAP repair. He is wearing his sling. He was at work on 08/10/2017 at [respondent's]. He tripped on a raised floor outlet and fell onto his left shoulder with his right hand rolled under him."

The diagnosis was contusion of left shoulder, strain of muscle, fascia and tendon of neck and sprain of interphalangeal joint of the right little finger.

He was seen in follow up on August 18, 2017, and physical therapy was ordered. He was seen again on August 24, 2017, September 8, 2017 and September 20, 2017.

Total bills for services rendered is $527.27.

Athletico Physical Therapy Records (PX.3)

Petitioner began therapy on August 14, 2017. The history provided was: "Patient reports tripping and failing at work this past Thursday. States he landed on his left shoulder (which was in sling) and significantly agitated his left shoulder and neck." He received physical therapy until November 8, 2017.

Total bills for services rendered totaled $12,307.00.

Progressive Radiology September 15, 2017 Cervical MRI Report and Bill (PX.4)

The September 15, 2017 Cervical MRI showed minimal broad-based right paracentral disc protrusion with minimal central canal stenosis at C5-6, and right uncovertebral arthropathy at C4-5 and C5-6.

The bill for services rendered is $1,210.00

Dr. Mark Sokolowski Records and Bill (PX.5)

Petitioner was first seen by Dr. Sokolowski on September 22, 2017 with complaint of neck pain, peri scapular pain, trapezial pain, headaches symptoms subsequent to fall at work. History

presented was: "James Donohue is a 29-year-old male seen today for a second opinion surgical evaluation. He reports he was working in his usual occupation on August 10, 2017, when he tripped over an outlet on the floor and fell." The diagnosis was cervical pain and radiculopathy, as well as cervicogenic headaches. He was given a prescription for a pain specialist near his home.

On October 6, 2017 petitioner was taken off work due to severe pain. He was continued off work on November 10, 2017, December 15, 2017 and January 31, 2018. On April 5, 2018, Dr. Sokolowski released petitioner to return to work as of April 6, 2018.

The bill for services total $1,978.00.

Pain Care Consultants Records and Bills (PX.6)

He was first seen by Dr. Henry Kurzydlowski on October 3, 2017. A C5-6 epidural with fluoroscopy was proposed and carried out on October 16, 2017. He was seen again on November 28, 2017. A right greater occipital nerve block with ultrasound was proposed and carried out on November 29, 2017. On December 26, 2017, a right C2, C3, C4, C5 median nerve block with fluoroscopy and sedation was scheduled for January 19, 2018.

The total bill for services rendered totaled $5,785.00.

Prescription Partners Bill (PX.7)

The bill, totaling $932.98, was for medication dispensed by Dr. Sokolowski on October 6, 2017.

Illinois Sports Medicine & Surgery Center and Bills (PX.8)

Dr. Kurzydlowski performed a right cervical medium branch blocks at C2, C3, C4 and C5 under fluoroscopy on January 19, 2018 and February 12, 2018. Dr. Kurzydlowski

$2,690.48 Ambulatory Surgical Care 10/16/2017
$11,483.55 Ambulatory Surgical Care 01/19/2018
$11,483.55 Ambulatory Surgical Care 02/12/2018
$6,019.88 Ambulatory Surgical Care 03/19/2018

Dr. Mark Sokolowski February 6, 2018 Deposition (PX.9)

Dr. Mark Sokolowski, board certified orthopedic surgeon, testified via deposition in behalf of petitioner. Dr. Sokolowski first saw petitioner on September 22, 2017 for a second opinion surgical evaluation. Dr. Sokolowski reviewed the medical treatment to date as discussed in his records contained in Petitioner's Exhibit 5.

Dr. Sokolowski's diagnosis was cervical pain, cervical radiculopathy and cervicogenic headaches (10). Dr. Sokolowski opined that these diagnoses were causally related to the work accident of August 10, 2017 (10). The diagnoses remained the same throughout the treatment (12). Dr. Sokolowski believed petitioner's treatment to date was reasonable and necessary to treat petitioner of his ongoing complaints (17).

Dr. Sokolowski explained that when petitioner fell it created a whiplash-type injury to his cervical spine (24).

Photos (PX.10)

The top photograph shows the office of the manager where petitioner was leaving at the time of his fall. The bottom three photos are of the outlets that are on respondent's showroom floor.

Concentra Records (PX.11)

Petitioner was seen at Concentra on August 10, 2017 after the fall at work on the same day. The history recorded was: "He tripped on an electrical outlet while walking and fell forward on to the left side. S/p left shoulder labrum repair July 8, 2017. He was wearing a shoulder sling when he fell an unable to catch him fall (sic). He does not believe he hit his head, denies LOC."

He reports a headache, nausea, lightheaded feeling, reports minor blurred vision and like he was in a fog. He reported pain in the posterior/left neck. He was referred to assume care.

The total bill for services rendered totaled $233.93.

Photos of Respondent's Showroom (PX.12)

Photos show respondent's show room with vehicle present and outlets exposed.

Northwest Community Hospital Records (RX.1)

Petitioner was seen on July 5, 2012 by PA-C Denise Rouse for ear complaints. Diagnosis was otitis media.

Petitioner underwent a CT brain scan on October 30, 2015 due to vertigo. No abnormalities were found.

Petitioner was seen by Dr. Hetal Shah on March 15, 2016 having had two episodes of vertigo one month apart. He reported he was standing at work on March 12, 2016 and lost balance and hearing for a few seconds. As symptoms had resolved, Dr. Shah recommended no further treatment; to have CT scan only if symptoms return.

Petitioner was seen by PA-C Denise Rouse for blurry vision and dizziness and pain in upper stomach. His history included suffering a stroke in 2006 during football, suffering a neck injury in a car accident in 2006 and being shot in the back at NIU in 2008. He reports intermittent headaches and neck pain as a result of these injuries. He underwent a brain scan that showed no acute abnormalities; chronic infarct in the right cerebellum and new small chronic ischemic lesion in the right frontal white matter. He also had a neck and head MRA on July 27, 2016 that were unremarkable.

He was seen by Dr. Lapid on November 7, 2016 due to chest pains. Diagnosis was chest pain and GERD.

On January 23, 2017 seen by PA-C Rouse due to nausea since endoscopy on January11, 2017. Diagnosis was esophagitis and gastritis.

On April 4, 2017, petitioner seen by Ashley Mores, PA due to issues with memory; requested MRI. He was to follow up with a neurologist.

Petitioner was seen on August 31, 2017 by Dr. JongHo Ham due to headache radiating from neck after a fall two weeks ago at work. He reported he hit his head.

Good Samaritan Hospital Records (RX.2)

These records were included in Petitioner's Exhibit 1.

Photo of Outlet (RX.3)

Photo shows the depth of outlet.

Dr. Lawrence Lieber February 26, 2018 Report (RX.4)

Dr. Lawrence Lieber examined petitioner are respondent's request on February 26, 2018. He also reviewed records of Dr. Sokolowski, Dr. Kurzydlowski, therapy notes by Jaime Lewandowski, as well as the September 15, 2017 cervical MRI report and the cervical and brain CT scans of August 10, 2017.

Dr. Lieber believed petitioner's diagnosis of degenerative disc disease was pre-existing and not related to the work accident of August 10, 2017. He agreed the MRI and CAT scan were appropriate, as well as treatment by Dr. Morris and Athletico, were reasonable, but not the injections or ablation.

Dr. Edward H. Sladek/Orthopedic Associates Reports (RX.5)

Petitioner was seen by Dr. Sladek on April 24, 2017 with left shoulder complaints after a motorcycle accident on April 10, 2017. The diagnosis was bursitis. He followed up on May 22, 2017 and June 5, 2017.

Dr. Brian J. Moss/Orthopedic Associates Reports (RX.6)

Petitioner was seen by Dr. Moss, as a referral by Dr. Sladek, on June 14, 2017. Dr. Moss recommended surgery due to a superior glenoid labrum lesion of the left shoulder. He was seen again by Dr. Moss on September 8, 2017 for his left shoulder, neck and right pinky; status post left shoulder [arthroscopic] labral repair [on July 6, 2017]. A cervical MRI was ordered. On September 20, 2017, he was seen after the MRI for a cervical disc displacement at C5-6 and sprain of right little finger.

Orthopedic Associates Physical Therapy Evaluation (RX.7)

Petitioner received a physical therapy evaluation on May 2, 2017 for left shoulder impingement.

Temporary Total Disability Payments (RX.8)

Payment of temporary total disability was made from August 11, 2017 to September 7, 2017.

Medical Payments (RX.9)

Medical payments listed.

James Cheatham June 23, 2018 Statement (RX10)

James Cheatham prepared this statement after testimony was taken on June 18, 2018. His statement is consistent with his testimony in that he was not present when petitioner fell. He indicated the only thing he recalled about the incident was that he was advised by Chris Creedon that petitioner was sent in an Uber for a drug test after doing a pirouette on his way to present a menu to a customer and fell on his ass.

He further stated he was not there to advise or instruct anyone to cover up the electrical outlet. However, he agreed there was a standard order to cover the outlets with the rear or front bumpers of the vehicle to hide the battery trickle chargers from view whenever needed.

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

The Arbitrator found petitioner to be credible. Although he spoke fast, he seemed very straight forward and courteous.

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 was in the course of his employment when he fell at respondent's on August 10, 2017. The issue is whether petitioner's fall arose out of his employment with respondent.

Petitioner testified he caught his right foot on a floor outlet. The history contained in the records in order of treatment was:

"He tripped on an electrical outlet while walking..." (Concentra, August 10, 2017, PX.11);

"This 29-year-old male tripped and fell at work…" (Good Samaritan Hospital, August 10, 2017, PX.1);

"He was at work on August 10, 2017 at [respondent's]. He tripped on a raised floor outlet and fell…" (Dr. Brian Moss on August 11, 2017, PX.2);

"Patient reports tripping and falling at work this past Thursday." (Athletico Physical Therapy on August 14, 2017, PX.3);

"…He reports he was working in his usual occupation on August 10, 2017, when he tripped over an outlet on the floor and fell" (Dr. Mark Sokolowski on September 22, 2017, PX.5).

All of these histories are consistent with petitioner's testimony that he tripped, and not slipped, and fell on August 10, 2017.

Although petitioner's co-worker, Earl Sklar testified petitioner was wearing slippery shoes and that petitioner slipped, Sklar did not recall if petitioner advised him that he slipped on a floor plate. Sklar also indicated the floor plate, identified in Respondent's Exhibit 3, was covered by a vehicle. However, Sklar acknowledged that Petitioner's Exhibit 10-A showed the floor plate was not covered. According to Sklar, there were 12 to 14 outlets on respondent's showroom floor and in most cases they are covered by vehicles.

James Cheatham testified he was not present when petitioner fell. He could not confirm or deny that petitioner tripped over an exposed outlet as he was not exactly sure where it happened. He checked the vehicle that petitioner fell into to make sure there was no damage.

The various photos introduced into evidence, as well as the testimony of the petitioner, Sklar and Cheatham, confirmed the floor outlets in respondent's show room were not all covered by vehicles at all times.

The Arbitrator found petitioner to be credible. His history to the five medical providers was consistent with his testimony that he tripped, and not slipped, and fell. The Arbitrator, in reliance on the history petitioner provided to the various medical providers, finds that petitioner's August 10, 2017 accident arose out of his employment with respondent when he tripped over an exposed outlet on the floor of respondent's showroom.

F. With respect to the issue of whether the petitioner's condition of ill-being is related to the injury, the Arbitrator makes the following conclusions of law:

Petitioner had previously suffered a stroke and a gunshot wound to the back of the head. There is no evidence he had prior problems or injury to his cervical spine. In fact, the MRA from July 27, 2016 was reported as normal. After the work accident, the September 15, 2017 cervical MRI showed a broad-based right paracentral disc protrusion at the C5-C6 level. Dr. Sokolowski testified there was a causal connection between petitioner's cervical pain, cervical radiculopathy and cervicogentic headaches and the work accident of August 10, 2017. He described the injury as a whiplash-type injury to his neck that resulted from the fall.

Petitioner had undergone surgery to his left arm on July 6, 2017 and was in a sling. There was no evidence petitioner did any damage or sustained any lasting injury to his left shoulder as a result of the work accident.

The evidence supports the Arbitrator's finding that petitioner's cervical pain, cervical radiculopathy and cervicogentic headaches were caused by the work accident of August 10, 2017.

The Arbitrator makes this finding despite Dr. Lieber's opinion that petitioner's cervical problems were caused by degenerative disc disease and not the work accident. The fact that petitioner's cervical MRA from July 27, 2016 was normal and the post-accident MRI from September 15, 2017 showed a C5-C6 disc protrusion fails to comport with Dr. Lieber's opinion.

J. With respect to the issue regarding medical bills, the Arbitrator makes the following conclusions of law:

Dr. Mark Sokolowski testified that the treatment petitioner was reasonable and necessary. Dr. Lieber believed all but the injections were reasonable and necessary. As petitioner received relief from the various injections, the Arbitrator finds all treatment to be reasonable and necessary and awards the following medical bills to be paid in accordance with the fee schedule, §8 and §8.2 of the Act, with credit to be given for any payments already made by respondent directly or by the group insurance pursuant to §8j:

$6,841.00 to Good Samaritan Hospital;
$527.27 to Orthopedic Associates/Dr. Brian Moss;
$12,307.00 to Athletico Physical Therapy;
$1,210.00 to Progressive Radiology;
$1,978.00 to Dr. Mark Sokolowski;
$5,785.00 to Pain Care Consultants;
$31,677.46 to Illinois Sports Medicine & Surgery Center;
$233.93 to Concentra.

The bill from Prescription Partners is denied as it is not itemized.

K. With respect to the Arbitrator's decision with regard to temporary total and temporary partial disability, the Arbitrator makes the following conclusions of law:

The evidence supports a finding that petitioner was disabled from October 7, 2017 to April 5, 2018, which is 25-6/7 weeks. The Arbitrator awards temporary total disability for 25-6/7 weeks at the rate of $1,274.77 per week.

L. In support of the Arbitrator's decision with regard to the nature and extent of petitioner's injury, the Arbitrator makes the following conclusions of law:

Petitioner suffered a broad-based right paracentral disc protrusion at the C5-C6 level causing cervical pain, cervical radiculopathy and cervicogentic headaches as a result of the work accident of August 10, 2017.

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

With regard to subsection (i) of §8.1b (b) the Arbitrator notes that there was no permanent partial disability impairment rating provided. The Arbitrator, therefore, cannot give any weight to this factor.

With regard to (ii) of §8.1b (b) the occupation of the injured employee, the Arbitrator notes petitioner was employed as a customer financial services managers. The injury does not affect petitioner's ability to perform this job. Therefore, the Arbitrator gives no weight to this factor.

With regard to (iii) of §8.1b (b) the age of the employee at the time of the injury was 29 years of age. The Arbitrator gives more weight to this factor.

With regard to (iv) of §8.1b (b) the employee's future earning capacity, the Arbitrator notes petitioner was capable of returning to his usual employment with respondent without a loss of earning capacity. The Arbitrator, therefore, gives no weight to this factor.

With regard to (v) of §8.1b (b) evidence of disability corroborated by the treating medical records, the Arbitrator notes the September 15, 2017 showed petitioner suffered a broad-based right paracentral disc protrusion with minimal central canal stenosis at C5-6 with radiculopathy. The Arbitrator gives some weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 5% loss of use of person as a whole under §8 (d) 2 and awards 25 weeks of permanent partial disability at the rate of $790.64 per week.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	07WC016458
Case Name	BOROWSKI, RAYMOND v. YORK TOWNSHIP
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0252
Number of Pages of Decision	20
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	James Marszalek
Respondent Attorney	Edward A. Coghlan

DATE FILED: 5/26/2021

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RAYMOND BOROWSKI,

Petitioner,

vs. NO: 07 WC 16458

YORK TOWNSHIP,

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, notice, temporary total disability, medical expenses, prospective medical care, 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.

The Commission, herein, corrects a scrivener's error in the Arbitrator's decision, page 3 of 16, paragraph 1, to correct the consolidated case number to 07 WC 18793 and correct date of accident to December 8, 2004 (not December 12, 2006).

The Commission, herein, corrects a scrivener's error in the Arbitrator's decision, page 3 of 16, paragraph 3, third sentence, to correct the consolidated case number to 07 WC 18793.

The Commission, herein, corrects a scrivener's error in the Arbitrator's decision, page 9 of 16, paragraph 3, eighth line, to correct "Mile" to "Mike".

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 30, 2019 is, otherwise, 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.

MAY 26, 2021

o- 5/18/21
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

BOROWSKI, RAYMOND
Employee/Petitioner

Case# **07WC016458**
07WC018793

YORK TOWNSHIP
Employer/Respondent

On 8/30/2019, 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 1.84% 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:

0347 MARSZALEK AND MARSZALEK
STEVEN A GLOBIS
120 W MADISON ST SUITE 801
CHICAGO, IL 60602

2389 GILDEA & COGHLAN
EDWARD COGHLAN
901 W BURLINGTON SUITE 500
WESTERN SPRINGS, IL 60558

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Raymond Borowski
Employee/Petitioner

v.

York Township
Employer/Respondent

Case # **07** WC **16458**

Consolidated cases: **07 WC 18793**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **June 19, 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 **December 12, 2006**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$40,711.84**; the average weekly wage was **$782.92**.

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 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 under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $521.95/week for 23 2/7 weeks, commencing December 26, 2006 through June 6, 2007, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule to the listed providers as detailed in the Arbitrator's finding with respect to Medical attached hereto, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for all medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $469.75/week for 100 weeks, because the injuries sustained caused the 20% 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

August 29, 2019
Date

AUG 30 2019

Statement of Facts

This matter was tried in conjunction with consolidated case number 07 WC 16458 (DOA: December 12, 2006). A single transcript was prepared although the Arbitrator is entering separate decisions.

Petitioner Raymond Borowski testified that he began work for Respondent York Township in 2001. His job title was head maintenance. This was his job for the entire time he worked for Respondent. His job duties include heating and air conditioning, maintenance of the building. He would set up the auditorium, did pickups for the food pantry, helped in the kitchen, cleaned the offices, cut the grass, plowed the snow, worked on the vehicles. He testified he would lift over 20 pounds lots of times, as an everyday occurrence. He would lift tables, chairs, food containers and equipment. He would lift 150 to 200-pound items. He would bring someone to help him.

Petitioner testified to a prior workers' compensation claim working for UPS. He testified he had an injury working for National Lift Truck in 2000 injuring his whole body. He stated he was fine after that. He testified to an assault on December 8, 2004 which is the subject of the decision in the consolidated case 07 WC 16458 decided in conjunction with this matter. Petitioner testified he returned to full unrestricted duties following that injury on February 1, 2005.

He testified that on December 12, 2006, he was assigned to go to Kentucky Fried Chicken (KFC) to pick up frozen foods for the food pantry. He testified he arrived about 2:30 PM. He would take the boxes from the freezer and put them in bins and then transport it back to the food pantry. He went by himself in Respondent's van. He took his cart and bins out of the van and brought them in to the back of the KFC. He went to the freezer and pulled the stuff out. He weighed the food. And picked it up to carry to the cart. The third one that he filled he slipped carrying a bin weighing about 65 pounds. He started falling backwards and quickly tossed the bin to the right and felt pop in his back. The floor was a rubber floor. It was wet. He sat on the floor. He noticed his legs were not working and his back, his whole body and arms were killing him. He had back pain radiating to his head. Petitioner had no feeling in his left leg. He did not fall. He did not drop the box. He did not hit his head.

Petitioner testified that he completed loading the van by dragging the stuff to the back. He drove the van back using the tire iron for the gas pedal. He returned to Respondent's offices and unloaded the van with help from Dan Dragovich. Petitioner testified he reported the incident to Mike Mariani, the assistant supervisor at about 3:30 PM when he saw him in the hallway when he told Petitioner to set up the auditorium. Petitioner testified Mr. Mariani told him to set up the auditorium right now. Petitioner said he hurt himself really bad, Mr. Mariani said he did not care and said he would send help. Petitioner testified that he crawled to the auditorium and sat on the floor. Two kitchen employees did the set up. By the time Tom got there it was 95% done. Petitioner did not actually help. Petitioner testified that he went back to the office and told Mr. Mariani that he was hurt and could not do his stuff. Mr. Mariani told him to go home. Petitioner testified he told him he got hurt carrying KFC frozen; that he slipped, but did not fall, and hurt his back. Leslie came and picked him up about 3:30 PM. He testified he had driven to work that day, so his friend Bob Arno picked his car up for him, picked him up at Leslie's house and drove him to his house.

Petitioner testified that he came in to work on December 13, 14, and 15, 2006. He did not do his regular work. He brought a friend to help him. He did not work the weekend. His back, legs, arms, neck and head were hurting. He went in to work on Monday, December 18, 2006. His father died on December 19, 2006 (RX 4)

and the funeral was December 22, 2006. He was a pall bearer for the funeral. He testified he put his hand on the casket.

Leslie Westergren testified she is Petitioner's girlfriend. She has known him since 2001. She testified she picked Petitioner up from work at 3:15 PM on December 12, 2006 because he could not drive. She noticed he was very slow moving. She took him to her house. He stayed until Bob Arno took him home. Petitioner's father died on December 19, 2006 and the funeral was December 22, 2006. Between December 12, 2006 and the funeral, Petitioner was in excruciating pain. He did not have any back problems before December 12, 2006. He did not appear to injure himself at the funeral.

Robert Arno testified that he has known Petitioner since they were children. He used to work for Petitioner's father. He considers Petitioner a close friend. On December 12, 2006, Leslie Westergren called him to pick up Petitioner's car because he got hurt at work. He got the car from York Township. He saw Petitioner on that date at Leslie's house. He could not stand. He could barely move his arms to support himself. He saw Petitioner two times between December 12 , 2006 and December 22, 2006. He noticed Petitioner could not move. He saw Petitioner at the funeral. He was up against the wall with his daughter and mother. Greg Rauch testified that he is a friend of Petitioner. He saw Petitioner on December 17, 2006 and noticed he was grimacing, moaning and looked like he was in a lot of pain.

Mike Mariani testified that from June 2005 to his retirement in January 2019 he was Deputy Township Supervisor for Respondent. He supervised the operation of the township hall's programs and services. Any incidents or accidents were to be reported to him and he would report it to the insurance company. This policy is in the employee manual and he also had meetings to advise employees of the policy. He was Petitioner's supervisor. Petitioner was a maintenance man. His job involved lifting. He had a regular stop at Kentucky Fried Chicken. Petitioner's hours were Monday through Friday from 8:30 AM to 4:30 PM. No work was required on weekends. He testified that Petitioner did not report an accident on December 12, 2006. Between December 12, 2006 and December 19, 2006, Mr. Mariani did not notice anything unusual about Petitioner. He does not know how often he saw Petitioner during this time. He did not present any medical documentation requesting time off or restricted job duties. He saw Petitioner at his father's wake. He embraced him. He did not notice anything unusual about his presentation.

On December 26, 2006, Mr. Mariani saw Petitioner at 8:30 AM. He had not started working at that time. Petitioner was limping and hunched over. He asked Petitioner what the problem was. Petitioner asked him if he remembered that he claimed an injury to him. This was the first time he was aware that he was claiming his back problem was work related. Petitioner had not reported an injury. Petitioner left work before starting that day.

Mr. Mariani identified RX 5 as Petitioner's attendance records. Petitioner received Comp time for December 11, 2006 and December 18, 2006. This is paid time off to recompense for overtime. Petitioner received bereavement pay for December 19, 20 and 21, 2006. December 25 was a holiday and Petitioner received Comp time on December 26, 2006. Human Resources records the categories.

Petitioner first sought treatment at Hofmaier Chiropractic on December 26, 2006 (PX 3, RX 1-3). Petitioner testified that he attempted to seek medical attention before December 26, 2006. He testified he called Dr. O'Rourke and Dr. Johnson, but did not have a workers' compensation number. He testified he tried to get this from Mike Mariani. On December 26, 2016, Petitioner was seen for a recent history of lower back pain. He

stated that the symptoms are a direct result of an accident at work on December 12, 2006. He reported he first noted his pain when carrying a 20 to 45-pound box. He slipped and jerked back causing immediate pain. He still proceeded to work carrying objects for the last two weeks. Last Friday, the pain became unbearable when he was at his dad's funeral. He denied any pain into the legs. Petitioner's hand-written History of Present Illness or Injury states the injury occurred 12/7/06 at 2:40. Lifting a 25 to 50-pound object. His Pain Diagram shows 10/10 pain across the waistline only. He completed a Disability Index for the Low Back and Extremity, listing the left lower extremity. His pain index indicate he had severe to crippling disability. Petitioner was noted to have an antalgic gait with a flexed forward posture. He had limited range of lumbar motion with shooting pain. There were trigger points in the lumbar paraspinals. Petitioner was diagnosed with displacement of the lumbar discs without myelopathy, myalgia and neuralgia. Petitioner underwent treatment on December 27 and 28, 2006 and was scheduled for an MRI.

Petitioner went to the Elmhurst Memorial Emergency Room on December 28, 2006 (PX 4). He provided a consistent history of accident and stated his symptoms were worsening. The Pain Diagram noted low back pain radiating to the left. Physical examination noted negative neurological testing. He had reduced range of motion with spasm in the low back. The neck was normal and non-tender. Petitioner was diagnosed with a lumbar strain (PX 4).

The December 30, 2006 MRI found an L4-5 central/left disc extrusion causing moderate left-sided canal compromise, L3-4 disc bulge with bilateral foraminal compromise and L5-S1 right sided foraminal protrusion with an annular tear with minimal compromise of the foramen (PX 3). On January 2, 2007, Dr. Hofmaier referred Petitioner to a pain specialist and a neurosurgeon. On January 17, 2007, Dr. Hofmaier noted Petitioner had seen the neurologist and was scheduled to see the neurosurgeon (PX 3).

Petitioner sent a type-written supplemental history to Dr. Hofmaier dated January 17, 2007. This was prepared with the assistance of and was typed by Leslie Westergren. The history includes a detailed description of Petitioner's movements from arrival at the KFC location through the end of the week. In the history, he stated he completed loading the van, drove back to York Township, and unloaded the van, by slowly pushing and pulling the dolly and bins into the building. He said he was 95% done with setting up the heavy tables and chairs in the auditorium when help arrived. He slowly struggled through the days to make it to the weekend (PX 3). On March 22, 2007, he provided a further history addendum noting that he had to be a pallbearer at his dad's funeral which he was unable to do because of pain, so he just walked with his hand placed on the top of the casket (PX 3).

Petitioner treated with Dr. Ahmed Elborno, of Midwest Academy of Pain and Spine on referral from Dr. Hofmaier (PX 5). On January 3, 2007, Petitioner complained of lower back and left leg pain since 12/13/06. He described carrying a 47-pound tub when he slipped. Pain diagrams note pain in the back and left leg. Some additional diagrams also note pain across the neck and shoulders The Petitioner presented with complaints of low back and leg pain. Petitioner presented using a walker. Examination noted reduced range of motion with full strength. He was diagnosed with bilateral lumbar facet syndrome at L4-L5 and L5-S1 and lumbar radiculopathy at L4-L5 with a herniated disc at L4-L5. Petitioner underwent caudal epidural steroid injections on January 3, 2007 and January 16, 2007 (PX 5).

Petitioner was seen by Dr. Douglas Johnson of DuPage Neurosurgery on January 18, 2007 on referral from Dr. Hofmaier complaining of low back and left leg pain. He provided a history that, on 12/12/06, he picked up a 53.5-pound container and turned around and slipped on a wet floor, but did not fall. He felt immediate sharp

pain in the lower back. He continued to work throughout the day, and he lifted 9,000 pounds in intervals. Days later, he had worsening of pain and was sent home. Dr. Johnson's findings included hypoesthesia at the L5 and S1 distribution of the left leg. Straight leg raising was positive on the left at 90 degrees producing leg pain. He reviewed the MRI scan and felt the Petitioner had a very large herniated disc at L4-L5. His diagnosis was displacement of a lumbar intervertebral disc without myelopathy. He prescribed surgery (PX 6). On January 24, 2007, Dr. Johnson performed a left sided L4-L5 hemi-laminectomy (PX 5). Post-operatively, Dr. Johnson prescribed physical therapy on February 7, 2007. On February 23, 2007, Petitioner telephoned with increased back pain over the last several days. He reported falling in the tub. A new MRI was recommended. On March 6, 2007, Dr. Johnson recorded complaints of numbness in the left foot and right leg itching. Dr. Johnson continued therapy and provided restrictions of no heavy lifting, alternate sitting and standing. The March 14, 2007 MRI was reported as unremarkable (PX 1, PX 6). Petitioner underwent transforaminal steroid injections at the L4-L5 and L5-S1 levels by Dr. Elborno on May 3, 2007 and May 17, 2007 (PX 5).

On June 6, 2007, Dr. Johnson authored a report. He notes that Petitioner "is most graphic in his description of this lower back pain." He complains of back pain, radiating into the hip and groin and down the right leg. He also has pain in the left leg. Dr. Johnson notes full strength and normal reflexes. He told Petitioner that he has spinal stenosis at L4-5 but that typically does not cause the type of excruciating pain of which he complains. He notes Petitioner does not describe leg weakness. Dr. Johnson also notes Petitioner is now complaining of neck and left arm pain, including his shoulders, elbows and wrists. He suggested evaluation by Dr. Hanna and Dr. Echiverri and ordered MRIs of the cervical and lumbar spine (PX 6).

The lumbar MRI scan performed on June 22, 2007, showed postsurgical changes at L4-L5 and L5-S1 and was unchanged from the March 14, 2007 study. A cervical MRI scan was also performed on June 22, 2007, which showed mild stenosis and moderate narrowing of the neural foramina at C5-C6 due to a bony spur and eccentric disc herniation more prominent on the right. On July 12, 2007, Dr. Johnson notes treatment with Dr. Hanna and the scheduling of an EMG with Dr. Echiverra (PX 6). Petitioner complained of bilateral shoulder pain, left side greater than the right. Dr. Johnson referred the Petitioner to Dr. Erickson for examination and evaluation of the shoulders (PX 6).

Dr. Johnson referred Petitioner to Central DuPage Hospital Pain Clinic where he was seen by Dr. Mark Hanna beginning June 27, 2007 (PX 7). Petitioner complained of numbness, tingling and weakness into his left foot and leg as well as weakness into his arms. Dr. Hanna diagnosed chronic pain syndrome; bilateral shoulder arthralgia; low back pain status post lower back surgery; intolerance to opiates; history of depression and generalized widespread pain. Dr. Hanna performed a series of cervical epidural steroid injections between December 13, 2007 and January 5, 2008. On March 27, 2008, Dr. Hanna had Petitioner follow up with Dr. Echiverri and Dr. Tomlin (PX 7).

Petitioner saw Dr. Henry Echiverri beginning July 11, 2007 (PX 8). Petitioner was diagnosed with post-laminectomy syndrome, spinal stenosis, cervicalgia and myalgia. EMG/NCV studies of the upper extremities were performed on August 13, 2007 and revealed right hand carpal tunnel syndrome and bilateral ulnar neuropathy at both elbows. Subsequent EMG/NCV studies were performed on February 19, 2008 which revealed mild demyelinating ulnar neuropathy across the right elbow with mild cervical radiculopathy at C5-C6 on the right side. On September 25, 2008, Dr. Echiverri felt the Petitioner essentially had a problem that was due to his significant muscular physical deconditioning. He was directed to a facility for evaluation and therapy (PX 8).

Petitioner saw Dr. Richard E. Erickson of Sports Med/Wheaton Orthopedics from July 25, 2007 to August 22, 2007 (PX 9) on referral from Dr. Johnson. Petitioner provided a history that he was was picking up some bins of frozen food when he slipped and strained his back and shoulders in an effort to avoid falling. MRIs of the shoulders performed on July 6, 2007 demonstrated a tear of the anterior/superior glenoid labrum on the right and a tear of the superior labrum anterior and posterior on the left. Petitioner provided an addendum to his history on August 14, 2007 (PX 9). Dr. Erickson prescribed physical therapy which Petitioner attended from July 27, 2007 to August 7, 2008 (PX 10). This therapy was solely for the shoulders. On August 22, 2007, Dr. Erickson noted Petitioner had made no significant improvement in physical therapy. He referred Petitioner to see either Dr. Brian Cole or Dr. Anthony Romeo for evaluation of his shoulder (PX 9).

Petitioner saw Dr. Kathy Borchardt, a clinical psychologist on referral from Dr. Mark Hanna beginning September 5, 2007. (PX 13). Petitioner noted his injury and his father's passing. He noted the denial of his Workers' Compensation claim and the filling of this action to obtain the benefits he felt he was owed. He complained of pain in his shoulders, pelvis, legs and feet. He stated that he was experiencing depression and anxiety more strongly since his back injury although he admitted he may have gone through bouts of lesser depression and anxiety before the injury. Dr. Borchardt formed goals and a treatment plan including non-pharmacological pain management training, activity pacing and planning education, sleep hygiene education and supportive psychotherapy to assist him with adjusting to the impact of his pain in daily activities. Petitioner attended sessions through October 17, 2007 (PX 13).

Petitioner saw Dr. Brian Cole of Midwest Orthopedics at Rush on September 13, 2007 (PX 11, RX 6). Petitioner reported he sustained an injury when he was lifting a bin of food and tried to place it on a cart. He did not fall. However, he became extremely unstable when walking on the wet floor and from that point he had significant amounts of shoulder, back and wrist pain. Dr. Cole noted an MRI scan showed superior labral tears bilaterally. Dr. Cole felt the Petitioner's significant shoulder and upper extremity discomfort was possibly due to a cervical disc herniation or stenosis. He referred Petitioner to Dr. April Fetzer for evaluation of the cervical spine. Dr. Cole opined that the mechanism of injury is not correct, nor does it reasonably correlate with labral tears which may have been incidental findings on the MRI (PX 11, RX 6). On November 7, 2007, Petitioner contacted Dr. Cole to make corrections to simple things in his office note (PX 11).

Petitioner saw Dr. April Fetzer at Rush University Department of Physical Medicine and Rehabilitation on September 24, 2007 (PX 12, RX 9). Petitioner reported that when he slipped and fell backward, he heard a pop and felt severe pain in the shoulder girdle. She notes that Petitioner was diagnosed with a lumbar problem and did not sustain any other diagnosis at that time. Petitioner was complaining of axial neck pain radiating to the posterior aspect of the bilateral shoulder girdle and radiating pain through the bilateral upper extremities with numbness and tingling involving the right thumb and first digit and entire left hand. He states he has all over body pain (PX 12, RX 9).

Dr. Fetzer noted the cervical MRI showed mild disc bulges at C5-6 and C6-7. There is no significant central canal or lateral recess stenosis. Physical examination noted multiple Waddell signs. Petitioner exhibited pain out of proportion to what they were doing. He had difficulty participating in the physical exam. Dr. Fetzer noted Petitioner was wearing wrist splints. Dr. Fetzer diagnosed chronic pain syndrome. While there may be a component of right C6 radiculopathy, she did not feel that it would contribute to his current amount and distribution of pain. She recommended he return to his pain specialist to consider other treatment options including a comprehensive panel of medications, or an implanted device such as a morphine pump or spinal cord stimulator (PX 12, RX 9).

Petitioner returned to Dr. Johnson on October 25, 2007 for his multiple complaints following his second opinions with Dr. Cole and Dr. Fetzer. Dr. Johnson notes that he is quite agitated. He has multiple complaints including head pain, His right arm and leg are almost as bad as his left arm and leg. His skin is hypersensitive. Dr. Johnson provided no treatment plan other that follow up with his PCP Dr. O'Rourke and with Dr. Erickson for his shoulders (PX 6).

At Respondent's request, Dr. William Marquardt examined Petitioner on January 16, 2008 (RX 8). Petitioner described his injury and stated he heard pops throughout his throughout his entire anatomy. He reported taking Vicodin from a prior throat problem. He claimed to show up for work for a few minutes each day for the next week before going home. He reported complaints in his low back which radiates to his neck and down both legs into is feet. He has pain in his entire anatomy including his neck, arms, wrists and shoulders. During the physical examination, Petitioner was unable to undress himself. He was moaning and groaning. Examination noted no atrophy. He had diffuse tenderness. Reflexes were brisk and equal. Examination has multiple pain responses that cannot be accounted for. He ambulates with an exaggerated left leg limp (RX 8).

Dr. Marquardt assessed Petitioner with status post L4-5 discectomy. He opined that Petitioner suffered a disc herniation at L4-5 with progression over a period of a few weeks to an extruded disc with neurological involvement of his left leg necessitating surgery. He notes Petitioner's current claim of having pain throughout his body is not consistent with the medical records which record only complaints in the lumbar spine and then radicular symptomology into the left leg. He opined that Petitioner has symptom magnification, noting that his subjective complaints are far and excessive from the objective abnormality. He stated Dr. Johnson has done an excellent job of decompressing the L4-5 disc and the residual complaints cannot be accounted for. He opined that, with respect to his lumbar spine and lower extremities, Petitioner could return to full-time work within the parameters of a functional capacities evaluation (FCE), but he questioned whether Petitioner would cooperate with the FCE due to the "gross and extreme symptom magnification" noted during his exam (RX 8).

Petitioner received additional chiropractic care from Dr. Brad Pins from December 11, 2008 through February 19, 2009 for constant pain in the lumbar spine, mid back and neck. Dr. Pins note no substantial improvement. (PX 14).

Petitioner saw Dr. Shawn O'Leary of Rush University Neurosurgery from February 2009 through April 2009 (PX 15, PX 16). Dr. O'Leary performed a CT myelogram of the cervical and lumbar spine at Lutheran General Hospital on February 24, 2009. The myelogram impressions were mild degenerative changes at L4-5 and L5-S1 with no spinal stenosis and degenerative disease at C5-6 without spinal stenosis (PX 16). On March 31, 2009, Dr. O'Leary suggested a trial spinal cord stimulator implantation (PX 15). This was performed on April 20, 2009 at Lutheran General Medical Center (PX 16). Petitioner testified the spinal stimulator was ineffective and it was removed shortly thereafter.

Petitioner testified that he did not seek any further treatment for his injuries, He has not worked anywhere since December 26, 2006. He testified that his legs are failing, and everything is getting more debilitating. His health is failing. He uses a cane, hand braces and a walker.

Conclusions of Law

In support of the Arbitrator's decision with respect to (C) Accident, the Arbitrator finds as follows:

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of the claimant's employment. An injury occurs "in the course of' employment when it occurs during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties or engages in some incidental employment duties. An injury "arises out of" one's employment if it originates from a risk connected with, or incidental to, the employment and involves a causal connection between the employment and the accidental injury.

Petitioner is alleging that he was injured when he slipped while moving a heavy bin of frozen food during his pickup from KFC for Respondent's food pantry on December 12, 2006. He slipped on either wet or greasy floor depending on the history given. If he is believed, this would have occurred at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties and originates from a risk connected with, or incidental to, the employment. It would therefore be an accident arising out of and in the course of his employment.

Respondent has disputed that this incident occurred based upon Petitioner's actions and medical histories during the period between December 12 and December 26, 2006. Respondent notes that he worked the remainder of the day of the alleged accident including completing the loading and unloading of the van of frozen food and set up the auditorium. Respondent notes that Petitioner's own addendum to his original medical history states he did not receive any help with the set up until it was 95% done. In one history he claims to have lifted 9000 pounds over time. Petitioner then worked the rest of the week before his father's death. He was a pall bearer and reported in his initial history that his pain became unbearable when he was at his dad's funeral. Mile Mariani testified that Petitioner did not report an accident on December 12, 2006. Between December 12, 2006 and December 19, 2006, Mr. Mariani did not notice anything unusual about Petitioner. He did not present any medical documentation requesting time off or restricted job duties. He saw Petitioner at his father's wake. He embraced him. He did not notice anything unusual about his presentation. Respondent notes that Petitioner sought no medical treatment until December 26, 2006.

The Arbitrator observed the Petitioner testify and reviewed the exhibits offered. The Arbitrator notes the highly dramatic exposition of the events both in Petitioner's testimony and his descriptions of the accident and the events thereafter. Even his description of working 14 to 16 hours 6 to 7 days per week is contradicted by Mr. Mariani and his attendance records. The Arbitrator also notes Petitioner's continued revisions to the events to explain the disputed elements including his set up of the auditorium, his return and unloading of the van, his continued working through December 18, and his participation in his father's funeral. The Arbitrator also notes the subsequent inclusion of multiple body parts in the injury not documented in the initial treating medical records. The Arbitrator discounts much of Petitioner's testimony and explanation as revisionist history and theatrics.

Yet Petitioner is consistent in describing the injury occurring when he slipped while carrying a heavy bin (although the weight tended to increase) when doing the pickup at KFC. This essential event is unaltered throughout the decade of history, revisions and testimony. The Arbitrator notes the corroborating testimony of

Ms. Westergren, Mr. Arno and Mr. Rauch. While it is clear that they have a long and close personal relationship with Petitioner, the Arbitrator finds their testimony persuasive that an event did occur on December 12, 2006. and that Petitioner did suffer back complaints from that date through his first treatment on December 26, 2006. The Arbitrator infers that Petitioner's continuing to work including heavy activities, participating in his father's funeral, and Mr. Mariani failure to notice anything unusual are more logically explained by the event and subsequent injury not have the dramatic and debilitating effects Petitioner later described, thereby discrediting the hyperbole of Petitioner's testimony and histories, rather than inferring that the event did not happen at all.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he suffered accidental injuries arising out of and in the course of his employment with Respondent on December 12, 2006.

In support of the Arbitrator's decision with respect to (E) Notice, the Arbitrator finds as follows:

Petitioner claims to have reported the injury to Mr. Mariani on the date of occurrence. Consistent with the Arbitrator's finding with respect to accident, the Arbitrator finds the testimony of Mr. Mariani more credible. Mr. Mariani testified to a conversation with Petitioner on December 26, 2006 wherein Petitioner advised of the accident occurring, albeit also claiming to have told him on December 12, 2006. Mr. Mariani testified that this was the first time he knew Petitioner was claiming his back injury was work related. Nevertheless, this conversation would constitute notice within the meaning of the Act which occurred within 45 days of the accident.

Based upon the record as a whole and the Arbitrator's finding with respect to Accident, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he provided notice of the accident to Respondent within the time limits stated in the Act.

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

A Workers' Compensation Claimant bears the burden of showing by a preponderance of credible evidence that his current condition of ill-being is causally related to the workplace injury. *Horath v. Industrial Comm'n*, 449 N.E.2d 1345, 1348 (Ill. 1983) citing *Rosenbaum v. Industrial Comm'n.* (1982), 93 Ill.2d 381, 386, 67 Ill.Dec. 83, 444 N.E.2d 122. It is the employee's burden to establish the elements of his claim by a preponderance of the credible evidence. *Illinois Bell Tel. Co. v. Industrial Comm'n.*, 265 Ill. App. 3d 681; 638 N.E. 2d 307 (1st Dist. 1994). This includes the issue of whether Petitioner's current state of ill-being is causally related to the alleged work accident. Id. A claimant must prove causal connection by evidence from which inferences can be fairly and reasonably drawn. *Caterpillar Tractor Co. v. Industrial Comm'n.*, 83 Ill. 2d 213; 414 N.E. 2d 740 (1980).

The Commission may find a causal relationship based on a medical expert's opinion that the injury "could have" or "might have" been caused by an accident. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 182, 457 N.E.2d 1222, 1226, 75 Ill. Dec. 663 (1983). However, expert medical evidence is not essential to support the Commission's conclusion that a causal relationship exists between a claimant's work duties and his condition of ill-being. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63, 442 N.E.2d 908, 911,

66 Ill. Dec. 347 (1982). A chain of events suggesting a causal connection may suffice to prove causation. *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839, 639 N.E.2d 886, 892, 203 Ill. Dec. 327 (1994). The Commission's decision in the present case is supported by both medical testimony *and* the chain of events. Prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. *Navistar International Transportation Co. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1205 (2000).

Petitioner had prior injuries including the 2000 work accident to his whole body. No medical records of the prior treatment were admitted, and Petitioner's unrebutted testimony was that he had no back problems prior to December 12, 2006. He had been working full duty including the multiple physical tasks required in performing his maintenance job. Beginning December 26, 2006, he gave a history of the accident and advanced complaints in his lower back and shortly thereafter into the left leg. Petitioner treated initially with Dr. Hofmaier who provided chiropractic treatment and referred Petitioner to Dr. Elborno for caudal epidural steroid injections on January 3, 2007 and January 16, 2007. Dr. Johnson read the MRI as showing a very large herniated disc at L4-L5. His diagnosis was displacement of a lumbar intervertebral disc. On January 24, 2007, Dr. Johnson performed a left sided L4-L5 hemi-laminectomy. Dr. Marquardt opined that Petitioner suffered a disc herniation at L4-5 with progression over a period of a few weeks to an extruded disc with neurological involvement of his left leg necessitating surgery. Based upon this chain of events and these medical opinions, the Arbitrator finds that Petitioner's initial lower back complaints and treatment were causally related to the accident on December 12, 2006.

Thereafter the Petitioner continued to advance complaints in his lower back and legs. On February 23, 2007, Petitioner telephoned with increased back pain over the last several days. The March 14, 2007 MRI was reported as unremarkable. Petitioner underwent transforaminal steroid injections at the L4-L5 and L5-S1 levels by Dr. Elborno on May 3, 2007 and May 17, 2007. On June 6, 2007, Dr. Johnson notes that Petitioner "is most graphic in his description of this lower back pain." He complains of back pain, radiating into the hip and groin and down the right leg. He also has pain in the left leg. Dr. Johnson notes full strength and normal reflexes. He told Petitioner that he has spinal stenosis at L4-5 but that typically does not cause the type of excruciating pain of which he complains. He notes Petitioner does not describe leg weakness. The lumbar MRI scan performed on June 22, 2007, showed postsurgical changes at L4-L5 and L5-S1 and was unchanged from the March 14, 2007 study. On July 12, 2007, Dr. Johnson notes treatment with Dr. Hanna for pain management of Petitioner's multiple complaints and the scheduling of an EMG with Dr. Echiverra for his complaints in the upper extremities. Not further treatment for the lower back is performed.

Petitioner also began to complain of pain in his neck, shoulders and arms. He has thereafter undergone multiple courses of treatment by Dr. Hanna, Dr. Echiverri, Dr. Erickson, Dr. Borchardt and Dr. O'Leary for complaints throughout his body, including pain management. injections, physical therapy, counseling and a trial of a spinal cord stimulator. None of the treatment has provided any relief.

The Arbitrator notes the lack of consistency in Petitioner's subjective complaints and his histories. The Arbitrator notes Petitioner's claimed intolerance to opioids but his statement that he had taken Vicodin for a prior throat condition. As noted by Dr. Fetzer, Petitioner reported that when he slipped and fell backward, he severe pain in the shoulder girdle. but Petitioner was initially diagnosed with a lumbar problem and did not sustain any other diagnosis at that time. Petitioner's only treatment was to his lower back until months after the accident. He thereafter adjusted his claim to include initial pain in the upper extremities that is not supported by the medical records. The Commission has considered such a gap in care in determining causal connection.

See: *Richard Olcikas v. Dominick's Finer Foods, Inc.*, 2009 Ill. Wrk. Comp. LEXIS 1098 affirmed *Olcikas v. IWCC*, 2012 Ill. App. Unpub. LEXIS 26; 2011 IL App (1st) 103274WC-U; 2012 WL 6951575; *Jacob Haltom v. Center for Sleep Medicine*, 2013 Ill. Wrk. Comp. LEXIS 509; 13 IWCC 563, affirmed *Haltom v. IWCC*, 2015 IL App (1st) 133954WC-U; 2015 Ill. App. Unpub. LEXIS 1568; *Jose Ruben Meraz vs. Minute Men Staffing*, 2015 Ill. Wrk. Comp. LEXIS 30; 15 IWCC 30.

Petitioner's subjective complaints are not persuasive based upon the lack of objective findings and the opinions of the medical providers. Following his surgery, Dr. Johnson notes that Petitioner is most graphic in his description of this lower back pain. Multiple MRI studies do not show anything but post-operative changes. Dr. Johnson notes full strength and normal reflexes. He told Petitioner that he has spinal stenosis at L4-5 but that typically does not cause the type of excruciating pain of which he complains. While Dr. Cole notes the MRI findings of labral tears. he opined that the mechanism of injury is not correct, nor does it reasonably correlate with labral tears which may have been incidental findings on the MRI. He suspects a cervical cause and refers Petitioner to Dr. Fetzer. Dr. Fetzer noted the cervical MRI showed mild disc bulges at C5-6 and C6-7. There is no significant central canal or lateral recess stenosis. Physical examination noted multiple Waddell signs. Petitioner exhibited pain out of proportion to what they were doing. Dr. Fetzer found that while there may be a component of right C6 radiculopathy, she did not feel that it would contribute to his current amount and distribution of pain. Dr. Marquardt stated Petitioner was unable to undress himself. He was moaning and groaning. Examination noted no atrophy He had diffuse tenderness. Reflexes were brisk and equal. Examination has multiple pain responses that cannot be accounted for. Dr. Marquardt assessed Petitioner with status post L4-5 discectomy. He notes Petitioner's current claim of having pain throughout his body is not consistent with the medical records which record only complaints in the lumbar spine and then radicular symptomology into the left leg. He opined that Petitioner has symptom magnification, noting that his subjective complaints are far and excessive from the objective abnormality. He stated Dr. Johnson has done an excellent job of decompressing the L4-5 disc and the residual complaints cannot be accounted for.

It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). A finder of fact is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts. A treating doctor's findings and opinions can be undermined, or even disregarded, through reliance on inaccurate or incomplete information." See *Ravji v. United Airlines*, 2012 WL 440353 at 13 (Ill. Indus. Comm'n) interpreting *Horath v. Industrial Commission*, 96 Ill.2d 349 (Ill. 1983).

The Arbitrator, having heard the testimony and reviewed the exhibits finds the opinions of Dr. Cole, Dr. Fetzer and Dr. Marquardt persuasive and supported by the objective findings of the multiple treating

doctors and diagnostic tests as well as the comments of Dr. Johnson. The Arbitrator does not find the Petitioner's subjective presentation credible and finds that his revisionist history to include initial complaints beyond the low back unsupported by the greater weight of the evidence. Petitioner's additional alleged conditions of ill-being to the neck, shoulders, arms, and wrists are not causally related to the accident.

With respect to Petitioner's ongoing complaints in his back and legs, the Arbitrator notes that Petitioner initially complained only of his lower back and left leg. Dr. Johnson last provided meaningful treatment prior to his June 6, 2007 report. At that time. Dr. Johnson provided no significant care for the low back but rather referred Petitioner for treatment for other body parts and pain treatment. As discussed more fully above, the Arbitrator does not find Petitioner's subjective complaints credible or supported by objective findings. Dr. Marquardt opined that Petitioner was at maximum medical improvement and could return to work concerning his low back condition. He stated that Dr. Johnson has done an excellent job of decompressing the L4-5 disc and the residual complaints cannot be accounted for. Based upon these opinions and Dr. Johnson's last meaningful treatment, the Arbitrator finds that Petitioner's causally related low back condition of ill-being reached maximum medical improvement as of June 6, 2007 when Dr. Johnson last provided significant care.

Based upon the record as a whole and the Arbitrator's finding with respect to Accident, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that as a result of the accident on December 12, 2006, he suffered an L4-5 disc herniation which resulted in the need for treatment including the discectomy performed by Dr. Johnson. The causally related low back condition reached maximum medical improvement as of June 6, 2007. Petitioner's low back complaints after that date and any other condition of ill-being to the neck, shoulders, arms, or any other body part are not causally related to the accident.

In support of the Arbitrator's decision with respect to (J) Medical, the Arbitrator finds as follows:

Under §8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a claimant's injury. The claimant has the burden of proving that the medical services were necessary, and the expenses incurred were reasonable. *City of Chicago v. Illinois Workers ' Compensation Commission,* 409 Ill. App. 3d 258,267 (1st Dist., 2011). In weighing the reasonableness and necessity of treatment, the Commission considered the medical opinions presented. Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission, 309 Ill. 591, 138 N.E. 211 (1923).* In determining the reasonableness and necessity of treatment, the Commission also has considered whether the records demonstrate subjective or objective improvement or whether the treatment failed to provide demonstrable benefit. *Hugo Alvarez v AMI Bearings, 16 IWCC 0408; Nelson Centeno v. Minute Men, 13 IWCC 0914, affirmed Centeno v. Illinois Workers' Compensation Commission, 2016 IL App (2d) 150575WC-U; 2016 Ill. App. Unpub. LEXIS 1261.*

Based upon the Arbitrator's finding with respect to Causal Connection, reasonable and necessary treatment for Petitioner's low back through June 6, 2007 would be causally related to the accident. The post-operative treatment and testing through that date, including the injections by Dr. Elborno and the March 2007 MRI, were a reasonable effort to determine the basis for Petitioner's ongoing subjective

complaints. While this treatment did not provide benefit to Petitioner, the Arbitrator finds that these efforts were reasonable and necessary. The Arbitrator notes that Dr. Marquardt did not provide opinions as to the reasonableness of this care.

The Arbitrator also notes that subsequent treatment, in addition to being not causally related, provided no benefit to Petitioner and would therefore not be reasonable or necessary. This would also be supported by the opinions of Dr. Cole, Dr. Fetzer, and Dr. Marquardt and would be supported by the report of Dr. Johnson.

Petitioner offered unpaid bills as PX 20 though PX 39 and PX 41. Some of the bills show payments made and remaining balances. Others are statements which do not show whether any payments have been made or what the current balances are. The Arbitrator notes that many of these exhibits were prepared many years ago and may not have current information listed. The parties stipulated that Respondent paid $71,643.89 through a group medical plan for which credit may be allowed under Section 8(j) of the Act. The parties provided no payment log to document for which bills these payments were made. PX 40 is the payments by Blue Cross/Blue Shield of Illinois.

The Arbitrator has reviewed the medical bills, payments and medical records admitted and finds that the bills of Dr. Echiverri (PX 30), Dr. Hanna (PX 31), ATI (PX 32), Sportsmed (PX 33), Midwest Orthopedics at Rush (PX 34), Dr. Borchardt (PX 35), Lutheran General Hospital (PX 38), and Dr. Pins (PX 39) are completely for treatment found not causally connected and are denied.

The Arbitrator finds the charges contained in the bills submitted from Hofmaier Chiropractic (PX 41), Elmhurst Memorial Healthcare (PX 20), Elmhurst Memorial Emergency Medical Services (PX 21), Vision MRI and CT of Oak Brook (PX 22), Advanced Ambulatory Surgical Center (PX 23), Dr. Elborno (PX 24), Dr. Johnson (PX 25), Painless Anesthesia (PX 26), Winfield Pathology (PX 27), Elmhurst Medical Associates (PX 28), and Hinsdale Hospital (PX 29) are for reasonable, necessary and causally related treatment. The bill from Central DuPage Hospital included reasonable, necessary and causally related treatment from 1/22/17 through 4/26/17. The additional charges from 6/22/17 through 3/31/08 are not causally related and are denied. Prescriptions (PX 37) from Dr. Johnson, Dr. Elborno and Dr. Johnson from December 28, 2006 through June 30, 2007 are reasonable, necessary and causally related. The Prescriptions issued thereafter are not causally related and are denied.

The Arbitrator notes that PX 40 lists payments for the listed charges to Dr. Elborno, Central DuPage Hospital, and Dr. Johnson. Other insurance payments are also listed on the bills which reduce the balances owed. Some of the 8(j) credit claimed is for bills which the Arbitrator has found not causally related. The Arbitrator cannot accurately determine the exact amount of the current balances, if any on the bills awarded. A Commission decision ordering the employer to 'pay any unpaid, related medical expenses according to the fee schedule and provide documentation with regard to said fee schedule payment calculations to Petitioner' complies with the statutorily mandated procedures set forth in the Act. *Springfield Urban League v. Ill. Workers' Comp. Comm'n,* 990 N.E.2d 284, 371 Ill.Dec 384 (4th Dist. 2013); *Wisdom v. Associated,* 19 IWCC 361.

Based upon the record as a whole and the Arbitrator's findings with respect to Accident and Causal Connection, the Arbitrator finds that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule to Hofmaier Chiropractic, Elmhurst Memorial Healthcare, Elmhurst

Memorial Emergency Medical Services, Vison MRI and CT of Oak Brook, Advanced Ambulatory Surgical Center, Dr. Elborno, Dr. Johnson, Painless Anesthesia, Winfield Pathology, Elmhurst Medical Associates, Hinsdale Hospital, Central DuPage Hospital from 1/22/17 through 4/26/17, and Prescriptions from Dr. Johnson, Dr. Elborno and Dr. Johnson from December 28, 2006 through June 30, 2007, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for all medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In support of the Arbitrator's decision with respect to (K) Temporary Compensation, the Arbitrator finds as follows:

Temporary compensation is provided for in Section 8(b) of the Workers' Compensation Act, which provides, weekly compensation shall be paid as long as the total temporary incapacity lasts, which has interpreted to mean that an employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit. The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To be entitled to TTD benefits a claimant must prove not only that he did not work but that he was unable to work. *Freeman United Coal Min. Co. v. Indus. Comm'n*, 318 Ill. App. 3d 170, 175, 741 N.E.2d 1144, 1148 (2000).

As more fully addressed in the Arbitrator's finding with respect to Causal Connection, the Arbitrator finds that Petitioner's causally connected condition of ill-being in the low back and left leg reached maximum medical improvement as of Dr. Johnson's report on June 6, 2007.

Based upon the record as a whole and the Arbitrator's findings with respect to Accident and Causal Connection, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he is entitled to Temporary Total Disability commencing December 26, 2006 through June 6, 2007, a period of 23 2/7 weeks.

In support of the Arbitrator's decision with respect to (L) Nature & Extent, the Arbitrator finds as follows:

Petitioner's date of accident is before September 1, 2011 and therefore the provisions of Section 8.1b of the Act are not applicable to the assessment of partial permanent disability in this matter.

As addressed more fully above in the Arbitrator's finding with respect to Causal Connection, the only condition of ill-being for which compensation is awarded is the L4-5 disc herniation in the lumbar spine, which condition reached maximum medical improvement as of June 6, 2007. Petitioner treated initially with Dr. Hofmaier who provided chiropractic treatment and referred Petitioner to Dr. Elborno for caudal epidural steroid injections on January 3, 2007 and January 16, 2007. Dr. Johnson read the MRI as showing a very large herniated disc at L4-L5. His diagnosis was displacement of a lumbar intervertebral disc. On January 24, 2007, Dr. Johnson performed a left sided L4-L5 hemi-laminectomy. Thereafter the Petitioner continued to advance complaints in his lower back and legs The March 14, 2007 MRI was reported as unremarkable. Petitioner underwent transforaminal steroid injections at the L4-L5 and L5-S1 levels by Dr. Elborno on May 3, 2007 and May 17, 2007. On June 6, Dr. Johnson notes full strength

and normal reflexes. He told Petitioner that he has spinal stenosis at L4-5 but that typically does not cause the type of excruciating pain of which he complains.

Dr. Marquardt opined that Petitioner suffered a disc herniation at L4-5 with progression over a period of a few weeks to an extruded disc with neurological involvement of his left leg necessitating surgery. Dr. Marquardt assessed Petitioner with status post L4-5 discectomy. He notes Petitioner's current claim of having pain throughout his body is not consistent with the medical records which record only complaints in the lumbar spine and then radicular symptomology into the left leg. He opined that Petitioner has symptom magnification, noting that his subjective complaints are far and excessive from the objective abnormality. He stated Dr. Johnson has done an excellent job of decompressing the L4-5 disc and the residual complaints cannot be accounted for. He found Petitioner at maximum medical improvement and able to return to work.

As more fully discussed in the Arbitrator's finding with respect to Causal Connection, the Arbitrator does not find the Petitioner's subjective complaints and testimony as to his current condition credible.

Based upon the record as a whole and the Arbitrator's findings with respect to Accident and Causal Connection, the Arbitrator finds that as a result of the accident on December 12, 2006, Petitioner has sustained 20% loss of use of the person as a whole as provided in Section 8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC010851
Case Name	HARDY, ANTHONY v. SALCO PRODUCTS INC
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0253
Number of Pages of Decision	25
Decision Issued By	Barbara Flores, Commissioner

Petitioner Attorney	Jason Marker
Respondent Attorney	Monica Dembny

DATE FILED: 5/26/2021

/s/ Barbara Flores, 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

ANTHONY HARDY,

Petitioner,

vs. NO: 16 WC 10851

SALCO PRODUCTS, 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, average weekly wage and benefit rates, causal connection, medical expenses, temporary total disability benefits, maintenance and vocational rehabilitation, and penalties and fees, being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980).

The Commission modifies the Decision of the Arbitrator with respect to the issues of causal connection, temporary total disability benefits, and maintenance and vocational rehabilitation.

I. Causal Connection

The Arbitrator concluded that Petitioner failed to prove that his current condition of ill-being was causally connected to the accident. In order to obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003).

The Arbitrator concluded that the causal connection terminated in this case by relying on the opinions of Dr. Levin (Respondent's Section 12 examiner) and Dr. Bare (Petitioner's second opinion physician) to find that Petitioner reached maximum medical improvement (MMI) and could return to full-duty work "as of four weeks following the August 26, 2016 surgery by February 16, 2018, the date Dr. Bare found Petitioner to be at MMI."

The parties are in agreement that the Arbitrator's reference to February 16, 2018 as the date Dr. Bare found Petitioner to be at MMI is incorrect. The treatment records show that Dr. Bare found Petitioner at MMI on February 6, 2019. In contrast, Dr. Levin opined that Petitioner reached MMI after undergoing surgery, by January 2017. The Arbitrator properly relied on these opinions to determine that Petitioner's current condition was not causally connected to the accident with the modifications made herein.

The Commission agrees with Petitioner that, reading the Decision of the Arbitrator as a whole, the Arbitrator preferred Dr. Bare's opinion of the date on which Petitioner reached MMI. The Arbitrator's award of medical expenses includes "the treatment provided by Dr. Bare on 12/7/18 & 2/6/18 as provided in Px23." The billing records contained in Petitioner's Exhibit 23 corroborate the treatment records and establish that February 6, 2019, the date on which Dr. Bare found Petitioner at MMI, was the final date for which the Arbitrator found a causal connection between the accident and Petitioner's condition. The Arbitrator's reference to "2/6/18" is a typographical error.[1]

Petitioner, however, is incorrect in asserting that his April 17, 2019 visit was also causally connected to his accident. Petitioner revisited Dr. Bare at that time to obtain a lifting restriction as part of his efforts at vocational rehabilitation, the benefits for which were correctly denied by the Arbitrator. Accordingly, the Commission affirms the Arbitrator's finding that the causal connection between the accident and Petitioner's current condition of ill-being had terminated, but modifies the Decision of the Arbitrator to find that the causal connection terminated on February 6, 2019.

II. Temporary Total Disability

The Arbitrator concluded that Petitioner was entitled to temporary total disability (TTD) benefits from February 23, 2016 through September 7, 2016, "the date Petitioner was offered sit-down work." Petitioner argues that he is entitled to benefits through February 6, 2019, when Dr. Bare found he had reached MMI. Petitioner also takes issue with the Arbitrator's assertion that he had contacted his physicians to extend restrictions in order to avoid work. Respondent maintains that the Arbitrator: could rely on Dr. Levin's opinions to terminate TTD benefits in September 2016; correctly concluded that Petitioner tried to avoid work; and could have relied on Petitioner's failure to attend the Section 12 examination to suspend TTD payments.

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[1] Petitioner's other treatment records do not support a contrary conclusion. Respondent observes that there was a gap in Petitioner's treatment between October 2017 and December 2018, but that gap occurs well after the January 2017 MMI date suggested by Dr. Levin. The Commission observes that Petitioner's treating surgeon, Dr. Patari, released Petitioner to seated work on February 20, 2017, but there is no indication that Petitioner was found to be at MMI at that time.

"To establish entitlement to TTD benefits, a claimant must demonstrate not only that he or she did not work, but also that the claimant was unable to work." *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 759 (2003). "The dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement." *Id.* The fact that an employee can do some light duty work or other useful tasks does not mean that he is ineligible to receive TTD benefits. *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 47.

In this case, Ms. Velemir, Respondent's human resource administrator, identified a September 7, 2016 letter addressing insurance issues and mentioning the availability of sit-down work as being sent to Petitioner by both regular and certified mail. However, the record also establishes that after his surgery, Petitioner was not released for sedentary work by Dr. Patari, the treating surgeon, until February 20, 2017. The record further establishes that Dr. Patari indicated that Petitioner could return to work on January 23, 2017, but Petitioner requested and was granted another month off. Even considering Petitioner's request in the least charitable light, this request occurred well after September 7, 2016 and shortly after Respondent terminated Petitioner's employment on January 18, 2017 in response to a work status note transmitted by Petitioner's physician.

The Commission observes that Petitioner's surgery was delayed in part due to his refusal of conservative treatment. However, the Commission agrees with the Arbitrator that the opinions of Dr. Bare are more persuasive given the totality of the record than those of Respondent's Section 12 examiner, Dr. Levin. Indeed, even Dr. Levin opined that while more conservative therapy may have been appropriate, Petitioner's surgery was ultimately appropriate given Petitioner's continued complaints. Given Petitioner's ongoing treatment with Dr. Patari through October 2, 2017 and Dr. Bare's opinion that Petitioner reached MMI on February 6, 2019, during which time Petitioner was placed on work restrictions that Respondent could not, or did not, accommodate, the Commission concludes that Petitioner has established that he is entitled to TTD benefits through February 6, 2019.

III. Maintenance and Vocational Rehabilitation

The Arbitrator denied Petitioner's request for maintenance benefits for the period from April 17, 2019 through the hearing date, concluding that Petitioner did not make a good faith attempt to find work. The Arbitrator also denied Petitioner's request for vocational rehabilitation benefits, observing that Petitioner refused or failed to discuss Respondent's offers of sit-down work with his physicians, and failed to obtain a recommended functional capacity evaluation. On review, Petitioner argues that he was entitled to these benefits based on the opinion of his vocational counselor, Mr. Blumenthal, that he was an excellent candidate for vocational rehabilitation and his calculation that Petitioner's permanent restrictions have reduced his earning capacity. Petitioner also cites the Commission's regulation requiring employers, when "appropriate," to prepare a written assessment of the vocational rehabilitation required to return the injured worker to employment, including the necessity for a plan or program that may include vocational evaluation and retraining. 50 Ill. Adm. Code 7110.10 (eff. June 22, 2006)

(amended at 30 Ill. Reg. 11743 (eff. June 22, 2006) and since recodified at 50 Ill. Adm. Code 9110.10 (eff. Nov. 9, 2016)).

Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2014)), an employer "shall *** pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto." "Since maintenance is awarded incidental to vocational rehabilitation, an employer is obligated to pay maintenance only 'while a claimant is engaged in a prescribed vocational-rehabilitation program.'" *Euclid Beverage v. Illinois Workers' Compensation Comm'n*, 2019 IL App (2d) 180090WC, ¶ 29 (quoting *W.B. Olson, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113129WC, ¶ 39). Vocational rehabilitation may include, but is not limited to, counseling for job searches, supervising job search programs, and vocational retraining, which includes education at an accredited learning institution. *Euclid Beverage*, 2019 IL App (2d) 180090WC, ¶ 30. An employee's self-directed job search or vocational training also may constitute a vocational rehabilitation program. *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 506 (2004). "[R]ehabilitation is neither mandatory for the employer nor appropriate if an injured employee does not intend, although capable, to return to work. *Euclid Beverage*, 2019 IL App (2d) 180090WC, ¶ 31.

In this case, Petitioner was not in a prescribed rehabilitation program and there is no evidence that Petitioner took advantage of Respondent's vocational education program. The record establishes that when Respondent offered Petitioner sedentary work, Petitioner was off work but evaded answering whether he raised the issue of returning to such work with his physician, based on Ms. Velemir's testimony and Petitioner's own testimony at the hearing, which never directly states that he discussed Respondent's offers with his physician. Respondent's actions in holding Petitioner's job open through January 17, 2017 and offering sedentary work are also relevant to whether Petitioner proved a loss of earning capacity. Respondent terminated Petitioner's employment in January 2017. Respondent was released to sedentary work in February 2017, but Petitioner did not demand vocational rehabilitation for approximately two years, after Petitioner was determined to be at MMI. Months later, Petitioner contacted only three staffing agencies and there is no evidence that he followed up with them. Petitioner did seek vocational counseling from Mr. Blumenthal, but the years-long delay in doing so raises questions regarding whether Mr. Blumenthal's opinions were sought more in anticipation of litigation than as part of a bona fide self-directed rehabilitation effort. Given this record, the Commission affirms the Arbitrator's denial of these benefits.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated June 8, 2020 is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner failed to prove that the current condition of ill-being is causally connected to the accident alleged in this case, as the causal connection terminated as of February 6, 2019.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $421.00 per week for the period from February 23, 2016 through February 6, 2019, for a period of 154 and 2/7ths weeks, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent shall receive a credit of $4,248.50 already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner's reasonable and necessary outstanding medical bills for treatment through February 6, 2019, pursuant to the fee schedule and §§8(a) and 8.2 of the Act, for the services provided by: Midwest Express Clinic as delineated in Petitioner's Exhibit 12; Premiere Occupational Health as delineated in Petitioner's Exhibit 13; Presence Saint Joseph Medical Center as delineated in Petitioner's Exhibit 14; MK Orthopaedics as delineated in Petitioner's Exhibit 15; Adco Billing Solutions as delineated in Petitioner's Exhibit 16; The Center for Sports Orthopaedics as delineated in Petitioner's Exhibit 17; Adventist Glen Oaks Hospital as delineated in Petitioner's Exhibit 19; Athletico as delineated in Petitioner's Exhibit 21; and the treatment provided by Dr. Bare on December 7, 2018 and February 6, 2019 as delineated in Petitioner's Exhibit 23. Respondent also shall pay to Petitioner the sum of $785.00 for medical bills Petitioner paid, as set forth in the Decision of the Arbitrator. Respondent shall receive a credit for medical benefits that have been paid by Respondent or Petitioner's private group carrier, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Petitioner is receiving this credit, as provided by §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for maintenance and vocational rehabilitation benefits is denied.

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

IT IS FURTHER ORDERED BY THE COMMISSION that 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 expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

Bond for the removal of this cause to the Circuit Court is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 26, 2021

o: 5/20/21
BNF/kcb
045

/s/ *Barbara N. Flores*
Barbara N. Flores

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0253
NOTICE OF 19(b) ARBITRATOR DECISION

HARDY, ANTHONY Case# **16WC010851**
Employee/Petitioner

SALCO PRODUCTS INC
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:

2998 MARKER & CRANNELL ATTY AT LAW
JASON MARKER
4015 PLAINFIELD-NAPERVILLE RD
NAPERVILLE, IL 60564

0532 HOLECEK & ASSOC
MONICA DEMBNY
PO BOX 64093
ST PAUL, MN 55164-0093

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Anthony Hardy
Employee/Petitioner

v.

Salco Products, Inc.
Employer/Respondent

Case # ~~17~~ 16 WC **010851**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Soto**, Arbitrator of the Commission, in the city of **Wheaton**, on **January 29, 2020** and completed in **Geneva** on **February 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. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☒ Other **vocational services**

FINDINGS

On the date of accident, **2/18/2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$32,838.20**; the average weekly wage was **$631.50**.

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 **$4,248.50** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$4,248.50**.

Respondent is entitled to a credit of **$16,066.35** under Section 8(j) of the Act.

ORDER

Because Petitioner failed to establish that his current condition of ill-being is causally related to the accident, Petitioner's request vocational services and maintenance is denied.

Respondent shall pay to Petitioner for the medical treatment incurred through February 6, 2018, pursuant to Section 8.2 of the Act and the Illinois Medical Fee Schedule, as outlined in Px 12 (Midwest Express Clinic), Px 13 (Premier Occupational Health), Px 14 (Presence Saint Joseph Medical Center), Px 15 (MK Orthopaedics), Px 16 (Adco Billing Solutions), Px 17 (The Center for Sports Orthopaedics), Px 19 (Adventist Glen Oaks Hospital), Px 21 (Athletico), and the treatment provided by Dr. Bare on 12/7/18 & 2/6/18 as provided in Px 23). The Arbitrator further finds Respondent is entitled to a credit for the medical bills paid by Respondent or Petitioner's private group heath carrier and Respondent shall hold Petitioner harmless for any bills which Respondent claims a credit as provided in Section 8(j) of the Act, as set forth in the Conclusion of Law attached hereto;

Respondent shall pay Petitioner temporary total disability benefits of $421.00/week for 20 1/7 weeks, commencing 2/23/2016 through 9/7/16, as provided in Section 8(b) of the Act, with credit for $4,248.50 paid.

Petitioner's request for Penalties is denied.

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

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

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

Signature of Arbitrator

4/30/20
Date

ICArbDec19(b)

MAY 5 - 2020

FINDINGS OF FACT

The issues in dispute are Accident, Wages, Petitioner's current condition of ill-being, entitlement to temporary total disability, medical bills, and vocational benefits and maintenance. (Arb. Ex. #).

Petitioner's Testimony

Anthony Hardy (hereafter referred to as "Petitioner") testified he is 37 years old and was working for Salco Products, Inc. (hereinafter referred to as "Respondent") in 2016 as a friction welder. (Tr. 11-12). Prior to February of 2016, Petitioner was employed by Respondent for four and a half years. (Tr. 12). As a friction welder Petitioner worked on 5 different machines to make parts and he stands to operate the machines. (Tr. 12-15). Petitioner testified he would also pick orders and assemble valves and acid pumps. (Tr. 16). Petitioner also testified that would use a forklift to pick orders and he used a forklift every day. (Tr. 17, 24).

Petitioner testified he earned $15.35 per hour in 2015 and was given a raise to $15.85 per hour. (Tr. 26). Petitioner testified he worked overtime, and he had to "stay to get orders out depending on the customers' needs." (Tr. 27). Petitioner also testified to receiving a revenue bonus each week depending upon the monthly and quarterly sales the company made. (Tr. 28). He believed he could earn more bonuses and revenue if he helped the company meet certain sales goals based upon the All Employee Revenue Bonus Plan. (PX 3, Tr. 28-30).

Petitioner testified he was injured at work on Thursday February 19, 2016 (Tr. 33-34). Petitioner testified he was picking orders. He normally starts work at 7:30 am. He started work that day at 7 am because he was on mandatory ten to twelve hour shifts that week. (Tr. 34). He was in hurry that day and he had to get on and off the forklift often. (Tr. 35). Late in the morning he was climbing on to the forklift and as he went to sit down, he "turned to sit to his right, and felt and heard a pop in his left knee. (Tr. 36). Petitioner testified getting into the forklift involves two steps. (Tr. 36). Petitioner testified that he was getting into the right side of the forklift. (Tr. 36). Petitioner testified "I stepped with my right foot first and then my left foot and then I went to turn to sit down as I got to the top of the forklift." (Tr. 37).

Petitioner testified he notified his supervisor Hussain Maalem and his supervisor did not send him to a clinic. (Tr. 36.). Petitioner completed his shift that day. (Tr. 39). The next day Friday, his supervisor was not at work and he worked his full shift. (Tr. 39). Petitioner testified the following day, Saturday, he went to Midwest Express Clinic and reported a history of getting into a forklift at work when he felt a pop in his knee. (Tr. 40-41). Petitioner was told to return the following day because the x-rays because the machine was not working. (Tr. 42). Petitioner did not have an x-ray, but the clinic ordered an MRI. (Tr. 42).

Petitioner testified he returned to the clinic because his attorney told him about something that was in the transcripts or medical records. Petitioner returned to Midwest to talk to them about the changing the records. (Tr. 42-3). Petitioner testified he requested the records to be changed to show that he was injured at work and not while on his way to work. (Tr. 43-44).[1]

[1] The medical records from Midwest Express dated February 20, 2016 indicate that Petitioner reported hearing a pop while driving to work on Thursday. The records contain an addendum, dated December 7, 2017, indicating that the patient is requesting the chart to be revisited. The records state transcription error and that patient was hurt on the job vs on the way to work. (Rx. 14).

Petitioner testified that Nick Lacatos, who works for Respondent, sent him to Premier Occupational on February 22, 2016. (Tr. 45). Premier gave him light duty work restrictions of sitting only, and he later went to MK Orthopedics on February 23, 2016, which took him off of work. (Tr. 46-7). Petitioner testified he saw Dr. Pizinger with MK Orthopedics in February and March, who recommended surgery. (Tr. 48). Petitioner testified Dr. Pizinger would not do the surgery unless it was approved, so he went to Dr. Patari. (Tr. 49-50).

Petitioner testified Dr. Pizinger never gave him a written script for physical therapy or for injections. (Tr. 50). Petitioner testified he saw Dr. Patari on July 21, 2016 who performed surgery on August 23, 2016. (Tr. 50, 51). Petitioner testified the surgery was performed at Glen Oaks Hospital and paid for by Blue Cross Blue Shield, which was his insurance through work. (Tr. 51).

Petitioner testified he attended physical therapy for nine months, but he continued to have pain in his knee. (Tr. 52). Petitioner testified Dr. Patari took him off work after his first appointment and released him to light duty on February 23, 2017. (Tr. 53). Petitioner testified that he provided the off of work notes to Tina Velemir. (Tr. 54). Petitioner testified his employment was terminated on January 18, 2017, and he received the notice by mail. (Tr. 55). Petitioner testified he received Workers Compensation benefits through April 2016. (Tr. 57).

Petitioner testified that Dr. Patari discussed a second surgery but sent him for a second opinion because "he said he wasn't too confident within his own self if the surgery was necessary..." (Tr. 58). Petitioner testified Dr. Patari referred him to a university doctor and he tried to see doctors at Rush University and Loyola but ended up seeing Dr. Bare at Northwestern in December of 2018. (Tr. 63-66). Petitioner testified he had an MRI which Dr. Bare reviewed before recommending physical therapy. Petitioner testified he returning to Dr. Bare on December 7, 2018, February 6, 2019 and April 17, 2019. (Tr. 68). Petitioner testified Dr. Bare gave him a work status note on February 6, 2019. (Tr. 68).

Petitioner testified to seeing Mr. Blumenthal, a vocational expert, after seeing Dr. Bare on February 6, 2019 and that Mr. Blumenthal advised him to obtain weight limits from Dr. Bare so he could perform his evaluation. Petitioner testified he went back to Dr. Bare on April 17, 2019 who issued lifting restrictions of no lifting greater than ten pounds. (Tr. 70, 71).

Petitioner testified that he did not attend the first scheduled IME exam because he did not receive travel pay and he was told not to attend by his attorney. (Tr. 62). Petitioner testified that he knew the IMR was rescheduled for August 30, 2016, but that date was changed to September 6, 2016. (Tr. 62). Petitioner testified he did not receive a travel check for that appointment. (Tr. 62). Petitioner also testified he never received any letters sent to his attorney regarding the IME appointments. (Tr. 62). Petitioner testified he attended an IME with Dr. Levin on December 7, 2018 and receiving a travel check for that appointment. (Tr. 63).

Petitioner testified he looked for jobs on his own and the scope of his job search is contained in Petitioner's Group Exhibit 11. Petitioner's job search consisted of contacting staffing companies

on June 25, 2019, July 29, 2019 and September 16, 2016. (Tr. 74) and (Px 11).[2] Petitioner testified he believed he did not get a job "Because I had to, you know, everything online and I am not good at all with computers." (Tr. 76). Petitioner testified he graduated high school and took a couple of courses after that. (Tr. 77).

On cross examination Petitioner agreed his job involved more than friction welding, he also did conductivity testing, soldering, and assembly work. (Tr. 85-86). Petitioner testified he was always a friction welder. (Tr. 86). Petitioner agreed his signature was shown on Respondents Exhibit 8D which listed him as Hazersolve Fabricator, but he did not remember. (Tr. 86-88). Petitioner did not believe he was given a handbook when he was hired, as he was told he could look it up on the internet. (Tr. 88). Petitioner testified he never had a chance to access the company internal online system. (Tr. 88). Petitioner denied receiving a handbook but agreed his signature appeared on page one of Respondent Exhibit 8D which was dated July 1, 2012. (Tr. 89-90).

Petitioner admitted speaking to Tina Velemir about his off work notes at least three times and that sit-down work was offered to him but Dr. Pizinger told him to be off work. (Tr. 90-93). Petitioner denied receiving Respondent's Exhibit 21 but recalled receiving something about medical leave. (Tr. 95-96). Petitioner admitting receiving Respondents' letter dated January 10, 2017 (Rx 8c) but he could not recall receiving Respondent's letters dated April 22,2016 and September 7, 2016 which stated "Also we had discussed back in July and August last week when we spoke, we do have sit-down work for you." (Rx 29, Tr 99-101). Petitioner testified his address did not change. (Tr. 102).

Petitioner testified that he chose Dr. Pizinger and he saw him the day after treating at the occupational health clinic. (Tr. 103). Petitioner also testified he chose to go to Midwest Express on February 20, 2016. (Tr. 103). Petitioner testified that he chose Dr. Patari (Tr. 114). He testified he never told Dr. Patari that he had tried and failed physical therapy, and he testified he never told Dr. Patari that he had tried an injection. (Tr. 114). Petitioner testified he never attended physical therapy or underwent any injection prior to his surgery. (Tr. 114). Petitioner testified he saw other doctors at MK Orthopedics who discussed physical therapy and an injection with him. (Tr. 115). Petitioner testified he told the doctor he would not attend physical therapy. (Tr. 115-116).

Petitioner testified he was aware of an IME appointment originally scheduled for June 7, 2016. (Tr. 109). Petitioner testified he was aware the appointment was moved to June 14 or 16, but he disagreed that he requested his attorney to change the date. (Tr. 109-111). He was aware of the IME being rescheduled for August 30, 2016 but stated he did not know it was moved to September 6, 2016. (Tr. 111-2). He agreed he did not appear for an appointment on August 30, 2016. (Tr. 112). Petitioner testified he wanted to attend the IME, but he didn't attend because he didn't receive the travel check. (Tr. 112). He agreed he received some checks from Travelers and that his address never changed. (Tr. 113).

Petitioner admitted being involved in a motor vehicle accident in December of 2017. (Tr. 116). He agreed that Respondents Exhibit 23 was the Crash Report from the accident. (Tr. 117).

[2] Petitioner's Exhibit #11 consists of Petitioner contacting three staffing companies seeking clerical positions on June 25, 2019, July 29, 2019 and September 16, 2016. (Px. 11).

Petitioner admitted that he did not tell Dr. Patari about being involved in the automobile accident and that after the automobile accident he went to an emergency room and was treated by a chiropractor for back pain. (Tr. 118-9). Petitioner also admitted that he also did not tell Dr. Bare about the motor vehicle accident. (Tr. 120-1).

Petitioner testified that he owns a smart phone, graduated from Proviso West Hight School and his school had computers. (Tr. 124, 126). He agreed he emailed Ms. Velemir with help from his sister. (Tr. 126).

Tina Velemir

Respondent called Tina Velemir to testify, she is the human resources administrator for Respondent. (Tr. 159-160). She first came to know him as an employer in their hazarsolve area of the warehouse. (Tr. 160). Respondent's Exhibit 8D is the acknowledgement from the employee receiving a handbook, which is done with all new employees. (Tr. 161). Currently the handbook is electronic, but that did not start until July 2016. Prior to July 2016 employees were given an actual handbook and in the handbook was a page to sign and acknowledge they received the handbook. (Tr. 162). The second page of Respondent's Exhibit 8D is another acknowledgment from an updated handbook. (Tr. 163). The third page of Respondent's Exhibit 8D is the job description for Hazersolve Fabricator. The new employee sign and acknowledge that they understand their job and qualifications. (Tr. 164). Ms. Velemir testified the records indicate Petitioner was hired in 2012 but must have changed positions to Hazersolve Fabricator in 2013. (Tr. 164-5).

Ms. Velemir testified Respondent's Exhibit 8B is the revenue bonus plan and that "once we meet certain sales goals employees are given a bonus amount depending upon the level it is, and that's monthly and quarterly." (Tr. 165-166). The bonus is determined by the full company sales amounts, and an employee's individual performance does not determine whether or how much is paid. (Tr. 166). The company can decide to not pay the bonus, and the Plan states that it is at ownership's discretion to amend or cancel the plan. (Tr. 167). Ms. Velemir testified there are 185 employees, and the revenue bonus is paid to every employee if the company makes its sales goal. (Tr. 168). The bonus is paid regardless of the individual employee's performance for that period, and there is nothing an individual employee can do to get more revenue bonus over other employees. (Tr. 168-169). On cross examination she agreed that there was a year when bonuses were not paid, in 2013. (Tr. 204).

Ms. Velemir testified that Respondent's Exhibit 19 is Petitioner's time sheets showing the times he punched in and out. (Tr. 169-170). Petitioner's start time was 7:30 am, and any punches after 7:30 am means he was late that day. (Tr. 170-171).

Ms. Velemir testified she spoke to Petitioner, by telephone, in June 2016, and told him that sit-down work available for him. (Tr. 172). She remembered speaking to Petitioner twice in August and offering him sit-down work. (Tr. Tr. 172-173). Ms. Velemir testified she also left Petitioner phone messages offering him sit down work. (Tr. 174). Ms. Velemir testified she sent Petitioner a letter dated January 10, 2017 (RX 8c) certified and regular mail. (Tr. 174). Ms. Velemir testified the letter sent to Petitioner dated April 12, 2016 (RX 22) was informing him about health insurance and FLMA paperwork. (Tr. 175). Ms. Velemir testified Petitioner never returned the FLMA paperwork. (Tr. 175). Ms. Velemir testified she sent Petitioner a letter dated September 7,

2016 (RX 29) advising him about the health insurance grace period and offering Petitioner sit down work. (Tr. 176). That letter was mailed by regular and certified mail. She received the certified mail back from the post office. (Tr. 177). She sent him another letter dated January 17, 2017, following up on the January 10, 2017 letter and advising him that they could no longer hold his position open. (Tr. 178-179). When she brought up with Petitioner the issue of returning to work, he would say "My doctor said I can't come to work," and she would ask if he discussed with his doctor they have sit-down work available for him and when she brought this up to Petitioner he would respond by saying "I can't talk, I got to go." (Tr. 180).

Petitioner's job was kept open from February 2016 through January 2017. (Tr. 181-182). He had health insurance through Respondent who paid 75% of the coverage while the employee paid the remaining 25%. (Tr. 181-182). While Petitioner was off work, Respondent paid 75% of the costs and Petitioner paid his 25%. (Tr. 182).

Ms. Velemir testified Respondent's Exhibits 4 and 5 are photographs of the forklift Petitioner would have been driving. Ms. Velemir further testified Respondent would have accommodated sit down work by having Petitioner work at a table sitting on a stool. (Tr. 186). Respondent's Exhibit 31 is a copy of Mr. Hardy's application for work for Respondent. (Tr. 187). Respondent offers an educational reimbursement program which Petitioner could have used while off work, whereas Respondent would had reimbursed Petitioner up to $5,250 dollars if the education helped him grow within the company. (Tr. 187-188). Respondent's Exhibit 32 is the letter she sent Petitioner certified mail which was returned. (Tr. 189).

Nick Lakatos

Respondent call Nick Lakatos to testify, who is the Director of Operations. (Tr. 219). Mr. Lakatos testified he is familiar with Petitioner because Respondent is a family company. (Tr. 220). On February 22, 2016 he was advised by Armando Sanchez that Petitioner was reporting a work injury. (Tr. 221). Mr. Lakatos spoke with Petitioner who said he was hurt on Thursday February 18, 2016 and that he worked a full shift on February 18, February 19, February 21 before reporting the injury on February 22, 2016. (Tr. 221- 223). He went to the clinic on February 22 returning to work at 1:45 p.m. and continuing to work until 4:30 p.m. (RX 19, Tr 223-225).

Mr. Lakatos testified that Respondent does not have an official overtime policy. Overtime is sometimes required, but a record is not kept of when it required, and he had not recall when it was required. (Tr. 226). Mr. Lakatos testified that Respondent's Exhibit 20, pages 2 and 3, is an email asking for volunteers for overtime in a different department but is an example of how overtime is offered. (Tr. 227-228). Mr. Lakatos testified the time sheets show that Petitioner did not have consistent hours, if overtime had been required but he would have worked four ten-hour days or five ten-hour days, but his hours fluctuated. (Tr. 228-229). Employees could work past the end of shift because employees were not required to leave (Tr. 229-230).

Mr. Lakatos testified there was nothing Petitioner could personally have done to increase his bonus pay. (Tr. 231). Bonus are paid whether the employee performs well or not, as long as the Companies sales goal are met. (Tr. 231).
Mr. Lakatos testified Respondent would have provided Petitioner sit down work having him work at a table. (Tr. 235). Respondent's Exhibit 33 is the labor report from their ERP inventory

software, showing what jobs employees worked on. (Tr. 235-6). The data is entered on a shop floor manager, which is a computer where they type in their employee number, find the job order and clock into it. (Tr. 227). The highlighted jobs were standing work, and the remainder were bench work, which could be sitting down cleaning welds. (Tr. 237-240).

Medical Records

Midwest Express Care

Petitioner presented to Dr. Pablo at Midwest Express Clinic on February 20, 2016 (Rx 14). The records Petitioner reported knee pain starting on 2/18/2016 "...hearing a pop while driving to work on Thursday." The records contained an addendum dated December 7, 2017 which states Patient is requesting the chart to be revisited. The record further states transcription error patient was hurt on the job vs on the way to work. Patient did not follow up on x-ray and for follow up appointment. (Rx 14).

Premier Occupational Health

Petitioner presented to the occupational health clinic on request of Respondent on February 22, 2016, reporting while climbing into a forklift he felt a pop in his left knee. The records include an MRI dated 2/23/2016. The MRI noted "increased signal along the tibial surface of the body of the lateral meniscus, consistent with slight meniscal tear." Petitioner was issued work restrictions of seated work only. The records indicate that Petitioner chose to follow up with MK Orthopedics. (Px 13)

MK Orthopedics

On February 23, 2016, Petitioner presented to Dr. Pizinger, of MK Orthopedics, reporting being injured while climbing up into a forklift on 2/18/2016. (PX 15). Dr. Pizinger took Petitioner off work until the MRI could be reviewed. Dr. Pizinger reviewed the MRI and found that it showed a tear of the meniscus which was related to the reported injury at work. Dr. Pizinger recommended surgery. In his record dated March 16, 2016, Dr. Pizinger stated "I am still recommending surgical intervention to definitively treat the underlying meniscal tear. I have talked to the patient about going through physical therapy as well as doing a steroid injection, but he has declined these treatments." On April 13, 2016 Petitioner saw Dr. Stakenas, of MK Orthopedics, who stated that he advised Petitioner the surgery was denied because of a lack of conservative treatments. In his record Dr. Stakenas wrote "I discussed with him doing a corticosteroid injection and/or physical therapy. He declined to do both of these again today..." Dr. Stakenas record of May 12, 2016, states he discussed with Petitioner "doing a trial of physical therapy or an injection, but he was not interested", and he wanted his lawyer to settle it for him. The record further indicates that Dr. Stakenas urged Petitioner to have the injection, but he refused. On June 15, 2016 Petitioner discussed with Dr. Stanekas he had missed the IME appointment "yesterday" and about proceeding with the surgery under group insurance. Dr. Stakenas record dated July 27, 2016 notes that Petitioner was still unwilling to attend physical therapy or have an injection. (Px 15).

Center for Sports Orthopedics Dr. Patari

Petitioner presented to Dr. Patari on July 21, 2016. Petitioner saw Dr. Patari 10 times and the last visit was on October 2, 2017. Dr. Patari performed surgery on August 23, 2016 and the operative report states that Petitioner failed conservative care. Two tears were found, one was repaired and the other was a complex degenerative radial tear which was not repairable. Dr. Patari authored an

addendum to his notes, on December 7, 2017, stating that Petitioner did not have an injection or physical therapy prior to surgery. On January 16, 2017 Petitioner Dr. Patari's office requesting that his off work be extended until a follow up appointment on January 23, 2017. On February 20, 2017 Dr. Patri released Petitioner to sit down work. On October 2, 2017 Dr. Patari wrote a note he was recommending repeat diagnostic, knee arthroscopy and "second opinion to university first." (Px 17).

Northwestern Medicine Dr. Bare

Petitioner presented to Dr. Bare on December 7, 2018. (PX 22, 7 and 8). At that visit, Petitioner reported a work injury in February 2016 while getting onto a forklift. Dr. Bare did not see a recurrent tear on the MRI. He did not feel Petitioner was a candidate for surgery. He recommended following up with his original orthopedic surgeon who operated on his knee. He also discussed physical therapy. Petitioner returned on February 6, 2018. Petitioner reported that his job required standing for hours on end. Dr. Bare opined Petitioner was at MMI and he said that "employee may return to light duty or alternate work if available, the following permanent restrictions on 2/6/2019 periodic sit breaks 15 minutes every hour. No repetitive squatting or kneeling motions." On April 17, 2019, Petitioner returned to Dr. Bare who amended Petitioner's work restrictions as including no lifting more than 10 lbs. and Petitioner "needs to follow up with surgeon who performed knee surgery." (Px 22).

Testimony of Dr. Bare

Dr. Bare testified he saw Petitioner two times, December 7, 2018 and February 6, 2019. Dr. Bare opined that Petitioner was not a surgical candidate. Dr. Bare testified he had not reviewed any Petitioner's prior medical records other than a prior MRI. Dr. Bare testified work restrictions would not be necessary if Petitioner was doing sit-down work. Dr. Bare agreed that attempting conservative treatment would be reasonable prior to proceeding to surgery. Dr. Bare agreed conservative treatment can help heal the knee. Dr. Bare testified that he would normally prescribe an FCE, but he did not in this case. Dr. Bare testified he saw Petitioner as a second opinion, and "if there is a debate, concern, or question as to what restrictions are warranted, I think a functional capacity evaluation for him would be an excellent option to help determine what's best for him for work." Dr. Bare agreed a person can hurt the knee getting in and out of a vehicle. (PX 24).

Testimony of IME Dr. Levin, Section 12 Examiner

Dr. Levin testified based upon the February 2016 MRI, which was equivocal, the standard of care would be to give a cortisone injection. Dr. Levin opined the majority of tears which are not full thickness tears resolve with cortisone injection and physical therapy. Dr. Levin also opined there was no reason why Petitioner could not have gone back to work in a sedentary position. Dr. Levin further opined that after surgery the typically patients would be out for two to four weeks. Dr. Levin testified that Petitioner had a lateral meniscal tear and a lateral meniscal tear is a type of injury common in the general population due to climbing stairs, getting in and out of cars and it is caused by an outward rotation, but getting into a forklift would require internal rotation, not an external rotation, so Petitioner's history does fit the type of meniscal tear he had. (RX 1).

Testimony of Steven Blumethal

Mr. Blumenthal testified he was retained by Petitioner to conduct a vocational evaluation. Mr. Blumenthal testified Petitioner did not provide any documentation of any job search to him. Mr. Blumenthal testified that he asked Petitioner's counsel to obtain clarification from Dr. Bare regarding Petitioner's work restrictions. Mr. Blumenthal opined Petitioner could earn at least $12.50 per hour. (PX 25).

The Arbitrator does not find the Petitioner's testimony to be credible.

Conclusions of Law

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992). To obtain compensation under the Act, the claimant bears the burden of showing by a preponderance of the evidence, he suffered a disabling injury which arose out of, and in the course of his employment. *Baggett v. Industrial Commission*, 201, Ill 2d. 187, 266 Ill. Dec. 836, 775 N.E. 2d 908 (2002).

With respect to issue "C" whether Petitioner sustained an accidental injury that arose out of and in the course of employment, the Arbitrator finds as follows:

To recover benefits under the Act, a claimant bears the burden of proving by a preponderance of the evidence that his injury "arose out of" and "in the course of" his employment. 820 *ILCS* 305/1(d) (West 2014). Both elements must be present to justify compensation. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill.App.3d 102, 105, 853 N.E.2d. 799, 803 (2006).

The requirement that the injury "arise out" of the employment concerns the origin or cause of the claimant's injury. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d. 193, 203. 797 N.E.2d 665, 672 (2003). The occurrence of an accident at the claimant's workplace does not automatically establish that the injury "arose out of" the claimant's employment. *Parro v. Industrial Comm'n*, 167 Ill. 2d 385, 393, 212 N.E.2d 882, 885 (1995). Rather, "[T]he "arising out of" component is primarily concerned with causal connection and is satisfied when the claimant has "shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury" *Sisbro*, 207 Ill. 2d at 203.

The Arbitrator finds that Petitioner proved by the preponderance of the evidence that Petitioner proved by the preponderance of the evidence that he suffered an accidental injury that arose out of and in the course of his employment on February 18, 2016. The medical record, with the exception of the Midwest express Clinic's records, and Petitioner testified that he injured his left knee while getting into a forklift on February 18, 2018. It was undisputed that Petitioner drove a forklift while engaged in his work duties. The Arbitrator finds that Petitioner suffered an injury to his left knee that arouse out and in the course of his employment with Respondent necessitating the need for arthroscopic surgery.

With respect to issue "F", whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

A Worker's Compensation Claimant bears the burden of showing by a preponderance of the evidence that his current condition of ill-being is causally related to the work injury. *Horath v. Indus. Comm'n*, 96 Ill. 2d 349, 357-358, 449 N.E.2d 1345, 1348-1349. (1983).

The Arbitrator finds that Petitioner failed to prove by the preponderance of the evidence that his current left leg condition is causally related to his work injury of February 18, 2016.

The last time Petitioner saw his treating physician, Dr. Patari, was on October 2, 2017, and, at that time, due to Petitioner's complaints, Dr. Patari recommended a diagnostic knee arthroscopy and he recommended Petitioner obtain a second opinion. Petitioner did not see Dr. Bare until December 2018. Dr. Bare testified Petitioner was not a surgical candidate and that Petitioner should follow up with Dr. Patari regarding work status and obtaining an FCE. Dr. Bare testified Petitioner should have an FCE; however, no FCE was ever completed. Dr. Bare testified he did not review Petitioner's prior treatment records. The Arbitrator does not find the opinions of Dr. bare to be persuasive because Dr. Bare did not have the benefit of reviewing Petitioner's past medical records or an FCE, which he recommended, nor information regarding Petitioner's job duties. The Arbitrator further notes that Petitioner last saw Dr. Patari on October 2, 2017. As such, Petitioner failed to provide sufficient evidence to support that his current condition is causally related to the work injury.

The Arbitrator also notes numinous incidents of inconsistencies with Petitioner's testimony and the other evidence presented at trial. Petitioner testified he did not undergo injection or physical therapy because it was not recommended by his doctors. The Arbitrator notes that the records from MK show that injections and physical therapy were recommend numinous times, but Petitioner refused the treatment. Petitioner testified he did not return to work because his doctor had him off all work, but the medical records do not provide a medical basis to be off all work from February 2016 through February 2018. It was undisputed that Respondent continuously offered Petitioner sit-down work. The initial medical records from Dr. Patari indicate that Petitioner reported failing conservative care but later Dr. Patari amended his records that Petitioner did not undergo conservative care. The initial medical records from Midwest Express Clinic indicate that Petitioner injured his left knee on his way to work but later the Clinic amended the record, at Petitioner's request, to state he was injured at work. Petitioner testified he never received various letters sent to him but admits the letters were to his correct address. Petitioner claims to not have received notices sent to his attorney or being unaware an IME visit was changed by his attorney at his request.

The Arbitrator finds Petitioner did not meet his burden of proof to show that his current condition is related to the work injury of February 18, 2016. The Arbitrator finds that Petitioner suffered a left knee meniscal tear on February 18, 2016 which required MRI, meniscal repair, and post-surgical physical therapy. The Arbitrator finds that Petitioner reached maximum medical improvement and could return to work full duty as of four weeks following the August 26, 2016 surgery by February 16, 2018, the date Dr. Bare found Petitioner to be at MMI. The Arbitrator relies on the opinions of Dr. Levin and testimony of Dr. Bare. The Arbitrator disregards Petitioner's testimony on this issue as inconsistent and not credible.

With respect to issue "G", what were Petitioner earnings, the Arbitrator finds as follows:

Based upon testimony and records, Petitioner received payments for overtime work, and he received bonus pay. The issue before the Arbitrator is whether the overtime pay, and the bonus pay are included in his average weekly wage under Section 10 of the Act. Section 10 of the Act defines average weekly wage as: "the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last

day of the employee's last full pay period immediately preceding the date of his injury, illness or disablement excluding overtime, and bonus divided by 52." 820 ILCS 305/10. "The claimant in a workers' compensation proceeding has the burden of establishing his average weekly wage." *Arcelor Mittal Steel v. Illinois Workers' Comp. Comm'n,* 961 N.E.2d 807, 813 (Ill. App. Ct 1st Dist. 2011). "The determination of a claimant's average weekly wage is a question of fact..." Id.

Overtime

The Appellate Court has defined overtime as: "working time in excess of a minimum total set for a given period." Webster's Third New International Dictionary 1611 (1981). *Airborne Exp., Inc. v. Illinois Workers' Comp. Comm'n,* 372 Ill. App. 3d 549, 553, 865 N.E.2d 979, 983 (2007). In the Airborne Express case, the Court found that the claimant was not required to work overtime, rather he used his seniority to request it. Id. at 984. The Court stated: "This court has been consistent in its interpretation of the overtime exclusion in section 10 of the Act. Overtime includes those hours in excess of an employee's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment or which are not part of a set number of hours consistently worked each week." *Airborne Exp., Inc.* at 983–84. The Court held that overtime hours worked by the claimant should not be included in the average weekly wage calculation. Id. at 984-5.

The Appellate Court in Arcelor Mittal did include required overtime hours in the average weekly wage calculation. *Arcelor Mittal Steel* at 815. The Court found that the claimant's regular shift was 7 a.m. to 3 p.m., but on certain days he worked a 12-hour shift which was required, and that shift was noted on the weekly schedule submitted into evidence. Id. In that case, the claimant also worked unscheduled voluntary overtime hours, which the Court agreed were not included in the wage calculation. Id.

Applying the caselaw to the case at hand, Petitioner has not met his burden of proof as to what weeks were mandatory overtime. The testimony of Nick Lakatos, which the Arbitrator finds more credible on this issue, is that the overtime was often voluntary. While overtime was occasional mandatory, the time sheets would have reflected a work schedule of either 4 by 10 hours days or 5 by 10-hour days consistently. There is no consistency in the work hours as shown by RX 19 the timecard report. Petitioner bears the burden of proof, and petitioner had not met his burden.

Bonus Pay

The Appellate Court defined bonus pay "Bonus" is commonly defined as "something in addition to what is expected or strictly due." Webster's Third New International Dictionary 167 (1981). We note a distinction between incentive-based pay, which an employee receives in consideration for specific work performed as a matter of contractual right, and a bonus, which an employee receives for no consideration or in consideration of overall performance at the sole discretion of the employer." *Arcelor Mittal Steel v. Illinois Workers' Comp. Comm'n,* 2011 IL App (1st) 102180WC, ¶ 40, 961 N.E.2d 807, 815

The Commission recently decided a case with similar bonus pay at issue in Alvarado v. Menards 12 W.C. 27144, 19 I.W.C.C. 0187 (April 11, 2019). The employee had received payments from an Instant Profit Sharing plan (IPS), which were paid based upon the unit maintaining profitability based upon year end figures, and the bonus was paid as a percentage of profitability. Employees were eligible based upon number of hours worked.

"The Commission notes that documents describing the IPS program clearly show that it was discretionary, and that Menards reserved the right to amend or even cancel the program in whole or in part without notice and in its sole discretion. . . Furthermore, these documents explicitly show that Menards' intention to pay these benefits was not a guarantee, and that no contractually enforceable rights between Menards and its employees were created in the process. More importantly, the evidence shows that IPS payments were not tied to individual performance but were instead dependent upon the profitability of the unit in which a Team Member worked, assuming an employee met the requisite number of hours worked."

The Arbitrator in *Alvarado* had included the bonus pay based upon *Arcelor Mittal Steel v. Ill. Workers' Compensation Comm'n*, 961 N.E.2d 807, 356 Ill. Dec. 418 (1st Dist. 2011). The Commission distinguished that case from *Alvarado* because the "IPS payments were not tied to individual performance but were instead dependent upon the profitability of the unit in which a Team Member worked, assuming an employee met the requisite number of hours worked." *Alvarado.* In Arcelor Mittal Steel, the Appellate Court noted that "In this case, claimant received production bonuses in consideration for work performed pursuant to his collective bargaining agreement and not as an extra benefit provided by employer gratuitously." *Arcelor Mittal Steel* at 815. The Appellate Court further found that the production bonus was calculated based upon measure of volume and quality of steel produced, and the "Employer had no discretion and was obligated to pay the production bonuses if earned by its employees; the production bonuses were 'strictly due'." *Id.* Further, the Court found: "The fact that an employee who did not work on those days would not receive the production bonuses further supports the Commission's finding that the production bonuses were not a bonus as contemplated by section 10 of the Act, but rather received in consideration for work actually performed." *Id.*

Applying the caselaw to the case at hand, Petitioner has failed to meet his burden of proof that the revenue bonus plan in this case was in the nature of incentive-based pay and not a bonus as defined by the Act and relevant caselaw. The arbitrator declines to include the bonus pay as part of the average weekly wage.

With respect to issue "J", whether Respondent is liable for medical services, the Arbitrator finds as follows:

For the reasons set forth above, the Arbitrator finds that the Respondent is responsible for all treatment incurred through February 6, 2018, the date Dr. Bare found Petitioner to be at MMI. The Arbitrator notes that Respondent did not dispute the necessity or reasonableness of Petitioner's medical treatment except for the Adco Billing Solutions bills which was disputed based upon a utilization review. The Arbitrator finds the medical services provided through February 6, 2018 were necessary and reasonable to diagnose, treat, relieve or cure the effects of Petitioner's injury. As such, Respondent shall pay to Petitioner for the medical treatment incurred through February 6, 2018, pursuant to Section 8.2 of the Act and the Illinois Medical Fee Schedule, as outlined in Px 12 (Midwest Express Clinic), Px 13 (Premier Occupational Health), Px 14 (Presence Saint Joseph Medical Center), Px 15 (MK Orthopaedics), Px 16 (Adco Billing Solutions), Px 17 (The Center for Sports Orthopaedics), Px 19 (Adventist Glen Oaks Hospital), Px 21 (Athletico), and the treatment provided by Dr. Bare on 12/7/18 & 2/6/18 as provided in Px 23). The Arbitrator further finds Respondent is entitled to a credit for the medical bills paid by

Respondent or Petitioner's private group heath carrier and Respondent shall hold Petitioner harmless for any bills which Respondent claims a credit.

Respondent asserts that the treatment Petitioner received by Dr. Bare exceeded the doctor rule. Dr. Patari recommended Petitioner obtain a second opinion and Petitioner saw Dr. Bare pursuant to the recommendation of Dr. Patari. As such, the Arbitrator finds that Dr. Bare was within the chain of referrals.

With respect to issue "L", whether Petitioner is entitled to TTD and/or maintenance benefits, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner was entitled to TTD benefits from 2/23/2016 through 9/7/2016, the date Petitioner was offered sit-down work. In various medical records it was noted that Petitioner contacted the medical provider and requested certain restrictions be extended. The Arbitrator finds it a reasonable assumption that Petitioner contacted those doctors to avoid returning to work he otherwise would have been capable of performing. For an employee to be entitled to total disability benefits under the act he must prove he is "totally incapacitated from work by reason of the illness attending the injury." *Mt. Olive Coal Co. v. Industrial Comm'n*, 129 N.E. 103, 104 (Ill. 1920). Entitlement to TTD also ceases where a claimant fails or refuses to work within the restrictions, which the Respondent is willing and able to accommodate. *See, e.g., Kirk v. City International Lease Dept.*, 03WC 55382, 06 IWCC 0382 (2006).

Respondent claims it issued payments totaling $5,098.20. Petitioner disputed that amount and claimed Respondent paid $4,251.04. Between the initial hearing date on January 29, 2020 and the second date on February 13, 2020, Respondent determined that Petitioner did not cash checks in the amount of $849.70, and reissued the checks totaling $849.70. Counsel for Petitioner returned said checks to Respondent. The Arbitrator finds Respondent did issue the payments totaling $5,098.20 in temporary total disability; however, Petitioner has returned $849.70 to Respondent; therefore, the Arbitrator grants Respondent credit towards temporary total disability in the amount of $4,248.50 ($5,098.20 minus $849.70).

Petitioner claims to be entitled to due maintenance from 4/17/19 through date of hearing 1/28/20. Petitioner's job search consisted of contacting three employment agencies from April of 2019 through January of 2020. The Arbitrator finds that Petitioner's did not make a good faith attempt to find work. As such, Petitioner's claim for maintenance benefits are hereby denied.

With respect to issue "M", whether penalties or fees should be assessed, the Arbitrator finds as follows:

Petitioner has filed a claim for penalties under Sections 19(k) and 19(l) and attorney's fees pursuant to Section 16. "Section 19(k) of the Act provides in relevant part that a penalty may be imposed when there has been an unreasonable or vexatious delay in payment of compensation or when proceedings instituted by the employer are frivolous or for purposes of delay. Section 19(l) of the Act similarly provides for the imposition of a penalty when the employer 'without good and just cause' fails to pay or delays payment of TTD payments. Section 16 provides, in relevant part, that attorney fees may be awarded when the employer has engaged in unreasonable or vexatious delay, intentional underpayment, or frivolous defenses under section 19(k). The intent of these sections is to implement the Act's purpose to expedite the compensation of industrially

injured workers and penalize an employer who unreasonably, or in bad faith, delays or withholds compensation due an employee." *McMahan v. Indus. Comm'n*, 289 Ill. App. 3d 1090, 1093, 683 N.E.2d 460, 462–63 (1997), aff'd as modified, 183 Ill. 2d 499, 702 N.E.2d 545 (1998),(citations removed).

Section 19(k) has "a higher standard is required for section 19(k) penalties and section 16 attorney fees than for additional compensation under section 19(l)". *McMahan v. Indus. Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 553 (1998). It is not enough for the claimant to show that the employer failed or neglected to make payment or unreasonably delayed payment, instead Section 19(k) " intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose. This is apparent in the statute's use of the terms "vexatious," "intentional" and "merely frivolous." Section 16, which uses identical language, was intended to apply in the same circumstances." *McMahan v. Indus. Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 553 (1998).

"The section 19(l) penalty is in the nature of a late fee. Assessment of the penalty is mandatory "[i]f the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay. In determining whether an employer has "good and just cause" in failing to pay or delaying payment of benefits, the standard is reasonableness." *Mech. Devices v. Indus. Comm'n*, 344 Ill. App. 3d 752, 763, 800 N.E.2d 819, 829 (2003).

The Respondent showed payments were issued, and Petitioner agreed he received, temporary total disability through April 2016. Respondent presented evidence of payment of additional temporary total disability in the amount of $849.70, which Petitioner disputes was received. When Respondent attempted to re-issue the payment, as the check had not been cashed, the Petitioner returned said payment. Respondent also presented the evidence of the utilization review (RX 9).

The Arbitrator finds that Respondent's actions were reasonable and justified, considering Petitioner's refusal or non-cooperation with the scheduling of the Section 12 exam, refusal to return to work, refusal to attempt conservative treatment, and the opinion of Dr. Levin. As such, the petition for penalties and fees is denied.

With respect to issue "O", whether Petitioner is entitled to vocational services, the Arbitrator finds as follows:

Having found that Petitioner has failed to meet his burden of proof as to causal connection of his current condition, the Arbitrator further finds that Petitioner failed to meet his burden of proof as to entitlement for vocational benefits. Vocational benefits can be awarded under Section 8(a), under certain circumstances. The Appellate Court has outlines the factors to consider, which includes: "factors which we consider appropriate are 'the relative costs and benefits to be derived from the program, the employee's work-life expectancy, and his ability and motivation to undertake the program, [and] his prospects for recovering work capacity through medical rehabilitation or other means...Whether a rehabilitation program should be designed to restore claimant to his pre-injury earning capacity depends upon the particular circumstances." *Nat'l Tea Co. v. Indus. Comm'n*, 97 Ill. 2d 424, 433, 454 N.E.2d 672, 676 (1983).

Given the findings herein, including the finding that he has not proven his current condition is causally related to the injury, the Arbitrator finds that Petitioner has failed to meet his burden of proof that he is entitled to vocational benefits under Sec. 8a of the Act. The Arbitrator notes that Respondent offered Petitioner work within his capabilities which Petitioner refused or failed to discuss or advise his medical providers if he can perform sit down work. The Arbitrator further notes that Dr. Bare recommend Petitioner obtain an FCE and follow up with Dr. Patari regarding his work capabilities, which Petitioner failed to do.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC023493
Case Name	FLORES, CARLOS M JR v. PENGUISS CORPORATION DBA SERVPRO OF NORRIDGE/HARWOOD HEIGHTS
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0254
Number of Pages of Decision	30
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Jack Epstein
Respondent Attorney	Michael Baggot, Jigar Desai

DATE FILED: 5/27/2021

/s/ Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CARLOS M. FLORES,

Petitioner,

vs. NO: 18 WC 23493

IMPACT STAFFING and PENGUISS CORP.
d/b/a SERVPRO OF NORRIDGE/HARWOOD
HEIGHTS,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b) of the Act by the Respondent Servpro herein and notice given to all parties, the Commission, after considering the issues of employee-employer relationship, accident, causal connection, medical expenses, prospective medical, temporary total disability (TTD) benefits, and penalties and attorney's fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

The Commission is not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n*, 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A.O. Smith Corp. v. Indus. Comm'n*, 51 Ill. 2d 533, 536-37 (1972).

The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties in its entirety. The Commission modifies the Arbitrator's Decision with respect to the issue of the employee-employer relationship. The Commission finds that the preponderance of the evidence demonstrates that an employee-employer relationship existed between Petitioner and Respondent Impact Staffing, as the loaning employer, and Respondent Servpro, as the borrowing employer, on July 24, 2018 – the date of accident. The Commission further modifies the Arbitrator's Decision to state that both Respondents are jointly and severally liable to Petitioner for payment of worker's compensation benefits as awarded and detailed below pursuant to Section 1(a)4 of the Act.

Servpro stipulated at the arbitration hearing that an employee-employer relationship existed between Petitioner and Servpro on July 24, 2018. Impact Staffing conceded that it loaned Petitioner to Servpro to work as a borrowed employee from July 10 through July 20, 2018. However, Impact Staffing asserts that Petitioner's work injury occurred on July 24, 2018 and Impact Staffing was not a loaning employer on that date. Servpro argues that Impact Staffing was a loaning employer on July 24, 2018 and together they are jointly and severally liable to Petitioner for his work-related injury.

By its Brief, Impact Staffing references the Supreme Court case of *A.J. Johnson Paving Co. v. Indus. Comm'n*, 82 Ill. 2d 341 (1980) which provides the two-part analysis on loaning-borrowing employers. However, the Commission finds *A.J. Johnson Paving Co.* distinguishable from the case at bar. The primary issue in *A.J. Johnson Paving Co.* was whether the claimant was the employee of the borrowing employer, A.J. Johnson Paving Co., whereas the specific issue herein is whether Petitioner was the employee of the loaning employer, Impact Staffing, on July 24, 2018. The parties agreed that a loaning-borrowing relationship existed prior to the accident date. Respondent Servpro offered into evidence its Exhibit 5 which contained correspondence dated July 25, 2016 between Impact Staffing and Servpro's owner, Mike Chiodo. The letter confirmed the terms of the agreement between the parties including that Impact Staffing would provide temporary employees to Servpro for general labor. (RX5). The specific issue before the Commission is whether the relationship between Impact Staffing and Servpro ended as it pertained to Petitioner after July 20, 2018.

The Service Confirmation, admitted without objection, governed Respondents' relationship. (RX5). As to work injuries, the Service Confirmation stated, "If an Impact employee is injured while performing duties other than those described above or one of the prohibited duties described below, Client [Servpro] will be liable for and reimburse Impact for any costs directly associated to workers' compensation for the injured employee." (RX5). This agreement in essence follows the assignment of liability described by the Act. Section 1(a)4 of the Act states:

> Where an employer operating under and subject to the provisions of this Act loans an employee to another such employer and such loaned employee sustains a compensable accidental injury in the employment of such borrowing employer and where such borrowing employer does not provide or pay the benefits or payments due such injured employee, such loaning employer is liable to provide or pay all benefits or payments due such employee under this Act and as to

> such employee the liability of such loaning and borrowing employers is joint and several, provided that such loaning employer is in the absence of agreement to the contrary entitled to receive from such borrowing employer full reimbursement for all sums paid or incurred pursuant to this paragraph together with reasonable attorneys' fees and expenses in any hearings before the Illinois Workers' Compensation Commission or in any action to secure such reimbursement. *820 ILCS 305/1(a)4.*

Thus, as *A.J. Johnson Paving Co.* found: "[T]he borrowing employer is primarily liable and the loaning employer is secondarily liable by virtue of section 1(a)(4)." 82 Ill. 2d 341, 351 (1980).

The Commission finds no indication in the record that the agreement had been terminated on July 24, 2018 or at any time; and, as noted by the Arbitrator, there was no dispute that Impact Staffing loaned employees to Servpro before and on the accident date of July 24, 2018. This is evidenced by the fact that other Impact Staffing employees continued to work for Servpro the week of and on the date of Petitioner's accident. The Commission therefore finds that both Respondents continued to operate in their loaning and borrowing capacity through July 24, 2018.

With respect to the relationship between Petitioner and the Respondents, the facts of this claim do not demonstrate that Petitioner had been terminated by Impact Staffing after July 20, 2018. Petitioner's Employment Application with Impact Staffing indicated that Petitioner was an at-will employee subject to termination at any time. "[T]he Employer may discharge the Employee at any time with or without cause." (RX4). Notwithstanding, Petitioner and Mr. Garcia testified that they had no indication that Petitioner was not authorized to work for Impact Staffing for Servpro. In fact, Macario Ortega, a dispatcher for Impact Staffing, attempted to call Petitioner so that he could work on July 24, 2018 but was unable to reach him. (T.202-203). There is also no evidence of any contract or other written agreement indicating that Petitioner would cease to work for Impact Staffing and its clients after July 20, 2018.

Impact Staffing argues that Petitioner was not authorized to work on July 24, 2018. The Commission finds that argument does not address whether Petitioner was an employee of Impact Staffing on July 24, 2018. The Arbitrator relied on the Service Confirmation, in part, to find that Petitioner was not Impact Staffing's employee because Petitioner was not authorized to work on July 24, 2018. With respect to authorization, the terms of the Service Confirmation between Impact Staffing and Servpro stated: "Client [Servpro] agrees that it may not hire an Impact employee without written authorization from a Principle of Impact Staffing, LLC . . ." (RX5). There is no evidence that Impact Staffing gave written authorization allowing Servpro to hire Petitioner directly, and the Service Confirmation fails to provide guidance as to the procedure for authorization to work on any given day.

What is evident from the record is that Petitioner consistently testified that he relied on Mr. Garcia to inform him whether he was to return to work the following day or the following week if the present week had ended. The facts support Petitioner's testimony because it was Servpro, through Mike Chiodo or Mr. Garcia, who would contact Impact Staffing regarding obtaining

employees for work. Mr. Garcia credibly testified in this regard. Mr. Ortega testified similarly regarding daily authorizations.

Based upon the totality of the evidence, the Commission finds that on July 24, 2018, an employee-employer relationship existed between Petitioner and Respondents Impact Staffing and Servpro and that Petitioner's injury arose out of and in the course of his employment with both Impact Staffing and Servpro. There was no evidence that the loaning-borrowing situation had ceased between Respondents. There was also no evidence that Petitioner had been discharged or terminated by Impact Staffing on or before July 24, 2018. Both Petitioner and Mr. Garcia testified that they had no indication that Petitioner was not authorized to continue working the week of the accident. Mr. Garcia's unrebutted testimony was that he contacted Impact Staffing on July 20, 2018 to discuss needing Petitioner the following week. In fact, Mr. Ortega had wanted Petitioner to work on July 24 but for an issue with Petitioner's cell phone. On the morning of July 24, 2018, there was no dispute that Mr. Ortega and Mr. Garcia spoke regarding Petitioner's presence at the job site, although there is no way to confirm what was actually said during that phone conversation. Finally, despite all the testimony regarding timesheets, there was no evidence of any formality regarding their completion. The Commission finds that any alleged lack of authorization, communication or paperwork between Respondents on July 24, 2018 did not sever Petitioner's employee status with Impact Staffing.

Therefore, the Commission modifies the Arbitrator's Decision with respect to the employee-employer relationship as explained herein. The Commission affirms and adopts the Arbitrator's Decision as to accident, causal connection, prospective treatment, and Section 19(l) penalties. The Commission further modifies the Decision to state that both Respondents are jointly and severally liable for the awarded medical bills, TTD benefits, Section 19(k) penalties, and Section 16 attorney's fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed July 20, 2020, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondents Impact Staffing and Penguiss Corp. d/b/a Servpro of Norridge/Harwood Heights are jointly and severally liable for payment of the reasonable, necessary, and causally related medical bills totaling $119,780.87, and as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondents Impact Staffing and Penguiss Corp. d/b/a Servpro of Norridge/Harwood Heights are jointly and severally liable for payment of temporary total disability benefits to Petitioner, commencing July 25, 2018 through February 27, 2019, at the rate of $319.00 per week for 31 1/7 weeks as provided in Section 8(b) of the Act. This Order clarifies the discrepancy found in the Arbitrator's Decision as to the TTD period and number of weeks.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Penguiss Corp. d/b/a Servpro of Norridge/Harwood Heights is entitled to a credit of $8,293.99 for TTD benefits previously paid to Petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is not entitled to penalties pursuant to Section 19(l) of the Act. The Commission affirms the Arbitrator's Decision as to Section 19(l) penalties.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondents Impact Staffing and Penguiss Corp. d/b/a Servpro of Norridge/Harwood Heights are jointly and severally liable for payment to Petitioner with respect to penalties pursuant to Section 19(k) of the Act equal to 50% of all TTD benefits owed from July 25, 2018 through February 27, 2019, or 31 1/7 weeks, as well as 50% of the outstanding unpaid medical bills, adjusted in accord with the medical fee schedule provided in Section 8.2 of the Act. Respondents Impact Staffing and Penguiss Corp. d/b/a Servpro of Norridge/Harwood Heights are also jointly and severally liable to Petitioner for payment of attorney's fees to the extent of 20% of unpaid TTD benefits and unpaid medical bills pursuant to Section 16 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondents Impact Staffing and Penguiss Corp. d/b/a Servpro of Norridge/Harwood Heights pay to Petitioner interest under §19(n) of the Act, if any.

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

Bond for the removal of this cause to the Circuit Court by Respondents Impact Staffing and Penguiss Corp. d/b/a Servpro of Norridge/Harwood Heights 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 the Circuit Court.

MAY 27, 2021

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

CAH/pm
O: 5/20/21
052

/s/ *Barbara N. Flores*
Barbara N. Flores

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
SECOND CORRECTED

FLORES, CARLOS M Case# **18WC023493**

Employee/Petitioner

IMPACT STAFFING AND PENGUISS CORP D/B/A SERVPRO OF NORRIDGE/HARWOOD HEIGHTS

Employer/Respondent

On 7/20/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.14% 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:

1072 EPSTEIN LAW FIRM
JACK EPSTEIN
4346 W 26TH ST SUITE 2000
CHICAGO, IL 60623

0507 RUSIN & MACIOROWSKI LTD
JIGAR S DESAI
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

4234 RIPES NELSON BAGGOT KALOBRATSO
MICHAEL R BAGGOT
650 E DEVON AVE SUITE 110
ITASCA, IL 60143

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
***2ND CORRECTED* ARBITRATION DECISION**

Carlos M. Flores
Employee/Petitioner
v.
Impact Staffing and Penguiss Corp. d/b/a Servpro of Norridge/Harwood Heights
Employer/Respondent

Case # **18 WC 23493**

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 Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **February 27, 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 the date of accident, 7/24/2018, Respondents ***were*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent Servpro. An employee-employer relationship ***did not*** exist between Petitioner and Respondent Impact Staffing.

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

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

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

In the year preceding the injury, Petitioner earned $ **$2,166.75**; the average weekly wage was **$361.13**

On the date of accident, Petitioner was **35** years of age, ***married*** with **2** dependent children.

Respondent Servpro ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services through January 29, 2019.

Respondent Servpro shall be given a credit of **$8,293.99** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$8,293.99.**

ORDER

The Arbitrator finds that Petitioner was an employee of Respondent Servpro only on July 24, 2018. Petitioner failed to prove that Respondent Impact Staffing was a loaning employer at the time of Petitioner's work accident on July 24, 2018.

The Arbitrator finds Petitioner is entitled to TTD benefits from July 24, 2018 to February 27, 2019, which represents a period of 31 & 2/7 weeks, at a rate of $319.00 per week.

The Arbitrator finds that Respondent Servpro is liable for the payment of the outstanding medical bills incurred through February 27, 2019, pursuant to §8(a) of the Act.

The Arbitrator finds that Petitioner failed to prove that he is entitled to penalties and fees pursuant to §16, §19(k), or §19(l) against Respondent Impact Staffing.

The Arbitrator finds that Respondent Servpro is entitled to a credit of $8,293.99 for TTD benefits paid.

The Arbitrator found that Respondent Servpro did comply with §19(l) of the Act and therefore finds that Petitioner failed to prove that he is entitled to penalties pursuant to §19(l).

The Arbitrator did find that Respondent Servpro violated §19(k) of the Act and shall pay Petitioner penalties pursuant to §19(k) of the Act equal to 50% of all TTD benefits owed from January 24, 2018 through February 26, 2019, 31 & 2/7 weeks. In addition, Respondent Servpro shall pay Petitioner additional penalties pursuant to§19(k) of the Act equal to 50% the amount of outstanding unpaid medical bills, adjusted in accord with the medical fee schedule provided in §8.2 of the Act. Also, Respondent Servpro shall pay attorney's fees to the extent of 20% of unpaid TTD benefits and unpaid medical bills otherwise awarded pursuant to §16 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

July 17, 2020
Date

ICArbDec19(b)

JUL 20 2020

CARLOS M. FLORES,
vs.
PENGUISS CORPORATION d/b/a SERVPRO of NORRIDGE/HARWOOD HEIGHTS and IMPACT STAFFING

18 WC 23493

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were:

PENGUISS CORPORATION d/b/a SERVPRO of NORRIDGE/HARWOOD HEIGHTS: ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***J:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***K:*** What temporary benefits are in dispute? TTD; ***M:*** Should penalties be imposed upon Respondent?

IMPACT STAFFING: ***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?; ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***J:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***K:*** What temporary benefits are in dispute? TTD; ***M:*** Should penalties be imposed upon Respondent?

Petitioner testified through a Spanish language translator.

FINDINGS OF FACT

Petitioner has been employed by Impact Staffing since May 2018. Impact is a temporary agency providing day laborers and temporary staffing located at 4324 N. Elston Avenue, Chicago. Petitioner was sent by Impact to "Hooks" Company (Mighty Hook) upon completion of an application. He made $12.00/hour on that job. An Impact employee gave him a map with directions find the location and the contact information of a supervisor at the worksite. Petitioner received instructions from Impact that the supervisor from Hooks would inform Petitioner if he was to work the following day.

Petitioner was instructed to work with Hooks until he was told not to return by his Hooks supervisor. Petitioner testified that during his employment with Hooks he did not call Impact to confirm he was return the following day or the following week. Petitioner

testified that the only communication he had with Impact regarding his employment with Hooks was picking up his check each Friday.

After 3 or 4 weeks the Hooks job ended. Petitioner returned to Impact and was offered demolition work with Servpro. On cross-examination Petitioner denied that he was told that the demolition job was intended to be clean up only and reiterated that someone from Impact told him it was a demolition job. Impact personnel gave Petitioner a map with directions on how to get to Servpro's office and additional contact information. Petitioner testified he did not complete any employment applications for Servpro, nor did he receive any paychecks or tax documents from Servpro.

Petitioner testified that he understood that as long as Servpro continued to offer him work, he was to continue to work as an Impact employee for Servpro. He was not required to check in with Impact and was only required to come to Impact to pick up his check. Petitioner testified that he was paid by Impact for all of the prior weeks before the July 24, 2018 accident date for his work at Servpro.

On July 10, 2018 Petitioner went to Servpro's office. The owner and 2 employees soon arrived. The employees were wearing Servpro t-shirts. He never received a Servpro shirt. Petitioner was issued latex gloves and goggles and was taken to a jobsite in a company car where he performed demolition work. At the end of the day, the Servpro supervisor instructed him to return to the jobsite the next day. Petitioner did not contact Impact because Impact personnel told him that if Servpro had work for him, Petitioner was to continue working.

Petitioner testified that he continued to work for Servpro at several other locations and at which all he performed demolition. Demolition involved knocking down walls, ceilings, breaking furniture, and putting all of these pieces in garbage bags. The tools for demolition work are a hammer, a 3 to 6-foot metal bar weighing about 30 lbs., a sledgehammer, and a shovel. The garbage bags weigh approximately 100 lbs. when full.

Petitioner also testified that as with his employment with Hooks, Petitioner was to speak with a Servpro supervisor at the end of the day to determine if he should return the following day. During the week of July 16 – July 20, more employees, Sergio Giron and Cesar Ortega, from Impact joined the Servpro demolition work.

On July 20, 2018, Petitioner had a conversation with the Servpro's supervisor "Marcos" Garcia. Petitioner asked Mr. Garcia if he should return Monday to work. Mr. Garcia said yes. After that conversation, Petitioner went to Impact to pick up his check.

Petitioner talk with anyone at Impact about his schedule. No one from Impact told him that he should not return the following Monday to Servpro. Petitioner also testified that nothing changed in the way that was to continue to work for Servpro and that he did not have to ask permission from Impact to return to Servpro.

Over the weekend of July 21, 2018, Petitioner contacted his Servpro supervisor, Mr. Garcia, to inform him that he could not work Monday due to a personal problem. Petitioner testified that Mr. Garcia responded, "No problem, can you come Tuesday?" Petitioner said, "Yes." Petitioner did not contact Impact about taking Monday off. Petitioner testified that on Monday, July 23, he had a conversation with Mr. Garcia via text message regarding the address where Petitioner was to report to work the following day. Petitioner testified that Mr. Garcia informed him of the location, which was different from the Friday work site.

On July 24, 2018 Petitioner arrived at job site at 8:00 a.m. Mr. Garcia arrived at 8:30. There were two other Impact workers also present. Petitioner testified that at around 9:00 or 9:30 Mr. Garcia called Impact and informed the Impact representative that Petitioner was on the job site along with the other Impact workers. Petitioner admitted that he knew little English but heard his and the others' names. He only heard Mr. Garcia's part of the conversation. He testified that Mr. Garcia told the Impact representative that there were three workers on the job. Mr. Garcia did not say anything or otherwise indicate that Petitioner was not authorized to work that day. After that Petitioner began working.

Petitioner and the other Impact workers were demolishing a basement. At about 12:30 p.m., while Mr. Garcia was on a lunch break off site, Petitioner was working at demolishing a closet that had a glass window. Petitioner tried breaking it with a metal bar. The first time the glass did not break completely. The second time Petitioner used all his strength and his hand went through the glass, cutting his wrist which then started bleeding a lot.

The other Impact workers called 911. Petitioner was taken by ambulance to Gottlieb Memorial Hospital with a history of injury to his right wrist (PX #2). Petitioner had a 13 cm laceration in his right volar surface area. An X-ray of the right wrist confirmed a 5 mm metallic foreign body in the proximal right forearm. Petitioner was diagnosed with extensor tendon laceration of his right wrist. He was told he needed surgery and was transferred to Loyola University Medical Center (Loyola).

Petitioner was then transferred to Loyola and was admitted through July 26, 2018 (PX #3). Petitioner reported 10/10 right hand and wrist pain. He reported that a sheet

of glass fell onto his right wrist while at work. Petitioner reported he was working on a demolition project in the basement. Petitioner denied any prior issues with his right hand or wrist.

Orthopedic surgeon Dr. Sameer Puri performed surgery on July 25. Dr. Puri performed a right medial nerve repair, ulnar nerve repair, flexor carpi radialis repair, palmaris longus repair, flexor carpi ulnaris repair, flexor digitorum profundus repair to the index finger, flexor digitorum profundus repair to the middle finger, flexor digitorum superficialis repairs to the index and middle finger, flexor digitorum superficialis repair of the ring and small fingers, and repair of the right flexor pollicis longus.

Petitioner followed up with Dr. Puri on August 8, 2018. Petitioner reported doing well since his surgery. Petitioner's pain was well controlled. Petitioner was wearing his hand splint. Petitioner's wounds were noted to be healing. Petitioner's tendons appeared to be intact. Petitioner had good capillary refill. Dr. Puri recommended wearing a dorsal blocking splint and physical therapy. Petitioner was placed off of work and told to follow up in 2 weeks.

Petitioner began physical therapy at Loyola August 20, 2018. Petitioner presented with impairments in range of motion, strength, pain, and sensation. Treatment included therapeutic exercises. Petitioner's care plan was for two times a week for 12 weeks. Petitioner continued his sessions on August 24, 2018.

Petitioner was seen again on August 22, 2018 by Dr. Puri. Petitioner reported that he was doing well. Dr. Puri was unable to get Petitioner to actively fire all of the tendons in his fingers. Petitioner reported that he was in therapy, which he was also undergoing at Loyola. Petitioner was given a refill of his pain medication and advised to follow up in 4 weeks. Petitioner was given work restrictions of no use of the right arm. Dr. Puri expected the restriction to last 6 to 9 months.

Petitioner returned to Loyola for physical therapy on August 28, 2018. Petitioner returned on September 4, 6, 11, 14, 18, and 25, 2018. On September 26, 2018 Petitioner returned for a follow-up with Dr. Puri. Petitioner was noted to be doing very well. Petitioner could fire his flexor tendons, but without full extension. Petitioner had not yet had all of his sensation returned to his five fingers. Dr. Puri recommended ongoing therapy. Petitioner was advised to follow up in 4 to 6 weeks.

Petitioner returned to Dr. Puri November 16, 2018. He reported improvement in therapy, but still had numbness in his fingertips. Petitioner had full range of motion with

no sensation to light touch in his index, middle, ring, or small fingers. Petitioner demonstrated good capillary refill. Dr. Puri noted Petitioner was doing well. Dr. Puri specifically indicated "there are no restrictions at this time." He recommended follow-up in 6 weeks. In a January 16, 2019 addendum of the November 16 note Dr. Puri clarified that Petitioner was unable to use his right hand at work.

Dr. Puri wrote work status notes on January 4 and 16, 2019, restricting Petitioner from any use of the right arm for the next 3 to 4 months. A follow-up evaluation in approximately 6 weeks was recommended.

Petitioner testified that he has very little to no sensation in his fingers and hand. His fingers are unable to touch the palm of his hand. Petitioner has a scar that is circumferential from the back side of the wrist over the entire palmar side of the wrist, and then to the back to the backside. The scar is almost a complete circumference of the wrist. Petitioner also testified that he cannot use a hammer, a bar, use a shovel, or carry debris.

Petitioner displayed his right wrist and forearm at the trial. The Arbitrator observed a nearly circumferential scar from the backside of the wrist over the entire palmar side of the wrist and then back to the backside. Almost a complete circumference of the wrist. Approximately an inch or so proximal to the palm of the hand and the center process of the thumb. Petitioner testified this was the scar from his injury.

On cross-examination Petitioner confirmed that he never received paychecks or tax documents from Servpro. The only application he filled out was with Impact Staffing. When he was working on the job, whether for the Hooks or Servpro, he had to deliver his completed timesheets to Impact. The timesheets would have his name printed on them. Each employee had their own timesheet.

On further cross-examination Petitioner testified that he only had the text message from the date of the accident, Exhibit #12. He further testified that he did not know of any conversations or content between Impact and Servpro about other Impact employees working at Servpro.

Respondent Impact Staffing (Impact) called Macario Ortega to testify. Mr. Ortega is a dispatcher for Impact. He has worked for Impact for 4 years as a dispatcher. He would set people up to work for Impact's clients and would talk with the clients beforehand about what their needs were regarding who was necessary to work. He is familiar with Petitioner Carlos Flores because he worked with Impact.

Mr. Ortega testified that the first time Petitioner worked for Impact Staffing, he worked at Mighty Hook. Mighty Hook was a job where employees go daily. It is a long-term or permanent position, meaning that until impact receives notification that employees are no longer needed. Petitioner worked at Mighty Hook until the work ran out sometime in July. Petitioner was then placed at Servpro.

Mr. Ortega described Servpro as a daily client. He would contact Servpro daily to determine whether or not employees were needed the following day; sometimes they did and sometimes they did not need employees. Mr. Ortega would contact Mike Chiodo, the owner of Servpro, about whether or not employees were needed the following day. Sometimes he would speak with Marco at Servpro. Before Impact Staffing would send any employees to Servpro, he would contact either Mike or Marco to confirm who was needed.

Impact Staffing tracks its employee's hours every day by contacting the employee and by contacting the client to confirm the hours on a daily basis. Impact sends a weekly timesheet to its clients to keep track of employees. This is how it worked with Servpro. Impact would send a list of employees for that week, and Servpro would keep track of the number of hours. Impact Staffing would give the employees a copy of the timesheet at the start of the job to give to Servpro to track the hours.

The Friday before Petitioner's accident, July 20, 2018, Mr. Ortega believes that no employees were requested to work on the 23rd. On July 23, Mike Chiodo contacted Impact Staffing and requested 2 employees, but Impact did not have any employees available. Mr. Chiodo said he would call back later that day to determine whether or not Servpro would need employees on Tuesday. Mr. Chiodo called Impact back later on July 23 and said that he needed 2 employees the following day. Mr. Ortega assigned 2 employees to work at Servpro on July 24, 2018: Cesar Devilla and Sergio Giron.

Mr. Ortega testified he tried to contact Petitioner, but the phone number they had was disconnected. Mr. Ortega confirmed that Mike Chiodo stated that only 2 employees were needed on July 24 to work for Servpro.

Mr. Ortega first became aware that Petitioner was on the jobsite on July 24, 2018, when he called Marco that day to find out about Petitioner's hours for the previous week. When Mr. Ortega said that Marco said he would ask Petitioner directly because he was standing next to him. When Mr. Ortega found out that Petitioner was on the job site, he told Marco that Petitioner was not scheduled to work that day and was not supposed to be there.

Mr. Ortega identified Servpro Exhibit #8, which was the timesheet for the work performed during the week of July 23. He testified that there were only 2 typed names on that timesheet: Cesar Devilla and Sergio Giron. They were the only people assigned to work at Servpro on the date of the accident. Mr. Ortega testified that despite Petitioner's testimony that his phone was not working, and the fact that he actually received a text message from Marcos Garcia, that Petitioner's phone was actually working, and he tried to contact him not to return to work. Mr. Ortega testified that on July 23, he attempted to contact Petitioner directly about working at Servpro, however Petitioner's phone was disconnected.

Marco Garcia was called as a witness by Respondent Servpro. He testified that he is employed by Servpro as a supervisor. He testified that he supervises the work of Impact employees on work sites, who included Petitioner. Mr. Garcia testified that the owner of Servpro, Mike Chido, would call Impact Staffing for staffing needs. That is how Petitioner came to work for Servpro. He further testified that, to his knowledge, Servpro has gotten employees from Impact for 3 to 4 years.

Mr. Garcia testified that Servpro's business is restoration from fire, water, mold mitigation, and clean up. He testified that the work included demolition, and that Impact Staffing was aware of the demolition work. He knew that Impact was aware of the demolition because they sent their employees with work gloves.

Mr. Garcia testified that there was demolition and clean-up work from July 10 to July 24, 2018. He testified that Mr. Giron and Petitioner were performing the same kind of work, and that Mr. Giron worked for Servpro through Impact the week of July 18, 2018, as well as July 24 through July 27, 2018. Impact never contacted him to say that Mr. Giron was not authorized to work for Servpro.

Mr. Garcia testified that Petitioner started working for Servpro on July 10, 2018. Petitioner worked on July 10, 11, and 13 during the week ending July 15, 2018. He testified that the work that week was a fire job, meaning demolition and clean up. He testified that he spoke with Impact on July 13 and told them that Petitioner would return for to work for Servpro the following week.

Mr. Garcia testified that Petitioner and two other individuals from Impact Staffing worked for Servpro on July 18, 19, and 20. The work that week was the same as the prior week, demolition and clean up. The other individuals from Impact were Sergio Giron and Carlos Ortega.

Mr. Garcia testified that he spoke with Petitioner on July 20, 2018 regarding coming back to work the next week at the same location. He testified that he told Petitioner that there was work for him the following week. Mr. Garcia had the same conversation with Sergio Giron. Mr. Garcia testified that at the end of the day on July 20 he spoke with Impact and requested that Petitioner came back to work the following week. Mr. Garcia testified that no one at Impact ever contacted him to say that Petitioner was not authorized to work for Servpro between July 20, 2018 and Tuesday July 24, 2018.

Mr. Garcia testified that he called Impact Staffing on the accident date, July 24, and told them that Petitioner was at the job site and to confirm he would be working for Servpro. He stated that Impact told him "fine" and did not raise any objections or indication that Petitioner was not authorized to work. He did not recall who at Impact he talked to. Further, Impact did not raise any objections to the other 2 individuals, Sergio Giron and Cesar Davila, working that day.

Mr. Garcia testified that on previous occasions he had contacted Impact employees directly via phone, text, or e-mail to confirm they are coming to work. He testified that Impact never denied that they had provided authorization for their employees to work for Servpro. Servpro never directly hired any borrowed employee from Impact. He had no knowledge of whether Servpro paid Petitioner directly for any of his work.

Mr. Garcia testified that he did not always have the timesheet listing all of the authorized employees at the start of the week. He explained that sometimes the workers brought the timesheets and sometimes the timesheets are faxed to Servpro. He testified that timesheets would not be sent by Impact at the start of the week or even after the second day of work. He testified that on July 24, 2018 he did not have a timesheet with just 2 names typed in.

Mr. Garcia testified that he was on break when Petitioner was injured. He subsequently called Impact to report the injury. He testified he could not recall what that person at Impact said in response.

On cross-examination by Impact Staffing, Mr. Garcia testified that he or the owner of the company, Mike Chiodo, would call Impact Staffing to get employees. He testified that Mr. Chiodo called Impact Staffing before July 10, 2018 requesting an employee. He further explained that either he or Mr. Chiodo would call Impact to confirm that the employee is going to work the next day. Typically, Impact called Mr. Garcia. Once it was confirmed that it was okay for Petitioner to work, then Mr. Garcia would let Petitioner know it was okay to come back to work.

Mr. Garcia testified that nobody worked on Monday, July 23, because Servpro did not need any Impact employees that day. He testified that on July 20 he had a conversation with someone at Impact who requested the same employees that had been coming to work. He testified that both he and Mr. Chiodo made the phone call.

Mr. Garcia testified that he had on other occasions contacted Impact employees directly by telephone or text to confirm if they were coming to work. He also testified that Impact had never denied authorization for Impact works to work with Servpro and Servpro never directly hired any Impact employees in the past.

Mr. Garcia testified that he did not always have the timesheet outlining all of the authorized employees at the start of the week. He testified that sometimes the workers bring the timesheets and sometimes the timesheets are faxed to Servpro. Mr. Garcia testified that Impact would not always send the timesheet to Servpro on Monday and it was mid-week before a sheet would be sent. He testified that, on July 24, 2018, he did not have a timesheet with just two names typed in.

Petitioner was examined pursuant to §12 of the Act by orthopedic surgeon Dr. Kevin Walsh at the request of Servpro on January 29, 2019. His report, Servpro Exhibit #1, was entered into evidence without objection. Dr. Walsh examined Petitioner with a Spanish language translator. In addition to the clinical examination Dr. Walsh reviewed petitioner's medical records from Gottlieb Memorial Hospital and Loyola University Medical Center (Loyola), which included the records of Dr. Puri. Petitioner testified that the examination listed about 10 minutes.

Petitioner gave a history of his work accident on July 24, 2018, when a piece of glass cut his right forearm. Dr. Walsh noted Petitioner's pain diagram, indicating Petitioner's complaints of pins and needles, specifically the volar aspect of the index through the 5th digit and the volar aspect of the hand. Petitioner also reported aching in the volar and dorsal aspects of his forearm, the volar aspect of the arm from shoulder to elbow, and the posterior aspect of the left shoulder, which Petitioner attributed to the injury. Petitioner complained of 10/10 pain in his right hand, 7/10 neck pain, and 8/10 low back pain. Petitioner also complained of numbness in his right hand and pain in his elbow.

Dr. Walsh noted the clinical findings at Loyola of right-hand pronation and supination. Petitioner had no 2-point discrimination of the index, middle, ring, and 5th digits. There was no flexion of the thumb IP joint or of the IF or MIF, PIP or DIP joints. Petitioner also had decreased sensation and motor function. Dr. Puri's surgical findings included complete lacerations of the flexor carpi radialis, palmaris longus, flexor

digitorum of the index and middle digits, digitorum superficialis of the index, middle, ring, and small digits. There was also an 80% partial laceration of the flexor carpi ulnaris, a complete laceration of the median nerve and partial laceration of the ulnar nerve. The flexor ulnaris and ulnar nerve were also cut.

On right-hand examination Dr. Walsh noted laceration and surgical scarring. He noted that there are no signs of complex regional pain syndrome or reflex sympathetic dystrophy. Petitioner reported lack of sensation index, long, ring, and 5th digits. He denied distinguishing pinprick from the light touch over those same areas, but had intact sensation in the thumb. Grip strength was only 3/5. Petitioner had difficulty making a full fist and could only move his fingertips within 3 cm of a palmer crease, although passive motion was better. Dr. Walsh found no muscle atrophy. Dorsiflexion was also diminished.

Dr. Walsh noted that Petitioner clearly experienced an injury to his right hand/wrist as a result of the work accident. He felt Petitioner's treatment to date was reasonable and necessary. He noted that the tendon repairs were successful but that there was no evidence in Petitioner's medical records to indicate the nerve repair was not successful. Petitioner reported a lack of full sensation in his hand. Dr. Walsh did acknowledge that after 6 months Petitioner's sensation had not returned and noted that it may take time for sensation to return. Dr. Walsh noted that it was not unexpected that return of sensation would take longer, as the nerve grows back along the axon to reinnervate the hand. However, he concluded that, more likely than not, Petitioner was at MMI. He advised Petitioner to continue with an exercise program.

Dr. Walsh noted Dr. Puri had released Petitioner at one time without any restrictions. Dr. Walsh noted that Petitioner's tendon repairs had healed and that his nerve repairs were more likely not functioning. He noted that Petitioner had not yet regained full sensation to his hand would continue to improve. He opined that it was reasonable to allow Petitioner to attempt to return to work without any formal restrictions because further work restrictions were not a benefit in terms of function.

Dr. Walsh also performed an AMA Impairment Rating, in accord with the 6th Edition of the Guide. Dr. Walsh found a 27% Impairment of the Upper Extremity.

Petitioner testified that he has current complaints of "a lot of pain. I don't feel my hand. My whole arm bothers me." Petitioner further explained that he does not have sensation in his finger or his hand. At trial Petitioner's attorney touched Petitioner's hand and Petitioner testified that he could not feel it. Petitioner was then requested to make as much of a fist as he could, which was described by his attorney as none of the fingers being able to touch the palm of his hand, with about 3 inches between the fingers and the palm.

Petitioner testified that he was not able to use a hammer or a steel bar, was not able to grab a bag of garbage, was not able to lift or carry debris, and was not able to use a shovel.

Upon viewing of the initial laceration scar on Petitioner's right wrist, the Arbitrator observed, "...a nearly circumferential scar from the back side of the wrist over the entire palmer side of the wrist and then back to the back side. Almost a complete circumference of the wrist. Approximately an inch or so proximal to the palm of the hand and the thenar process of the thumb." Petitioner testified that he also had a surgical scar on his hand, but no further description was entered into evidence.

CONCLUSIONS OF LAW

B: Was there an employee-employer relationship?

It was stipulated that an employee-employer relationship existed between Petitioner and Servpro on July 24, 2018 (ArbX #1).

There is no dispute that Impact Staffing provided loaned employees to Servpro before and on the date of the accident, July 24, 2018. The witnesses called by Impact and Servpro confirmed the procedure for loaning an Impact employee to Servpro. Before Impact would send any employee to work at Servpro, the parties would confirm Servpro's needs for that day or the next day and whether Impact could fulfill those needs. There is no dispute that the Petitioner worked as a borrowed employee for Servpro for 2 weeks prior to the July 24 accident. There is no dispute the during these 2 weeks Servpro and Impact communicated daily regarding assigning borrowed employees to Servpro, including Petitioner.

However, on the date of the accident, there was no communication between Servpro and Impact regarding assigning the Petitioner to work for Servpro before Petitioner showed up at the worksite. Macario Ortega of Impact Staffing testified that on July 23, 2018 Mike Chiodo, the owner of Servpro, contacted Impact and requested 2 employees for work that day. Mr. Ortega advised Mr. Chiodo that Impact could not provide the requested employees that day. Mr. Chiodo called Impact back later on July 23 and requested 2 employees to work for Servpro the following day, July 24. Mr. Ortega testified that he did in fact assign 2 employees to work for Servpro on July 24: Cesar Davila and Sergio Giron. Petitioner was not assigned by Impact to work for Servpro on July 24. Mr. Ortega testified that he was not able to reach the Petitioner to ask him to work on July 24, 2018, because Petitioner's phone disconnected. Petitioner's testimony corroborated Mr. Ortega's testimony that Petitioner's phone was not working on July 24, 2018. Further, there is no dispute that Petitioner was contacted by Servpro's employee, Marco Garcia, to work on July 24.

Petitioner was a direct employee of Servpro and not a borrowed employee on July 24, 2018. Respondent Servpro presented the testimony of Marco Garcia, it's employee. Mr. Garcia testified that when Petitioner showed up at the worksite he had a telephone conversation with "Impact Staffing." Mr. Garcia did not identify the person whom he conversed with at Impact. Mr. Garcia stated that "Impact" authorized Petitioner to work that day, July 24. There was no objection to the hearsay nature of Mr. Garcia's testimony. There was no evidence that whomever Mr. Garcia spoke with was in a position at Impact to authorize Petitioner's work. Even so, Petitioner proceeded to work for Servpro up to the point where he was injured.

Macario Ortega testified for Impact Staffing. He testified that he had a telephone conversation with Marco Garcia on July 24, 2018 at which time he learned Petitioner was at the job site that Impact had previously assigned to other employees. Mr. Ortega testified that Petitioner was not assigned or authorized by Impact to work for Servpro on July 24. It is clear that Mr. Garcia, on behalf of Servpro, authorized Petitioner to work outside of the terms of the Service Agreement with Impact Staffing (Servpro X #5).

Mr. Ortega's unrebutted testimony was that he spoke with Mike Chiodo on July 23 regarding hiring two employees for July 24 work for Servpro. Mr. Ortega sent two Impact Staffing employees to work for Servpro, but not Petitioner. The Impact Staffing Weekly Timesheet dated July 24, 2018 submitted to Servpro had two employees assigned to work on July 24, 2018. The Timesheet for the day of the accident had the preprinted names of Cesar Davila and Sergio Giron, the Impact employees assigned to work that day, as was the usual procedure . Servpro, presumably Mr. Garcia, hand wrote the name of Petitioner on the Timesheet after the accident.

Petitioner and Servpro attempt to raise the inference that the casual conversation Mr. Garcia testified to was customary in the relationship between Servpro and Impact Staffing. There was no evidence that this type of informal assignment of loaned employees had occurred before. The inference rests on Mr. Garcia's hearsay evidence that some unidentified person at Impact had orally authorized Petitioner's work assignment that day, which was outside the bounds of the Service Agreement. The Arbitrator does not find this inference to be supported by the evidence, particularly in light of the credible testimony of Mr. Ortega to the contrary. The Arbitrator notes that Mr. Ortega testified in convincing detail regarding the formalities of assigning Impact employees to Servpro.

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

The Arbitrator finds that this issue was not genuinely disputed. Petitioner was at respondent Servpro's worksite engaged in demolition work as he had been for the weeks before his accident. He was under the direction of Servpro on site supervisor, Marco Garcia. Petitioner was using tools provided by Servpro. Petitioner was injured while using Servpro's tools at the direction of his Servpro supervisor.

Accordingly, the Arbitrator finds that Petitioner proved that he was injured in an accident that arose out of and in the course of his employment by Respondent Servpro.

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

The Arbitrator finds that this issue was not genuinely disputed. Petitioner sustained a severe laceration to his right forearm and wrist which was immediately apparent after his accident. Petitioner was transported by ambulance the day of his injury to Gottlieb Memorial Hospital but was then transferred to Loyola University Medical Center where he had corrective surgery the following day, July 25, 2018. The chain of evidence between accident and medical intervention is compelling. In fact, Respondent's s§12 examining physician opined that Petitioner's injuries were causally related to his work accident. Petitioner still has limitations and impaired function of his right hand.

The Arbitrator further finds that the opinion of Dr. Walsh, the §12 examining physician, that Petitioner had reached MMI is not persuasive or supported by objective fact. Petitioner demonstrated significantly restricted motion of his right hand as well as subjective numbness. Petitioner's treating orthopedic surgeon, Dr. Puri, recommended continued physical therapy but without specifics and that Petitioner should continue to follow up with Dr. Puri.

Accordingly, the Arbitrator finds that Petitioner proved that his current condition of ill being is causally related to work accident on July 24, 2018.

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?

It follows from the Arbitrator's findings above that the medical services provided to Petitioner to cure or relieve the effects of his accident injuries were reasonable and necessary. Accordingly, the Arbitrator finds that Petitioner proved that the medical

services provided to treat his injuries and that the fees and charges related to those medical services were reasonable and necessary.

Respondent Servpro shall pay all outstanding unpaid balances for all medical care provided to Petitioner up to February 27, 2019, to be adjusted in accord the medical fee schedule provided in §8.2 of the Act, totaling $119,780.87, itemized as follows:

1. Village of Franklin Park	$1,706.00
2. Gottlieb Memorial Hospital	$6,388.81
3. Loyola University Medical Center	$56,441.55
4. Loyola Medicine Transport	$1,598.00
5. Loyola Medicine Physician	$615.00
6. Loyola Medicine Anesthesia	$3,571.00
7. Loyola University Medical Center Surgery	$43,561.00
8. ATI Physical Therapy	$5,899.51
Total	**$119,780.87**

The foregoing medical bills shall be adjusted in accord with the Medical Fee Schedule provided in §8.2 of the Act.

K: What temporary benefits are in dispute? TTD

Petitioner claims to be entitled to Temporary Total Disability benefits for the period July 24, 2018 through February 27, 2019. Respondent Servpro paid temporary total disability benefits from July 25, 2018 through January 24, 2019, albeit untimely and inconsistently, but denies further liability for any additional claimed temporary total disability benefits after January 24, 2019.

Respondent Servpro relies on the opinions of Dr. Walsh, who opined that Petitioner did have functional deficits, loss of movement, and loss of feeling, but was able to return to work full duty. Dr. Walsh seemingly relied on a scrivener's error in Dr. Puri's November 16, 2018 chart note that Petitioner could return to work without restrictions. Dr. Puri corrected the note to reflect that Petitioner could return to work but without use of his right hand. Dr. Walsh also stated that the Petitioner should be encouraged to participate at least in a light duty capacity so he would be moving his hand and regaining function with his digits.

Dr. Walsh admitted that Petitioner does not have full function in his fingers. Dr. Walsh opined that Petitioner cannot return to work in a full duty capacity and then, later, stated Petitioner is able to work full duty. The Arbitrator finds, based on Petitioner's testimony and Dr. Puri's records, that Petitioner is not at MMI and is unable return to work full duty due to the injuries to his right hand.

The Arbitrator finds that Dr. Puri's work restrictions have been appropriate. The Arbitrator finds the opinions of Dr. Puri more persuasive than those of Dr. Walsh. As noted, Dr. Walsh either ignored or did not appreciate the extent of Petitioner's loss of function of his right hand. Moreover, the Arbitrator specifically finds that Respondent Servpro's reliance on Dr. Walsh's opinion is unjustified and that Respondent Servpro is liable to pay temporary total disability from July 25, 2018 through February 27, 2019, 31 & 2/7 weeks. Respondent Servpro shall receive a credit for all total temporary disability benefits previously paid, $8,293.99.

M: Should penalties be imposed upon Respondent?

The Arbitrator has previously found that Petitioner failed to prove that a relationship of employee-employer existed between him and Impact Staffing. Therefore, the issue of fees and penalties against Impact Staffing is moot.

Petitioner filed a Petition seeking penalties and attorney fees under Sections 16, 19(k) and 19(l) of the Act. Penalties and fees under the Act are intended to implement the purposes of the Act to expedite the compensation of injured workers and penalize an employer who unreasonably, or in bad faith, delays or withholds compensation due to an employee.

§19(k) penalties will lie where there has been any unreasonable or vexatious delay of payment of benefits.

§19(l) penalties are in the nature of a late fee and will be awarded in the case the employer or his or her insurance carrier shall without good cause and just cause fail, neglect, refuse or unreasonably delay the payment of benefits under §8(a) or §8(b) of the Act. The employee is entitled to additional compensation in the sum of $30 per day for each day that benefits...have been so withheld or refused, not to exceed $10,000 for such violations is no written reply to the demand for benefits is made within 14 days after receipt of the demand for benefits.

Attorney fees pursuant to §16 are appropriate when penalties under §19(k) are appropriate. §19(k) penalties and attorney's fees are intended to address situations where there is not only delay, but when the delay is unreasonable or deliberate or the result of bad faith or improper purpose.

Respondent Servpro denied Petitioner payment of benefits under the Act, including temporary total disability and payment of medical expenses. Servpro did serve a denial letter in compliance with §19(l). Only later did Servpro initiate temporary total disability benefits to Petitioner but did not pay any medical bills nor did Respondent

Servpro authorize any treatment prior to the hearing. Although Servpro later paid temporary total disability benefits, Servpro did not issue a letter to Petitioner or Petitioner's counsel indicating they would pay medical benefits, nor did Servpro authorize any medical treatment.

The Arbitrator finds that the denial of temporary total disability and medical treatment by Respondent Servpro was unreasonable. Petitioner provide Respondent with sufficient evidence that the surgery was reasonable and necessary and causally connected to the accident and that the Petitioner was unable to work. The Arbitrator has found that there was an employee-employer relationship by and between Petitioner and Respondent on the date of the accident.

Moreover, despite clear objective evidence of a compensable injury which required significant medical intervention, Respondent Servpro's reliance on Dr. Walsh's IME opinions was unreasonable. Dr. Walsh's report was convoluted, confusing, and internally inconsistent. In one sentence he admitted that Petitioner has limited use of his hand and does not have sensation in his fingers and in another indicates that the Petitioner can "try" to work full duty (Servpro X #1).

Petitioner's trade was that of a laborer. He used various tools which required a strong hand grip. It was obvious to the Arbitrator at trial that Petitioner did not have full use of his dominant hand and that an opinion that Petitioner can work as a laborer runs counter to common sense. Respondent's own TTD payment history log shows numerous, significant delays in TTD benefits during this period, even up to four weeks.

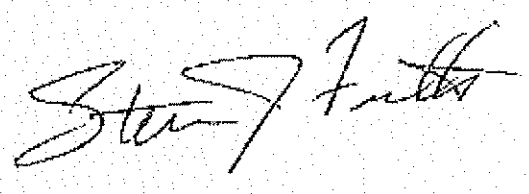
Because the Arbitrator found that Respondent Servpro did comply with §19(l) of the Act, the Arbitrator finds that Petitioner failed to prove that he is entitled to penalties pursuant to §19(l).

The Arbitrator does find that Respondent Servpro did violate §19(k) of the Act and therefore orders Respondent to pay the sum equal to 50% of all TTD benefits owed during the period between July 24, 2018 and February 26, 2019, or 31 & 2/7ths weeks. This amounts to $4,989.16. The Arbitrator orders Respondent Servpro to pay an additional 50% of the amount of medical bills outstanding following reduction pursuant to the Medical Fee Schedule, under §19(k). Finally, the Arbitrator orders Respondent Servpro to pay attorney fees to the extent of 20% of the temporary and total disability and unpaid medical bills awarded to Petitioner, pursuant to §16 of the Act.

ADDENDUM

Certain of the parties presented arguments regarding whether Petitioner was entitled to prospective medical care. Whether Petitioner was entitled to prospective medical care was not a disputed issue according to Arbitrator's Exhibit #1. Furthermore, there was no evidence other than a nonspecific note by Dr. Puri that Petitioner continue physical therapy that suggested that entitlement to prospective medical care was at issue. In addition, Petitioner did not testify that he wished to receive any sort of prospective medical care.

Accordingly, the Arbitrator makes no finding regarding whether Petitioner is entitled to prospective medical care.



Steven J. Fruth, Arbitrator

July 17, 2020
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC023802
Case Name	KREILBACH, EDWIN v. ADVANCED DISPOSAL SERVICES
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0255
Number of Pages of Decision	15
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Joshua Rudolfi
Respondent Attorney	Jack Shanahan

DATE FILED: 5/28/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

EDWIN KREILBACH,

Petitioner,

vs. NO: 17 WC 23802

ADVANCED DISPOSAL 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 all issues, 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 thereof.

The Commission hereby incorporates by reference the findings of fact contained in the Decision of the Arbitrator. However, following a careful review of the entire record, the Commission modifies the award of temporary total disability benefits to begin on July 25, 2017, as opposed to July 24, 2017, pursuant to the Request for Hearing form.

On the Request for Hearing form, which was admitted into evidence as Arbitrator's Exhibit 1, Petitioner claimed entitlement to temporary total disability benefits from July 25, 2017 through July 10, 2018. Respondent disputed this period and claimed that Petitioner was entitled to temporary total disability benefits only from July 25, 2017 through January 26, 2018. Although there was a dispute as to the date benefits should end, both parties stipulated that the period of temporary total disability began on July 25, 2017. As such, the Commission modifies the Decision of the Arbitrator to award temporary total disability benefits commencing on July 25, 2017.

After July 25, 2017, Petitioner's treating doctors kept him on either light duty or off-work restrictions through July 10, 2018, at which time Dr. Peter Lee returned Petitioner to full duty work. The Commission thus awards temporary total disability benefits from July 25, 2017 through July 10, 2018, because Petitioner remained under work restrictions for his causally related lumbar

and/or thoracic spine conditions that could not be accommodated by Respondent for that period. The Commission modifies the Decision of the Arbitrator accordingly. In all other aspects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 27, 2019, is modified as stated herein. The Decision of the Arbitrator is otherwise affirmed and adopted.

IT IS FURTHER ORDERED that Respondent shall pay temporary total disability benefits to Petitioner in the sum of $1,078.46 per week for 50 weeks, commencing July 25, 2017 through July 10, 2018, as provided in §8(b) of the Illinois Workers' Compensation Act. Respondent shall be given a credit of $30,498.85 for temporary total disability benefits that have been paid.

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 $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 28, 2021

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

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

DLS/met
O: 4/7/21
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/s/*Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0255
NOTICE OF ARBITRATOR DECISION

KREILBACH, EDWIN Case# **17WC023802**

Employee/Petitioner

ADVANCED DISPOSAL SERVICES INC

Employer/Respondent

On 12/27/2019, 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 1.57% 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
JOSHUA E RUDOLFI
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

2337 INMAN & FITZGIBBONS LTD
JACK SHANAHAN
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Edwin Kreibach
Employee/Petitioner

v.

Advanced Disposal Services, Inc.
Employer/Respondent

Case # **17** WC **23802**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Geneva**, on **July 11, 2019 and** in the city of **Wheaton on August 5, 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 **July 24, 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 **$84,119.88**; the average weekly wage was **$1,617.69**.

On the date of accident, Petitioner was **43** 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 **$30,498.85** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$30,498.85**.

Respondent is entitled to a credit of **$38,231.45** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $19,065.50 to Northwestern Medicine, and $23,598.90 to ATI, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of $38,231.45 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $1,078.46/week for 50 weeks, commencing July 24, 2017 through July 10, 2018, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $30,498.85 for temporary total disability benefits that have been paid.

Respondent shall pay Petitioner permanent partial disability benefits of $790.64/week for 125 weeks, because the injuries sustained caused the 25% 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

December 13, 2019
Date

ICArbDec p. 2

DEC 27 2019

Statement of Facts

This matter was tried on July 11, 2019. Petitioner's motion to reopen proofs to redact exhibits in compliance with Supreme Court Rule 138 was presented and granted on August 5, 2019. At that time, handwritten redactions were made to PX 1, PX 2, PX 3 and PX 5. Petitioner withdrew the CD version of PX 4 and substituted a redacted paper PX 4.

Petitioner Edwin Kreibach testified that he has worked for Respondent Advanced Disposal Services for approximately 11 years as a residential route driver. His job was operating a residential garbage truck. He would to go from site to site picking up dumpsters, also known as roll off boxes. This required him to open the door of the roll off box in order to let the contents out. On July 24, 2017, while he was doing this with one box, the door started to move and then stopped abruptly. Petitioner testified that the doors were heavy and that when the door stopped, he felt pain in his back. He testified that his arms went weak and that his entire back locked up. Petitioner testified he notified his supervisor and was driven to Physicians Immediate Care.

Petitioner testified he had prior back issues 5 years before. He saw a chiropractor. His medical plan allowed 12 visits per year. Petitioner noted back pain was part of his job. He did not have a prior MRI or diagnosis given to him. Petitioner had prior treatment for his spine at Northwestern Medicine (RX 1). Petitioner was seen by Dr. Flatt beginning January 16, 2013 for lower back pain. Petitioner reported injuring his back a year ago lifting trash cans repeatedly at work. The Active Problem List includes sciatica noted 12/21/2010 and cervicalgia noted 3/10/2011. Petitioner's pain diagram shows the middle of his lower back. Petitioner received manipulations through January 31, 2013 for a diagnosis of lumbar facet joint syndrome, cervicalgia and pain in the thoracic spine (RX 1, p 7-23). Petitioner testified he missed no time from work and did his regular job. Petitioner was also treated for DVT in his right leg, diagnosed April 12, 2017. This was confirmed by Doppler study and Petitioner was placed on Xarelto as an anti-coagulant. He was last seen before the accident on July 10, 2017. Petitioner reported smoking ½ pack per day. It is noted he is planning to quit. He reported no pain at that time (RX 1, p 36-60).

After the accident, Petitioner was seen at Physicians Immediate Care on July 24, 2017 (PX 2). Petitioner presented with a chief complaint of back pain of the upper back since 6:30 that morning. He reported that he injured his middle back when he was pushing open the door of a 30-yard roll off box that moved about 8 inches and then stopped. He reported a pop in his back and shooting sharp pain immediately, rating his middle back pain at 9/10. After the occurrence, he had continued constant sharp pain in the middle back region. He denied any radiation to other regions or extremities. He denied any previous middle back injury. His past medical history included active acute embolism and thrombosis of the deep veins of the right leg and a 20-year history of smoking cigarettes (PX 2).

The physical examination noted he was hunched over. There was spasm and tenderness in the thoracic muscles with mild swelling on the right side of the thoracic region. He had negative straight leg raise testing bilaterally. He was neurologically normal. He underwent unremarkable x-rays of the thoracic spine. The "Back Exam Notes" have a diagram of the area of symptoms lower on the right side of the back. He was diagnosed with a sprain of the thorax. He was provided a lumbar orthosis and placed on lifting restrictions (PX 2). Petitioner testified that there was no light duty offered.

Petitioner saw Northwestern Medicine, his primary care facility, on July 25, 2017, complaining of a back injury at work (PX 4). He noted that he was pushing the door of a container open and felt instant pain in the center of

the back, wrapping around the sides of the torso. He complained of pain with forward flexion of his neck down the spine to the back, He had some tingling and numbness in the right hip. He reported a previous history of lumbar pain since age 15. Petitioner gets flares of discomfort in the back intermittently, and sees Dr. Flatt for treatment. His back had been doing well until this recent event. Physical examination revealed tenderness and spasms over the bilateral paraspinal muscles of the mid-lower portion of the thoracic spine. Range of motion was limited with forward flexion and extension. He was able to walk heels and toes. Plantar flexion and dorsiflexion were intact. Straight leg raising was negative and sensation and strength were normal. The diagnosis was acute bilateral thoracic back pain. (PX 4).

On July 31, 2017, Petitioner followed up at PIC. The interval history noted central back pain without pain in legs, but numbness in the right hip. Examination findings were tenderness and spasm of the thoracic muscles and mild swelling noted on the right side of the thoracic region. There is reduced lumbosacral range of motion. Straight leg raising was again negative bilaterally. The diagnosis remained a strain of the muscles and tendons of the back wall of the thorax. It was noted he was going to follow-up with his primary care physician (PX 2).

Petitioner returned to Northwestern on August 3, 2017, complaining of middle to lower right back pain (PX 4). He is still having pain in the mid back, right and right lumbar with radiating pain and tingling into the right leg-thigh. Examination showed tenderness in the thoracic spine at T9-10, L4-5 and LS and spasms in the right mid-thoracic paraspinal muscles. Petitioner had pain on heel and toe walking, and straight leg raising was positive on the right. His diagnosis was acute lumbar radiculopathy, pain and spasm in the thoracic spine and muscles. MRIs of the thoracic and lumbar spines were ordered. Petitioner was referred to physical therapy (PX 4). Physical therapy began August 7, 2017. Petitioner reported the injury pushing a container and complained of back pain with radiating pain and tingling into the right leg. The evaluation notes tingling/numbness in the L4-5 distribution with spasm in the lumbar and thoracic paraspinal muscles. The August 12, 2017 MRI of the thoracic spine impression was multilevel disc herniations at T6 through T10. The lumbar spine MRI noted L4-5 disc degeneration, spondylolisthesis and diffuse posterior disc protrusion extending to the neural foramina bilaterally. Petitioner was referred for a neurosurgical consult (PX 4).

Petitioner saw Dr. Lee, a neurosurgeon, on August 22, 2017. His history to Dr. Lee consistently described the details of the accident, He stated he had acute onset of back pain and numbness in both legs, with constant low back pain across the lumbar region. Following his review of lumbar and thoracic MRI studies, Dr. Lee diagnosed low back pain with bilateral lower extremity pain including L4-5 spondylolisthesis, and a questionable L4 pars defect. He recommended additional physical therapy and a CT scan of the lumbar spine (PX 4). The September 8, 2017 CT impression was Grade 1 anterolisthesis of L4 over L5 with spondylolysis of the pars interarticularis and advanced degenerative disc disease at L4-5. Petitioner continued physical therapy without improvement. He was referred to pain management (PX 4).

Petitioner saw Dr. Yang who performed L4-5 lumbar epidural steroid injections on September 18 (PX 4). On September 19, 2017, Dr. Lee noted no improvement yet from the injection. He ordered continued therapy and a second injection. He stated the CT scan indicates some motion and instability at L4-5. He recommends conservative management for the thoracic discomfort and continued PT and pain management for the low back pain. He notes that if symptoms worsen or persist, he would recommend L4-5 spinal fusion (PX 4). On October 4, 2017, Petitioner reported a 25-30% improvement from the injection, His relief lasted for about a week. A second ESI was then ordered. Petitioner had a doppler ultrasound of the right leg to assess his DVT which showed no acute DVT, but chronic nonocclusive DVT in one of two popliteal veins. Dr. Habib Shaikh stated he could hold the anticoagulation for 3 to 4 days prior to the procedure (PX 4). Dr. Yang performed a

second set of injections on October 30, 2017 (PX 4). On November 13, 2017, Petitioner advised Dr. Lee that neither the injections nor therapy were helping. His main issue was low back pain. He also had some numbness in either the right or left leg with activity.

A third ESI was scheduled for November 24, 2017 (PX 4). But Petitioner presented with complaints of chest pain and shortness of breath. He advised he had stopped his Xarelto three days earlier. He was diagnosed with a pulmonary embolism. He was hospitalized until November 26, 2017. The ESI was not done (PX 4). On November 28, 2017, Dr. Lee postponed surgery for a work-up of the DVT/PE issues. On November 29, 2017, Dr. Shaikh recommended delay of surgery for at least 2 months and the placement of an IVC filter should Petitioner need surgery (PX 4). On January 11, 2018, Dr. Shaikh stated that since Petitioner would need to be off of Xarelto for 5 days prior to surgery and 2 weeks thereafter that he would need the placement of an IVC filter for surgery which could be removed once he was back on Xarelto (PX 4).

Petitioner saw Dr. Jay Levin for a Section 12 examination on January 17, 2018 at Respondent's request (RX 2, Ex. 2a, 2b). Following his examination and review of Petitioner's records, Dr. Levin opined that Petitioner sustained a myofascial thoracic sprain from the work accident. He found no acute or aggravating injury to his lumbar spine related to the work. He found Petitioner was in need of no further treatment related to the July 24, 2017 accident and was at maximum medical improvement (RX 2, Ex 2b).

Petitioner advised Dr. Lee that, given the denial by workers comp, he would like to proceed through his private insurance. Dr. Lee scheduled a second opinion to address the dispute. On March 2, 2018, Petitioner saw Dr. Steinke who agreed with Dr. Lee's assessment and recommended an L4-5 decompression and fusion (PX 4). Petitioner was cleared for surgery by Dr. Andrikopoulos from a neuro-psych standpoint and was scheduled for an L4-5 transforaminal lumbar interbody fusion. He had the IVC filter implanted on March 28, 2018. He underwent a left L4-5 anterolateral interbody arthrodesis with instrumentation and cages on March 29, 2018. The post-operative diagnosis was L4-5 spondylolysis, spondylolisthesis and degenerative disc disease (PX 4).

Petitioner was seen at the emergency department on April 5, 2018 for shortness of breath. A chest CT noted progression of the pulmonary embolism. On April 16, 2018, Dr. Lee noted no numbness/pain in the legs; low back pain significantly improved. Petitioner saw Dr. Shaikh on April 20, 2018. He was back on Xarelto and had no shortness of breath. Dr. Shaihk noted he should continue Xarelto indefinitely. On May 14, 2018, Petitioner reported no numbness/pain in his legs; no back pain, just some stiffness if he sits too long. Dr. Lee ordered PT at ATI (PX 4). Petitioner had therapy at ATI from May 16, 2018 through June 8, 2018, when he transitioned to work conditioning (PX 5). On June 26, 2018, Dr. Lee ordered an FCE (PX 4). Petitioner was continued off work. Petitioner testified he underwent the FCE on July 9, 2018 and was released by the FCE to the Very Heavy PDL. Dr. Lee released Petitioner to return to work without restriction on July 10, 2018 (PX 6). Petitioner saw Dr. Shaikh for removal of the IVC filter on November 15, 2018 (PX 4).

Petitioner testified that he received temporary compensation through Dr. Levin's examination. His medical bills are either unpaid or were paid by his insurance through the employer. He testified he filed for bankruptcy while his benefits were suspended.

Petitioner testified that after the accident his whole back hurt. The upper back has resolved. His low back is functional. It hurts, but he can do his job. It has not affected the number of hours he works. He remains on blood thinners.

Dr. Lee testified by evidence deposition taken June 5, 2018 (PX 7). He testified that he first saw Petitioner on August 22, 2017. He took a history of accident resulting in the acute onset of back pain and numbness in both legs. He testified to his treatment including the review of the initial x-rays and MRI, the scheduling of the CT scan. He stated his diagnosis of spondylolisthesis and the pars defect. He noted Petitioner advanced complaints in the thoracic and lower lumbar region. The lumbar pain was more intense. He noted the continued therapy and injections. He testified that by October 1, 2017, Petitioner's thoracic pain improved significantly with therapy, but his low back pain did not seem to be improving. Petitioner had numbness in the legs. This is a sign of some nerve involvement. In November 2017, he believed surgical intervention was necessary. The surgery was delayed in order to address the pulmonary embolism. He would need an IVC filter to undergo the surgery. A lumbar fusion was performed on March 29, 2018. He believed a fusion was more appropriate because Petitioner's pain was both back and leg. Where there is a spondylolisthesis and pars defect, a fusion would help with his back pain (PX 7).

Dr. Lee opined that Petitioner's current condition of ill-being in the lumbar spine was casually related to the work injury, given what the patient told him regarding the onset of his symptoms in relation to the time of the accident. He is relating it to the temporal aspect. He opined that the surgery was causally related to the incident. The spondylolisthesis most likely was preexisting. It appeared to be asymptomatic until the injury. The pars defect probably appeared chronic. Dr. Lee testified he did not review any records of treatment from before his care began on August 22, 2017. Whether evidence of prior low back complaints or treatment would impact his opinion would depend on the nature of the pain. The surgery was based upon the complaints of low back pain and leg numbness and the diagnostic findings. There was nothing in the MRI or CT scan that was an acute finding. The thoracic pain was not a surgical issue. He disagreed with Dr. Levin that surgery was not required, and Petitioner was at maximum medical improvement (PX 7).

Dr. Jay Levin testified by evidence deposition taken July 17, 2018 (RX 2). Dr. Jay Levin is board certified in orthopedic surgery and was recertified in 2017. He performs approximately 15 spine surgeries per year. None are fusions. He testified Petitioner gave him a history of a prior injury to his lumbar spine that occurred in high school, when Petitioner was told he had a slipped disk. He stated he saw a chiropractor then for a few sessions, and his symptoms resolved. He denied any subsequent complaints or other prior injuries to the lumbar spine before the work accident. He told Dr. Levin that he jarred his whole body during the work accident, and had immediate pain in his entire back, though he denied any leg complaints. He had had no improvement whatsoever in the lumbar spine since the accident date. With regard to the thoracic spine, he was 50% improved since the injury date (RX 2).

Dr. Levin reviewed Petitioner's immediate post-accident and some pre-accident medical records following his examination. He noted that, despite Petitioner's denial of prior instances of low back pain or treatment other than when he was 15, he had seen Dr. Flatt in January 2013 for low back pain. He also noted that the records reflected prior instances of lumbar facet joint pain on January 6, 2013, cervicalgia in March 2011 and sciatica diagnosed in December 2010. He reviewed no records of treatment between January 31, 2013 and July 24, 2017. Following his review of these prior treatment records, the PIC records immediately following the accident, and the subsequent thoracic and lumbar MRIs, Dr. Levin opined that Petitioner sustained a thoracic myofascial strain from the July 24, 2017 work accident. He did not believe there was an acute injury to the lumbar spine resulting from the work accident. He based this opinion on the absence of evidence, in both the initial medical records and the diagnostic studies, of an acute correlating pathology following the work accident. The evidence of Petitioner's prior lumbar spine problems confirmed that the anatomical findings on the diagnostic studies were long-standing. Petitioner had had periodic flare ups of low back complaints, which he

felt were consistent with the evidence of spondylolisthesis at L4-5 from the MRI and CT scans of the lumbar spine (RX 2).

Dr. Levin testified that, as it related to the thoracic spine, the initial examinations, therapy, medications and thoracic MRI were appropriate, with roughly 10 therapy visits to resolve the problem being also medically appropriate. With regard to the thoracic myofascial strain that Dr. Levin felt was sustained in the work injury, he testified that Petitioner should have been able to return to full duty work from that injury within 4 to 6 weeks of the initial occurrence. Dr. Levin opined that none of the treatment to the lumbar spine was related to the work injury of July 24, 2017. He testified that he did not believe there was an acute traumatic injury to the lumbar spine arising from the work accident that necessitated the treatment. Dr. Levin testified that L4-5 radiculopathy would elicit radiating pain complaints below the knee. If conservative care does not resolve the symptoms from a spondylolisthesis, a fusion would be reasonable treatment. If someone has a fusion and becomes pain free that would be a clinical success (RX 2).

Conclusions of Law

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

A Workers' Compensation Claimant bears the burden of showing by a preponderance of credible evidence that his current condition of ill-being is causally related to the workplace injury. *Horath v. Industrial Commission*, 449 N.E.2d 1345, 1348 (Ill. 1983) citing *Rosenbaum v. Industrial Com.* (1982), 93 Ill.2d 381, 386, 67 Ill.Dec. 83, 444 N.E.2d 122). Claimant has the burden of showing by a preponderance of credible evidence that his injury arose out of and in the course of employment, which requires a showing of causal connection. The accident need not be the sole or principal cause, as long as it was a causative factor in a claimant's condition of ill-being. *Lopez v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130355WC-U, P25 (Ill. App. Ct. 3d Dist. 2014)

The parties stipulated to the Petitioner's accident on July 24, 2017 when he injured his back when the door of the roll off box stuck abruptly. It is unrebutted that Petitioner suffered an injury at that time to the thoracic spine. The dispute is whether the condition of ill-being in the lumbar spine and the subsequent treatment is causally related to the accident.

Nothing in the statutory language requires proof of a direct causal connection. *Sperling v. Industrial Comm'n*, 129 Ill. 2d 416, 421, 544 N.E.2d 290, 292 (1989). A causal connection may be based on a medical expert's opinion that an accident "could have" or "might have" caused an injury. *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839, 639 N.E.2d 886, 892 (1994). In addition, a chain of events suggesting a causal connection may suffice to prove causation even if the etiology of the disease is unknown." *Id.* Prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. *Navistar International Transportation Co. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1205 (2000).

It is unrebutted that immediately after the accident, Petitioner began a course of medical treatment for his back. The initial records from PIC and the July 25, 2017 visit to Northwestern focus on a diagnosis of thoracic spine pain. Petitioner diagnosis in lumbar spine is first mentioned on August 3, 2017. Thereafter, Petitioner was treated for lumbar symptoms, ultimately undergoing the fusion surgery at L4-5.

Dr. Lee testified that, based upon the Petitioner's history and the clinical and diagnostic findings, that there is a causal connection between the accident and the subsequent condition of ill-being in the lumbar spine and the treatment thereafter including the surgery performed. Dr. Levin testified that based upon the medical records reviewed and the diagnostic test results that Petitioner sustained a thoracic myofascial strain from the July 24, 2017 work accident. He did not believe there was an acute injury to the lumbar spine resulting from the work accident.

It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). A finder of fact is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts.
Not only may the Commission decide which medical view is to be accepted, it may attach greater weight to the opinion of the treating physician. *International Vermiculite Co. v. Industrial Comm'n*, 77 Ill.2d 1, 31 Ill.Dec. 789, 394 N.E.2d 1166 (1979); *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 225, 168 Ill. Dec. 756, 590 N.E. 2d 78 (1992).

The Arbitrator, having heard the testimony and reviewed the evidence, including the deposition testimony of Dr. Lee and Dr. Levin, finds that Petitioner has proven causal connection based upon the opinions of Dr. Lee and the chain of events. Dr. Lee found causal connection, but this was based upon the Petitioner's history of an acute onset of back pain and numbness in both legs. He did not review records of treatment before August 22, 2017 which would have disclosed the 2013 treatment and the initial post-accident diagnosis of thoracic sprain only. The Arbitrator finds that the facts establish sufficient evidence of a concurrent lumbar condition. The Arbitrator notes the initial PIC pain diagram was in the lower right back area. Although Petitioner had no initial radicular symptoms, he was noted to be hunched over. He was given a lumbar support at the initial visit. Petitioner began complaining of right hip pain the next day and the lumbar spine complaints were documented by August 3, 2017, only 10 days post-accident. Thereafter, diagnostic testing confirmed the spondylolisthesis and pars defect. The Arbitrator finds that there is sufficient evidence to corroborate Petitioner's testimony that he had pain in entire back from the accident. As discussed below with respect to Dr. Levin's opinions, the Arbitrator does not find the prior 2013 low back treatment persuasive in light of Petitioner's ability to work through those symptoms and continue his regular work for 5 years until the accident. Therefore, the incomplete information received by Dr. Lee was not sufficient to discredit his opinion. The Arbitrator also finds the chain of events is applicable to causation in this matter.

Dr. Levin bases his opinions on three elements: the prior low back symptoms and treatment, the initial medical records failing to document any lumbar spine condition, and the diagnostics failing to disclose an acute traumatic finding. The Arbitrator does not find this causation opinion persuasive.

It is well-established that an accident need not be the sole or primary cause—as long as employment is a cause—of a claimant's condition. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). Furthermore, an employer takes its employees as it finds them. *St. Elizabeth's Hospital v. Illinois Workers' Compensation 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). Where an accident accelerates the need for surgery, a claimant may recover under the Act. *Caterpillar Tractor Co.*, 92 Ill. 2d at 36. The prior back complaints and treatment did not cause Petitioner to miss work and there is no evidence of any low back treatment from January 31, 2013 until the accident. Following the accident, Petitioner has significant increase in symptoms, immediate and continuous medical care including the lumbar fusion surgery. As discussed above, the Arbitrator does not find the initial medical treatment focusing on the thoracic spine for 10 days sufficient to overcome the chain of events supported by Dr. Lee. Finally, the Arbitrator does not find the lack of a traumatic finding on the MRI or CT scan sufficient to deny causation. Dr. Levin agrees that the finding noted could be asymptomatic and, once symptomatic and not resolved by conservative care, could require surgery. Petitioner's unrebutted testimony and prior medical records document that he was able to work his regular physical job without treatment for 5 years before the accident and thereafter was disabled and in need of treatment.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that the conditions of ill-being in the thoracic and lumbar spine are causally connected to the accidental injury sustained on July 24, 2017. Based upon this finding, the Arbitrator also finds that Petitioner's pre-existing condition of DVT/PE was temporarily aggravated by the lumbar spine condition and related treatment. Said aggravation returned to baseline with the removal of the IVC filter in November 2018.

In support of the Arbitrator's decision with respect to (J) Medical, the Arbitrator finds as follows:

Under §8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a claimant's injury. The claimant has the burden of proving that the medical services were necessary, and the expenses incurred were reasonable. *City of Chicago v. Illinois Workers ' Compensation Commission,* 409 Ill. App. 3d 258, 267 (1st Dist., 2011). Based upon the Arbitrator's finding with respect to Causal Connection, reasonable and necessary unpaid bills related to the Petitioner's thoracic and lumbar spine and the exacerbation of his DVT/PE conditions would be causally related.

Petitioner testified that many of his bills are unpaid and that some were paid by his insurance through his employer. Petitioner offered PX 1 as a group exhibits including the claimed medical bill and the payments by Blue Cross/Blue Shield totaling $38,231.45. Respondent would be entitled to credit for these payments pursuant to Section 8(j) of the Act. The Arbitrator has reviewed the exhibit and the medical records admitted and finds the bills relate to the treatment rendered in the medical records. With respect to the bills the Arbitrator finds as follows:

Northwestern Medicine: Petitioner is claiming total bills of $35,994.45. The exhibit notes that many of these have already been paid by Workers Compensation, leaving a $0 balance. There are also some payments noted from Blue Cross/Blue Shield. Based on the exhibit offered, the remaining unpaid balance is $19,065.50.
Physicians Immediate Care: This bill was paid by Workers Compensation and no balance is due and owing.
ATI Physical Therapy: The bill of $23,598.90 is for reasonable and necessary treatment.
IWP: This bill is for Petitioner's Xarelto prescription on 9/6/2018. Petitioner was on this medication for his DVT before the accident and was to continue it indefinitely. The prescription is not causally related to the accident and is denied.

Based upon the record as a whole and the Arbitrator's finding with respect to Causal Connection, the Arbitrator finds that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $19,065.50 to Northwestern Medicine, and $23,598.90 to ATI, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of $38,231.45 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In support of the Arbitrator's decision with respect to (K) Temporary Compensation, the Arbitrator finds as follows:

Temporary compensation is provided for in Section 8(b) of the Workers' Compensation Act, which provides, weekly compensation shall be paid as long as the total temporary incapacity lasts, which has interpreted to mean that an employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit. The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003).

Petitioner was placed on restricted duty or taken completely off work from the date of the accident on July 24, 2017 through his release to unrestricted duty by Dr. Lee on July 10, 2018. Petitioner's unrebutted testimony was that light duty was not available or offered by Respondent. The parties stipulated that Respondent paid $30,498.85 in temporary total disability benefits.

Based upon the record as a whole and the Arbitrator's finding with respect to Causal Connection the Arbitrator finds that Petitioner is entitled to 50 weeks of temporary compensation commencing July 24, 2017 through July 10, 2018. Respondent shall be given a credit of $30,498.85 for temporary total disability benefits that have been paid.

In support of the Arbitrator's decision with respect to (L) Nature & Extent, the Arbitrator finds as follows:

Petitioner's date of accident is after September 1, 2011 and therefore the provisions of Section 8.1b of the Act are applicable to the assessment of partial permanent disability in this matter.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that 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 residential disposal driver 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 this is a physical job. Petitioner testified his back is functional and he can perform his job duties. Because of this, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 43 years old at the time of the accident. He would be anticipated to remain in the work force for many years. Because of this, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner has been released to work in the Very Heavy PDL and returned to his regular work. He testified that this is a union position. Because of this, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner suffered injuries to his thoracic and lumbar spine. The thoracic condition was treated conservatively and significantly improved. Petitioner was diagnosed with an L4-5 spondylolisthesis and pars defect and underwent an L4-5 anterolateral interbody arthrodesis with instrumentation and cages. He was released to return to unrestricted work in the Very Heavy PDL and returned to his regular employment. Petitioner also suffered complications from his preexisting DVT including a pulmonary embolism. Because of these facts, the Arbitrator therefore gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% loss of use of person as a whole pursuant to §8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC027015
Case Name	BAUTISTA, LOURDES v. CLOVERHILL BAKERIES
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0256
Number of Pages of Decision	15
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	David Feuer
Respondent Attorney	Andrea Carlson

DATE FILED: 5/28/2021

/s/Deborah Baker, Commissioner

Signature

21IWCC0256

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 & Reanalyze	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LOURDES BAUTISTA,

Petitioner,

vs. NO: 15 WC 27015

CLOVERHILL BAKERIES, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to Petitioner's timely filed Petition for Review of the Decision of the Arbitrator. Therein, the Arbitrator found Petitioner sustained an accidental injury arising out of and in the course of her employment on July 17, 2015, resulting in injuries to her lumbar spine only. The Arbitrator calculated Petitioner's average weekly wage at $318.75; awarded medical expenses incurred through December 15, 2015, excluding those charges denied by utilization review; and found the injury resulted in 2% loss of use of the person as a whole. Temporary Total Disability benefits were denied. Notice having been given to all parties, the Commission has considered the issues of causal connection of Petitioner's lumbar spine and right wrist conditions of ill-being, reasonableness and necessity of medical expenses, entitlement to temporary total disability benefits, and the nature and extent of Petitioner's injuries. While the Commission agrees, in part, with the underlying decision, we find a new analysis of all issues is required. The Commission makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Petitioner filed an Application for Adjustment of Claim alleging a July 17, 2015 back injury while in Respondent's employ. Prior to hearing, the Application for Adjustment of Claim was amended to allege injuries to Petitioner's back, right shoulder, right hand/wrist, left leg, neck, and chest. Resp.'s Ex. 7.

Petitioner is a Spanish-speaking individual; she testified through an interpreter. She worked

as a packer for Respondent. T. 10. Petitioner testified she sustained accidental injuries when she slipped while descending a metal ladder on July 17, 2015. T. 10. She described the incident: "I was climbing a ladder at work, and as I was going down, I slipped and I was about to fall. And so I held on with both hands, and I fell and I injured my back because I fell against the ladder." T. 9. Petitioner's coworkers were present and witnessed her fall. T. 29-30. Petitioner testified she reported the accident to her supervisors but did not complete an accident report immediately after her fall: "I went to the office, but they didn't give me an accident report." T. 11, 30. Respondent sent her to its company clinic in a taxi. T. 11-12.

The July 17, 2015 Concentra records reflect Petitioner presented with left shoulder and back pain "after slipping down the steps, she was able to balance herself and not fall. However she thinks that she twisted her back and now has 10/10 pain. She has pain in the [left] shoulder as well 5/10." Resp.'s. Ex. 9. Examination findings included anterior glenohumeral joint tenderness, limited and painful shoulder range of motion, as well as paraspinal tenderness bilaterally; x-rays were normal. Diagnosing a lumbar strain and contusion of the left shoulder, the clinic physician prescribed Naprosyn and Flexeril, directed Petitioner to apply muscle rub, and imposed modified duty restrictions of no lifting, pushing, or pulling greater than five pounds, and no climbing stairs or ladders. Resp.'s. Ex. 9. Respondent provided accommodated duty and Petitioner continued working. T. 38.

On July 20, 2015, Petitioner was re-evaluated at Concentra. She reported improving symptoms, with her back pain decreased to 5/10. The physician directed Petitioner to continue taking the prescribed medications and modified her work restrictions: occasional trunk rotation, bending, and sweeping/mopping, and 10-pound maximum weight on an occasional basis. Resp.'s. Ex. 9.

At the July 28, 2015 follow-up appointment, Petitioner again reported her symptoms were improved; she rated her shoulder pain at 3/10 and her low back pain at 4/10. She was advised to continue her medications, and her restrictions were eased to allow frequent activities up to six hours per day with a 20-pound maximum lift, and 25-pound maximum push or pull. Resp.'s. Ex. 9.

Petitioner testified she was at work a few days later and experienced an increase in her lower back pain: "…I was working again. But I was again having to climb up and down ladders, and all of a sudden one day I felt really bad and I had to go to the hospital." T. 12. Records from Community First Medical Center show that on July 31, 2015, Petitioner presented to the emergency room complaining of severe lower back pain. The triage report reflects Petitioner gave a history of a fall at work two weeks prior and for the past three days, she had 10/10 lower back pain with tingling to both lateral thighs. The emergency room staff administered Norco and Robaxin for pain relief, however Petitioner had a reaction to the medication. Once Petitioner was stabilized, she was admitted for observation. Dr. Ireneusz Pawlowski was Petitioner's attending physician, and the doctor documented the admitting history as follows:

> The patient is a 35-year-old female who presented to the Emergency Department yesterday because of marked pain. Apparently about [eight] days ago or so, patient fell down on the steps and landed on her buttock region and injured her coccyx

> area. She was seen by worker's [*sic*] compensation physician. Apparently, she was getting better somewhat on a muscle relaxer and some other medications. The patient returned to work, and she was changed to a little bit different work involving a lot of walking up to [eight] stairs. Her condition got worse and she presented to the Emergency Department. The patient denies loss of consciousness when falling down [eight] days ago. The patient was given Norco and a muscle relaxant, and patient was extremely drowsy and was observed for several hours in the Emergency Department. She was given Narcan with some improvement when patient was admitted to telemetry for further observation. Pet.'s Ex. 3, Resp.'s. Ex. 10.

At Dr. Pawlowski's direction, neurology and cardiology were consulted. Dr. Prasad Chappidi performed a neurologic evaluation. Dr. Chappidi noted Petitioner was in the emergency room for complaints of back pain radiating to the lower extremities following a fall at work when she had an episode of loss of consciousness without seizure. Dr. Chappidi's impression was idiopathic/neurocardiogenic syncope; the doctor recommended a lumbar spine MRI and a physical therapy evaluation. The lumbar spine MRI revealed minimal bulging at T12-L1, L2-3 and L3-4 intervertebral discs; no evidence of intervertebral disc herniation; probable hemangioma left posterior superolateral aspect vertebral body of L3; and degenerative changes at T12-L1. The cardiac consultation was performed by Dr. Shirish Shah. Dr. Shah recorded Petitioner experienced chest discomfort while at the hospital for low back pain as well as urinary frequency and suprapubic pain; in Family History, Dr. Shah wrote, "The patient does claim he [*sic*] had a history of motor vehicle accident a few weeks ago." Dr. Shah opined Petitioner had atypical chest pain but her cardiovascular status was stable and did not require further testing. After Petitioner's workup was complete, Dr. Pawlowski diagnosed back pain after mechanical fall; urinary tract infection; lethargy and change of mental status after Norco administration in Emergency Department, now resolved; and probable hemangioma of L3. Petitioner was treated with medication and discharged on August 1, 2015. Pet.'s. Ex. 3, Resp.'s. Ex. 10.

Directed to Dr. Shah's reference to a motor vehicle accident, Petitioner testified the doctor's note is incorrect as she has never been in a car accident. T. 16. She further stated she does not drive, and she does not own a car. T. 16.

On August 3, 2015, Petitioner was evaluated by Eugene Jao, D.C., at La Clinica. She complained of low back, right wrist, and left shoulder pain after an incident at work where she slipped and had to catch herself. Diagnosing sprains/strains of the lumbar spine, right wrist, and left shoulder, DC Jao authorized Petitioner off work, ordered physical therapy, and referred Petitioner for a consultation with Dr. Aleksandr Goldvekht. Pet.'s. Ex. 4, Pet.'s. Ex. 7. Physical therapy commenced the next day; exercise modalities were directed to Petitioner's lumbar spine and right wrist. Pet.'s. Ex. 4, Pet.'s. Ex. 7, Resp.'s. Ex. 10.

The consultation with Dr. Goldvekht took place on August 5, 2015. Petitioner gave a history of slipping while descending stairs and "as she fell she tried to hold on to the railing with extended arms and also violently twisted her low back." Pet.'s. Ex. 4, Pet.'s. Ex. 7, Resp.'s. Ex. 10. She complained of low back pain referring into the left glute as well as right wrist pain made worse with use. Examination revealed decreased and painful lumbar active range of motion with spasms at end range, tenderness to palpation of the lumbar paraspinals and quadratus lumborum

muscles, right wrist pain with resisted extension, tenderness of the right wrist ulnar surface, and positive Kemp's test bilaterally. Dr. Goldvekht diagnosed lumbar sprain/strain with possible intervertebral disc syndrome and right wrist sprain/strain. The doctor prescribed Naproxen, Flexeril, and Terocin patches and ordered Petitioner to remain off work while undergoing physical therapy. Pet.'s. Ex. 4, Pet.'s. Ex. 7, Resp.'s. Ex. 10.

Over the next month, Petitioner attended physical therapy three times per week. The records reflect exercise modalities were initially directed to her lumbar spine and right wrist. As of August 20, 2015, however, wrist treatment ceased, and the therapists only treated Petitioner's lumbar spine. Pet.'s. Ex. 4, Pet.'s. Ex. 7, Resp.'s. Ex. 10.

On September 2, 2015, Dr. Goldvekht re-evaluated Petitioner who advised her right wrist pain had resolved but her low back pain persisted. On examination, the doctor again observed decreased and painful lumbar spine range of motion, tenderness to palpation of the lumbar paraspinals and quadratus lumborum muscles, and positive Kemp's test bilaterally. Dr. Goldvekht concluded Petitioner's wrist sprain had resolved, but her lumbar spine required further workup with an MRI; the doctor also maintained Petitioner's off work status and ordered further physical therapy. Pet.'s. Ex. 4, Pet.'s. Ex. 7, Resp.'s. Ex. 10.

Lumbar spine therapy continued over the next two weeks, and the MRI was completed on September 11, 2015. The radiologist's impression was that the lumbar neural foramina and spinal canal were patent, and no herniations were present. Pet.'s. Ex. 5, Resp.'s. Ex. 12.

Petitioner's September 17, 2015 physical therapy session was conducted by Kathryn Engel-Morales, D.C. The record reflects Petitioner reported persistent low back pain rated at 3-4/10, though her wrist and shoulder were feeling good and without pain. Noting the recent lumbar spine MRI was "unremarkable and essentially normal," DC Engel-Morales indicated the therapy modalities would be re-evaluated to facilitate Petitioner's return to light duty work. Pet.'s. Ex. 4, Pet.'s. Ex. 7, Resp.'s. Ex. 10. On September 22, DC Engel-Morales released Petitioner to modified duty, 20-pound maximum weight and rest as needed. Pet.'s. Ex. 4, Pet.'s. Ex. 7, Resp.'s. Ex. 10. Respondent provided an accommodated position and Petitioner worked while attending physical therapy.

At the October 6, 2015 therapy session, Petitioner complained of severe low back pain radiating down her legs; she stated her pain was mild, 3-4/10, at the beginning of the day but increased to 7/10 after a few hours at work. DC Engel-Morales provided a lumbar spine brace and maintained Petitioner's restrictions. Pet.'s. Ex. 4, Pet.'s. Ex. 7, Resp.'s. Ex. 10.

On October 7, 2015, Petitioner presented to Dr. Neeraj Jain for a pain management consultation. Petitioner gave a history of slipping off a ladder while at work; she reported an initial onset of back and right lower extremity pain and subsequent development of left thumb numbness as well as head pain. Examination revealed tenderness to palpation of the left occipital, left hand grip deficit, and bilateral lumbosacral pain with hypertonicity at the lumbosacral junction, increasing with motion; Dr. Jain interpreted the lumbar MRI as demonstrating focal disc herniations. Dr. Jain's impression was lumbar facetogenic pain, extension based, non-radicular with known nerve root impingement. Noting Petitioner had been recalcitrant to conservative care,

Dr. Jain recommended proceeding with bilateral lumbar facet injections at L4-5 and L5-S1. In the interim, Petitioner was prescribed Meloxicam, Flexeril, and Omeprazole and directed to continue with physical therapy. Pet.'s. Ex. 4, Pet.'s. Ex. 6, Resp.'s. Ex. 10.

Therapy continued as directed. On November 3, 2015, Petitioner complained of increased low back pain associated with a new assignment at work the day before; Petitioner also reported working two 12-hour shifts the week prior which resulted in mild pain. Examination revealed normal lumbar range of motion with pain at end ranges and tenderness at L3-5. DC Engel-Morales reduced the physical therapy schedule to once per week and modified Petitioner's work restrictions to limit her to 10 hours per shift. Pet.'s. Ex. 4, Pet.'s. Ex. 7, Resp.'s. Ex. 10.

At the November 19, 2015 therapy session, Petitioner advised she had very little to no pain when working 10-hour shifts; she felt she was 70% because she still had pain after standing at work after two to three hours and because she had not tried running or any normal activity for a while. DC Engel-Morales recommended further physical therapy but released Petitioner to resume regular duty on November 20, 2015. Pet.'s. Ex. 4, Pet.'s. Ex. 7, Resp.'s. Ex. 10.

Petitioner attended once-weekly physical therapy into January 2016. On January 14, 2016, Petitioner reported her low back pain had improved to 1/10 until she slipped a week prior; since then, she had mild low back soreness rated at 3-4/10. Petitioner further advised she stopped working due to pain in her shoulder and chest. Examination findings included tenderness to palpation at L3-5, the sterno-costal joints on the left, left pec minor, and left rib heads at T3-5; normal and pain-free lumbar range of motion; mild pain with right wrist extension; and normal and pain-free left shoulder range of motion. DC Engel-Morales concluded Petitioner had improved strength and endurance of her low back, shoulder, and wrist; Petitioner was discharged from physical therapy, given a home exercise program, and directed to follow-up in six weeks. Pet.'s. Ex. 4, Pet.'s. Ex. 7, Resp.'s. Ex. 10. During her testimony, Petitioner confirmed she did not return to the clinic after January 14, 2016. T. 22. She has been looking for a job but has thus far been unsuccessful in obtaining employment. T. 24.

On November 9, 2017, Respondent obtained a utilization review from Dr. Todd Hagle. Dr. Hagle certified Petitioner's treatment with the exception of the following: July 31, 2015 emergency room admission; physical therapy in excess of 12 authorized sessions; lumbar spine MRIs; Meloxicam, Omeprazole, and Terocin patch prescriptions; TENS unit; exercise equipment; osteogenous stimulator; and lumbar orthosis. Resp.'s. Ex. 4. Dr. Hagle's evidence deposition was admitted as Respondent's Exhibit 5. Dr. Hagle testified consistent with his report. His opinions will be addressed below.

On August 18, 2018, Dr. Jesse Butler performed a Section 12 examination of Petitioner's lumbar spine. Dr. Butler recorded Petitioner suffered a twisting injury to her back when she slipped on metal stairs and lost her balance. On examination, the doctor noted moderate tenderness to palpation of the lumbosacral spine, normal range of motion, negative straight leg raise, and negative Waddell's signs. Dr. Butler opined Petitioner sustained a lumbar strain as a result of the slip without fall on the stairs, and Petitioner's current complaints were not related to the work accident. The doctor further opined Petitioner's medical treatment was excessive, indicating a 20-session course of physical therapy was reasonable. Dr. Butler concluded Dr. Jain's

recommendation for spinal injections was contraindicated given Petitioner's facet joints were normal on her imaging studies on two occasions. The doctor opined Petitioner could work in regular duty capacity. Resp.'s. Ex. 1. Dr. Butler performed an impairment rating, finding Petitioner had a 0% impairment. Resp.'s. Ex. 2.

The May 14, 2019 evidence deposition of Dr. Butler was admitted as Respondent's Exhibit 3. Dr. Butler testified consistent with his report, reiterating Petitioner sustained a low back strain which had since resolved:

> As I said before, I believe she did sustain an injury. The MRI was normal. She received an appropriate amount of conservative care, medicine, therapy, activity modification. Then, after a reasonable period of time, which is usually between three and six months, she would reach maximum medical improvement and be discharged. Three years down the road when I saw her, there's no basis for her to have ongoing complaints from a lumbar strain where there is no structural abnormality at all in the lumbar spine on a diagnostic imaging study. That's the basis of my answer, that her current complaints are not related. Resp.'s. Ex. 3, p. 21.

Dr. Butler later confirmed Petitioner would have reached maximum medical improvement within three to six months of the accident, or by January 1, 2016, based upon the care she received. Resp.'s. Ex. 3, p. 35-36.

At the hearing, Petitioner testified she had no lower back problems prior to her July 17, 2015 work accident. T. 17. She described her current symptoms:

> I cannot stand longer than five minutes at a time, because my back hurts. I cannot turn my shoulder quickly from one side to another, because it's too painful. My hand, I have lost the strength in my hand. I don't have enough strength in it, and I can't lift heavy things with it. I have pain in my chest, and to be able to sleep at night I have to take Ibuprofen. T. 17.

Petitioner testified that because of her ongoing back complaints, she cannot sweep, mop floors, bend down to give her daughters baths, lift things weighing over 10 pounds, or sit or stand for long periods. T. 18. Petitioner is right-hand dominant, and the persistent right hand pain makes it "difficult for me to pick up the laundry baskets; and holding the mop if I want to mop something, it's difficult. There are a lot of things that I can't do." T. 19. She takes Ibuprofen for her pain. T. 27.

CONCLUSIONS OF LAW

I. Accident

"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. Here, Petitioner was required to utilize a metal ladder to perform her job duties and on July 17, 2015, she slipped while descending the ladder, *i.e.*, while performing her assigned job duties. Petitioner testified her fall was witnessed by her coworkers; she went to the office and reported the incident and was sent to Concentra by Respondent.. The Commission observes the medical records consistently document a history of Petitioner slipping while descending steps at work followed by an acute onset of low back, left shoulder, and right wrist pain. We acknowledge that in the Community First Medical Center records, Dr. Shah referenced a history of a recent motor vehicle accident; we emphasize, however, Dr. Shah was the only physician to reference a motor vehicle accident and notably, the full statement is "The patient does claim he [*sic*] had a history of motor vehicle accident a few weeks ago." Pet.'s. Ex. 3, Resp.'s. Ex. 10 (Emphasis added). Given Dr. Shah incorrectly identified the patient as a male, the Commission finds Dr. Shah's reference to a motor vehicle accident is erroneous and not credible, particularly when contrasted with the consistent history of falling at work documented by RN Markut, APN Myers, Dr. Pawlowski, and Dr. Chappidi.

Petitioner's unrebutted testimony as well as the medical records all demonstrate Petitioner slipped while descending a ladder at work. The Commission finds Petitioner sustained an accidental injury arising out of and in the course of her employment on July 17, 2015.

II. Causal Connection

Petitioner's Amended Application for Adjustment of Claim alleges injuries to her back, right shoulder, right hand/wrist, left leg, neck, and chest. Resp.'s. Ex. 7. On Review, Petitioner pursues only causation of her lumbar spine and right wrist conditions of ill-being. Respondent concedes Petitioner sustained a lumbar spine sprain but argues her condition reached maximum medical improvement on January 1, 2016. Respondent disputes the claimed wrist injury.

A. Lumbar Spine

Petitioner had no lower back problems prior to her July 17, 2015 work accident. T. 17. Immediately following her slip on the ladder, she was sent to Concentra by Respondent where she complained of severe low back pain. The Concentra physician diagnosed Petitioner with a lumbar strain, prescribed pain medication, and imposed work restrictions. Resp.'s. Ex. 9. The Concentra records reflect Petitioner's symptoms improved over the next week, and on July 28, 2015, when she reported her low back pain was down to 4/10, her restrictions were eased to allow frequent trunk motions and handling of items weighing up to 20 pounds. Within days thereafter, while Petitioner was performing the more physically demanding work tasks, her symptoms flared; on July 31, 2015, Petitioner went to the hospital with complaints of marked low back pain. Petitioner was admitted overnight and discharged with instructions to follow-up with a primary care physician. Pet.'s. Ex. 3, Resp.'s. Ex. 10. Thereafter, Petitioner came under the care of La Clinica, where she underwent physical therapy. The records reflect Petitioner steadily improved with physical therapy. On September 22, 2015, DC Engel-Morales concluded Petitioner had recovered

enough to return to modified duty: 20-pound maximum weight and rest as needed. On November 3, 2015, DC Engel-Morales continued Petitioner's restrictions but allowed her to work 10-hour shifts. At the November 19, 2015 session, Petitioner stated she felt 70 percent improved and had only intermittent back pain. DC Engel-Morales recommended ongoing therapy but released Petitioner to resume regular duty the next day. Once-weekly therapy continued. On December 15, 2015, when Petitioner reported a flare of her low back pain, DC Engel-Morales restricted her to no more than eight hours per shift. The severe pain episode improved over the next four weeks. Petitioner's final visit to La Clinica took place on January 14, 2016. Petitioner advised DC Engel-Morales that up until an unrelated slip a week prior, her low back pain had been down to 1/10. On examination, lumbar range of motion was full and pain-free. DC Engel-Morales released Petitioner with a home exercise plan. Pet.'s. Ex. 4, Pet.'s. Ex 7, Resp.'s. Ex. 10.

The Commission observes Petitioner's therapy course at La Clinica is consistent with Dr. Butler's conclusions. Dr. Butler agreed Petitioner sustained a lumbar spine sprain and opined that with appropriate conservative care, including medication, therapy, and activity modification, her condition would reach maximum medical improvement within three to six months. Resp.'s. Ex. 3, p. 19-21. While Dr. Butler opined physical therapy was only reasonable up to 20 visits, the Commission finds physical therapy provided consistent benefit to Petitioner through the final session on January 14, 2016.

The parties agree Petitioner sustained a lumbar spine strain in the July 17, 2015 work accident. The Commission finds Petitioner's lumbar spine condition of ill-being reached maximum medical improvement on January 14, 2016. *See International Harvester v. Industrial Commission*, 93 Ill. 2d 59, 63-64, 442 N.E.2d 908, 911 (1982) ("A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury.")

B. Right Wrist

The first documented right wrist complaints are in the August 3, 2015 evaluation at La Clinica in which DC Jao noted Petitioner described an onset of right wrist pain when she tried to catch herself during her slip at work. DC Jao diagnosed a right wrist sprain and recommended physical therapy. When Petitioner commenced physical therapy the next day, the therapist included exercise modalities for both the right wrist and lumbar spine. The Commission notes, however, therapy for the wrist ended on August 20, 2015, and on September 2, 2015, Dr. Goldvekht concluded Petitioner's wrist sprain had resolved. Pet.'s. Ex 4, Pet.'s. Ex. 7, Resp.'s. Ex. 10.

The Commission finds Petitioner sustained a mild right wrist sprain in the July 17, 2015 work accident. We further find the right wrist sprain fully resolved as of September 2, 2015.

III. Average Weekly Wage

On the Request for Hearing, Petitioner alleged an average weekly wage of $600.00. Arb. Ex. 1. Petitioner testified she worked a mandatory 60-hour workweek and earned $10.00 per hour.

T. 24-25. No documentary evidence was offered on Petitioner's behalf to support her earnings calculation.

Respondent's Exhibit 6 is an Employee Wage Statement. The spreadsheet's search parameters indicate it documents Petitioner's earnings from July 7, 2014 through April 10, 2017. The wage statement reveals Petitioner began working for Respondent the week ending July 5, 2015 and worked two full weeks prior her accidental injury. During those two weeks, Petitioner earned $637.50.

The Commission finds the Employee Wage Statement is the most reliable evidence of Petitioner's earnings. The Commission calculates Petitioner's average weekly wage as $318.75 ($637.50 / 2 = $318.75). *820 ILCS 305/10* (West 2006).

IV. Temporary Disability

On the Request for Hearing, Petitioner alleged entitlement to Temporary Total Disability benefits from July 17, 2015 through September 23, 2015 and December 15, 2015 through January 14, 2016. Arb. Ex. 1. Respondent argues Petitioner is not entitled to any Temporary Total Disability benefits because she did not miss any time from work.

The Commission first notes Petitioner worked in a light duty capacity for approximately two weeks following her accidental injury: Petitioner testified Respondent accommodated the Concentra physicians' restrictions, and she continued working. T. 38. That changed, however, as of August 2, 2015. According to Respondent's wage statement, following August 2, 2015, Petitioner worked zero hours and earned no wages until returning to work the week beginning September 23, 2015. Resp.'s. Ex. 6. The Commission observes this coincides with the period Petitioner was authorized off work by the treaters at La Clinica. On Monday, August 3, 2015, DC Jao took Petitioner off work and ordered a consultation with Dr. Goldvekht. Pet. Ex. 4, Pet. Ex. 7. Dr. Goldvekht evaluated Petitioner on August 5, at which time he directed Petitioner to remain off work. Pet.'s. Ex. 4, Pet.'s. Ex. 7, Resp.'s. Ex. 10. Petitioner's off work status was maintained until September 22, 2015, when DC Engel-Morales released Petitioner to modified duty. Pet.'s. Ex. 4, Pet.'s. Ex. 7, Resp.'s. Ex. 10. Respondent's Exhibit 6 confirms Petitioner returned to work the week beginning September 23, 2015. Given there is no contrary opinion challenging the propriety of the authorization off work, the Commission finds Petitioner was temporarily and totally disabled from August 3, 2015 through September 22, 2015.

The Commission denies Temporary Total Disability benefits for December 15, 2015 through January 14, 2016. While DC Engel-Morales did impose an eight-hour shift limitation on December 15, 2015, the record reflects Respondent had consistently accommodated such restrictions and there is nothing to suggest modified duty was no longer available. As such, we find Petitioner failed to prove she was temporarily and totally disabled from December 15, 2015 through January 14, 2016.

Petitioner's average weekly wage of $318.75 yields a Temporary Total Disability rate of $212.50, which falls below the minimum as calculated pursuant to Section 8(b)1. *820 ILCS 305/8(b)1*. The statutory minimum benefit rate for a claimant with three dependents on Petitioner's

date of accident is $319.00, though the statute caps Petitioner's benefit rate at her average weekly age of $318.75.

V. Medical Expenses

Petitioner alleges she is entitled to the unpaid medical expenses set forth in Petitioner's Exhibit 9. Respondent, in turn, argues its liability is limited to the charges certified by Dr. Hagle. The specific items denied by Dr. Hagle are the July 31, 2015 emergency room admission; physical therapy in excess of the 12 authorized sessions; lumbar spine MRIs; Meloxicam, Omeprazole, and Terocin patch prescriptions; TENS unit; exercise equipment; osteogenous stimulator; and lumbar orthosis. Resp.'s. Ex. 4.

A. July 31, 2015 Emergency Room Admission

Dr. Hagle non-certified the July 31, 2015 emergency room admission because Petitioner "presented with an 8/10 pain following a work related injury. There is no documentation of radiation or neurological changes. The patient could have visited an outpatient facility, as there is no indication of acute level care." Resp.'s. Ex. 4. The Commission finds Dr. Hagle's assertion is contrary to the record. Petitioner testified she was at work, climbing up and down ladders, and experienced an acute episode of severe pain; the emergency room triage history reflects Petitioner presented at 7:50 p.m. with complaints of 10/10 lower back pain and tingling to the bilateral thighs. Pet.'s. Ex. 3, Resp.'s. Ex. 10. We further note Dr. Chappidi also documented Petitioner complained of back pain radiating to her lower extremities. The Commission finds Dr. Hagle's non-certification was based on incorrect information and is therefore entitled to no weight. *See*, *e.g.*, *Sunny Hill of Will County v. Illinois Workers' Compensation Commission*, 2014 IL App (3d) 130028WC, ¶ 36, 14 N.E.3d 16, 25 (Expert opinions must be supported by facts and are only as valid as the facts underlying them.) The Commission finds Respondent is liable for the charges for Petitioner's admission to Community First Medical Center from July 31, 2015 through August 1, 2015.

B. Physical Therapy

Petitioner attended 43 sessions of physical therapy from August 3, 2015 through January 14, 2016. Dr. Hagle certified only 12 physical therapy sessions. Resp.'s. Ex. 4. Dr. Butler, however, concluded a 20-session course was reasonable. Resp.'s. Ex. 3, p. 12. The Commission observes the twentieth therapy session occurred on September 22, 2015, and this is the date DC Engel-Morales released Petitioner to return to modified duty. Petitioner worked accommodated duty and attended 14 more therapy sessions over the next several weeks; her restrictions were progressively eased and on November 19, 2015, she was released to full duty. Petitioner had a temporary symptom flare in December which resulted in imposition of an eight-hour shift limitation, but this steadily improved and on January 14, 2016, she reported her low back pain had decreased to 1/10. The Commission finds Petitioner obtained consistent benefit from physical therapy through her last treatment date and as such, the entire course of therapy was reasonably required to relieve from the effects of the accidental injury. *820 ILCS 305/8(a)*. The Commission finds Respondent is liable for the charges incurred for physical therapy at La Clinica through January 14, 2016.

C. Lumbar Spine MRIs

Dr. Hagle concluded neither the August 1, 2015 nor the September 11, 2015 MRI was medically necessary. In both instances, Dr. Hagle noted there was no documentation of radiation or radicular pain to warrant the imaging. Resp.'s. Ex. 4. The Commission disagrees. As detailed above, Petitioner reported lower back pain radiating to her lower extremities, *i.e.*, radicular complaints, in the emergency room and to Dr. Chappidi, and it was Dr. Chappidi who ordered the August 1, 2015 lumbar spine MRI. Regarding the September 11, 2015 scan, this was ordered by Dr. Goldvekht at his September 2, 2015 re-evaluation of Petitioner. During his examination that day, Dr. Goldvekht noted Petitioner again had a positive Kemp's test bilaterally; this is a provocative test which elicits radiating pain. Dr. Goldvekht's order for further diagnostic workup in those circumstances was reasonable and necessary. The Commission finds Respondent is liable for the charges incurred for both the August 1, 2015 and September 11, 2015 MRIs.

D. Meloxicam, Omeprazole, and Terocin Patch Prescriptions

In denying the prescriptions for Meloxicam, Omeprazole, and Terocin patches, Dr. Hagle indicated a first-line agent NSAID such as ibuprofen or naproxen should have been utilized before progressing to Terocin patches or Meloxicam; since Meloxicam was not appropriate, the associated prescription for the proton pump inhibitor Omeprazole was similarly not appropriate. Resp.'s. Ex. 4. The Commission notes, however, the record demonstrates first-line NSAIDs were attempted: the Concentra physician prescribed Naprosyn on July 17, 2015. Moreover, as of August 5, 2015, when Dr. Goldvekht prescribed the Terocin patches, Petitioner was taking the medications prescribed by the company physicians yet still had occasional pain at 9/10. The Commission finds Respondent is liable for the Meloxicam, Omeprazole, and Terocin patch prescription charges.

E. TENS Unit, Exercise Equipment, Osteogenous Stimulator, and Lumbar Orthosis

Dr. Hagle concluded the medical records did not warrant the provision of any equipment for at-home use. Dr. Hagle noted the TENS unit was not necessary given the absence of evidence of failed physical therapy. The doctor further opined the exercise equipment could not be considered necessary because no rationale for home equipment was disclosed. Dr. Hagle non-certified the osteogenous stimulator because Petitioner did not have evidence of fracture or incomplete surgical healing, and denied the lumbar orthosis because Petitioner had no evidence of instability or fracture. Resp.'s. Ex. 4. The Commission agrees in part. Having found Petitioner's entire course of physical therapy was reasonable, necessary, and beneficial, we find there is no failed physical therapy to warrant the TENS unit. We further conclude the record is devoid of bony pathology or instability which would justify the provision of an osteogenous stimulator or the lumbar orthosis. We observe Petitioner testified she did not know what a TENS unit or an osteogenous stimulator was and did not recall if she was given either one. T. 33-34. The Commission disagrees, however, with Dr. Hagle's non-certification of the exercise equipment. Petitioner testified she was provided with an exercise ball as well as elastic bands which she utilized when performing her home exercise program. T. 34-35. The Commission notes compliance with home exercises is an essential aspect of physical therapy, and we find the provision of the equipment associated therewith was reasonable and necessary.

The Commission finds Respondent is liable for the charges for the exercise equipment dispensed on August 25, 2015. The Commission finds the TENS unit dispensed on August 11, 2015; the osteogenous stimulator dispensed on September 28, 2015; and the lumbar orthosis dispensed on October 13, 2015 were neither reasonable nor necessary, and Respondent is not liable for the charges incurred for these items.

VI. Permanent Disability

Petitioner's work accident occurred after September 1, 2011; therefore, Section 8.1b is applicable. Section 8.1b(b) requires permanent partial disability be determined following consideration of five factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. *820 ILCS 305/8.1b(b)*.

Section 8.1b(b)(i) – §8.1b(a) impairment report

Respondent submitted an impairment rating of Petitioner's lumbar spine condition performed by Dr. Butler. Dr. Butler concluded Petitioner had an impairment rating of zero. The Commission finds this factor is indicative of decreased permanent disability for the lumbar spine.

Neither party submitted an impairment rating of Petitioner's right wrist. As such, the Commission assigns no weight to this factor and will assess Petitioner's right wrist based upon the remaining enumerated factors.

Section 8.1b(b)(ii) – occupation of the injured employee

Petitioner returned to her pre-accident job as a packer. The Commission finds this factor weighs in favor of decreased permanent disability.

Section 8.1b(b)(iii) – age of the employee at the time of the injury

Petitioner was 35 years old on the date of her accidental injury. Petitioner is a relatively young individual and will therefore experience her residual complaints for an extended period. The Commission finds this factor is indicative of increased permanent disability.

Section 8.1b(b)(iv) - future earning capacity

Petitioner testified that shortly after she returned to full duty with Respondent, she left Respondent's employ due to pain in her shoulder and chest; she is currently unemployed. T. 23-24. The Commission observes that on review, Petitioner does not argue her shoulder and chest conditions are related to her work accident. As such, there is no direct evidence Petitioner's work accident had an adverse impact on her future earning capacity. The Commission finds this factor weighs in favor of reduced permanent disability.

Section 8.1b(b)(v) – evidence of disability corroborated by treating medical records

> Petitioner testified to significant ongoing complaints.
>
> I cannot stand longer than five minutes at a time, because my back hurts. I cannot turn my shoulder quickly from one side to another, because it's too painful. My hand, I have lost the strength in my hand. I don't have enough strength in it, and I can't lift heavy things with it. I have pain in my chest, and to be able to sleep at night I have to take Ibuprofen. T. 17.

Because of her ongoing back complaints, she cannot sweep, mop floors, bend down to give her daughters baths, lift things weighing over 10 pounds, or sit or stand for long periods. T. 18. Petitioner is right-hand dominant, and her persistent right hand pain makes it "difficult for me to pick up the laundry baskets; and holding the mop if I want to mop something, it's difficult. There are a lot of things that I can't do." T. 19. The Commission finds the medical records do not contain objective findings to corroborate Petitioner's description of severe disability. Following her work accident, Petitioner underwent a course of conservative care with no invasive pain management interventions. The La Clinica records establish right wrist treatment ended on August 20, 2015, and Dr. Goldvekht concluded Petitioner's right wrist strain resolved on September 2, 2015. At Petitioner's last medical visit on January 14, 2016, she reported her lower back pain had decreased to 1/10 until she suffered an unrelated slip the week prior. Examination findings included tenderness to palpation at L3-5 but normal and pain-free lumbar range of motion. The Commission finds this factor weighs heavily in favor of decreased permanent disability.

Based on the above, the Commission finds Petitioner's lumbar spine injury resulted in 2% loss of use of the person as a whole under Section 8(d)2. The Commission further finds Petitioner's right wrist injury did not result in any permanent disability.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner sustained an accidental injury arising out of and in the course of her employment on July 17, 2015.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $318.75 per week for a period of 7 2/7 weeks, representing August 3, 2015 through September 22, 2015, 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 the medical expenses contained in Petitioner's Exhibit 9 pursuant to §8(a) and subject to §8.2 of the Act, except for the charges incurred for the TENS unit dispensed on August 11, 2015; the osteogenous stimulator dispensed on September 28, 2015; and the lumbar orthosis dispensed on October 13, 2015.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $318.75 per week for a period of 10 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused 2% loss of use of the person as a whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $43,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 28, 2021

/s/ *Deborah J. Baker*

DJB/mck
O: 4/7/21
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/s/ *Stephen Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC010319
Case Name	BASLER, KATHY v. IDES
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0257
Number of Pages of Decision	14
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Michael Miles
Respondent Attorney	Nicole Werner

DATE FILED: 5/28/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KATHY BASLER,

Petitioner,

vs. NO: 14 WC 10319

ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of whether Petitioner sustained an accidental injury arising out of her employment, causal connection of her lumbar spine and upper extremity injuries, reasonableness and necessity of medical expenses, temporary total disability, and the nature and extent of Petitioner's injuries, 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 strikes the fourth full paragraph on Page 4, as it misstates the law. To be clear, a hazard on the employer's premises constitutes an employment risk:

> The presence of a "hazardous condition" on the employer's premises renders the risk of injury a risk incidental to employment; accordingly, a claimant who is injured by such a hazardous condition may recover benefits without having to prove that she was exposed to the risk of that hazard to a greater extent than are members of the general public. *Archer Daniels Midland*, 91 Ill. 2d at 216; *Mores-Harvey*, 345 Ill. App. 3d at 1040; *Suter*, 2013 IL App (4th) 130049WC, ¶40. In other words, such injuries are not analyzed under "neutral risk" principles; rather they are deemed to be risks "distinctly associated" with the employment. *Dukich v. Illinois Workers'*

Compensation Commission, 2017 IL App (2d) 160351WC, ¶40, 86 N.E.3d 1161 (Emphasis added).

This correction of the applicable law does not alter our ultimate conclusion as the Commission finds Petitioner failed to prove her slip and fall was caused by water on the floor.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 20, 2019, as modified above, is hereby affirmed and adopted.

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

/s/ *Stephen Mathis*

/s/ *Deborah L. Simpson*

DISSENT

I disagree with the majority's decision to affirm the Arbitrator's denial of benefits based on accident even with the correction of the applicable law. In my view, Petitioner established by the preponderance of the evidence that her slip and fall was caused by water on Respondent's breakroom floor and thus, Petitioner proved that a hazardous condition existed on Respondent's premises.

Initially, I find Petitioner's testimony to be credible and I note that there was no credibility determination in the Arbitrator's Decision. When describing the March 4, 2014 incident, Petitioner noted there had been an ice storm the preceding two days, and the sidewalks and driveway around the IDES building were a "sheet of ice." T. 16. She entered the building, made sure to wipe her feet, and walked across several feet of carpet before walking into the breakroom where she slipped and fell. T. 16-17. Petitioner testified that the floor where she slipped was wet; she did not know where the water came from, but she is certain the floor was wet. T. 69. I do not believe the inability to identify the source of the wet substance that she slipped on is fatal to Petitioner's claim, as that element is not included in her burden of proof. Rather, her burden is to establish by a preponderance of the credible evidence that she encountered a hazard on the employer's premises. I believe that it is contrary to the law to require a Petitioner to affirmatively and positively identify the source of a hazardous condition in order to prove their claim.

Respondent highlights the testimony of Penny Valentine in disputing that the floor was wet. I do not find Ms. Valentine's testimony is as definitive as Respondent suggests. Ms. Valentine was asked twice if the floor was wet when she arrived in the breakroom after Petitioner's fall; on

both occasions, rather than an outright denial that the floor was wet, Ms. Valentine instead stated she did not recall whether water was on the floor. T. 71, 78. I find the absence of an affirmative statement that the floor was dry is telling. Interestingly, when asked whether she could recall if there was an ice storm around March 4, 2014, Ms. Valentine testified that "there had to be because the state never closes for any reason." T. 71-72. However, immediately after, Ms. Valentine testified, "it could have been, I don't know." T. 72.

Additionally, I find the medical records corroborate Petitioner's testimony. Of particular import is the history provided to Dr. Korte the day after Petitioner's fall. Dr. Korte's March 5, 2014 office note documents Petitioner "slipped and fell yesterday; slipped on wet floor and fell forward on knees and forearms; jarred back." Pet.'s Ex. 2. In my view, this medical record, which is most contemporaneous to the accident, is entitled to significant weight. Moreover, while Petitioner did not always explicitly state that she slipped because of water, the presence of water (or some wet substance) is nonetheless documented throughout her medical treatment and is consistent with her testimony that she slipped on a wet substance on the floor, most likely water. For instance, on April 24, 2014, Petitioner presented to Dr. Brent Newell and the progress note states: "c/o back pain, related a fall on 3.4.14, said she just arrived at office, walked into kitchen, slipped and fell forward…" Pet.'s Ex. 3. Further, Petitioner completed an Intake Form for the October 2, 2014 consultation with Dr. Jones; and in the "How did this happen" section, Petitioner wrote "Slipped in water puddle." Pet.'s Ex. 4. Likewise, Dr. Sudekum, one of Respondent's Section 12 examining physicians, similarly documented Petitioner suffered a fall "when she slipped on a wet spot." Resp.'s Ex. 8. I find that Petitioner's consistent reports of "slipping" in the breakroom, combined with her reports of specifically slipping on water, combined with her reports and testimony of a storm that occurred the day before the injury, in totality, is sufficient to prove that more likely than not Petitioner slipped on water in the breakroom which was a hazardous condition.

Finally, I do not find the accident reports force a contrary conclusion. I note the Form 45 was prepared by an individual named Kristin Denning who appears to be an employee at Tristar, and not Petitioner herself; and while Ms. Denning incorrectly indicated Petitioner's shoes were slick from ice, the overall picture presented is that melted ice caused Petitioner to slip and fall. Resp.'s Ex. 1. With respect to the "Workers' Compensation Employee's Notice of Injury" form from Tristar, which Petitioner completed, I note that it does not specifically ask "what object or substance, if any, directly harmed the employee," unlike the Form 45, which does specifically ask this question. Resp.'s Ex. 2. Petitioner's responses to the questions on this form, questions such as "What duty were you performing at time of injury" and "Detail how injury occurred" are very different questions which Petitioner answered consistent with her testimony at trial. Petitioner answered the questions by stating that she "slid" down to her knees and fell forward while walking into the breakroom to put her lunch in the refrigerator. Resp.'s Ex. 2. This is consistent with her testimony at trial and indicates that Petitioner slipped on a substance in the break room. Based on all of the evidence and Petitioner's testimony, it is reasonable to infer that if the form had asked what object or substance directly harmed her, she would have said a wet substance or water on the floor of the breakroom.

As to Petitioner's recorded statement, when asked what happened (specifically, she was asked "can you just walk me through it?"), Petitioner responded:

> Okay. I was walking in from outside, there was a lot of snow and ice. Um, um, right at the front door, the back door where we walk in there are carpets there for me to wipe my feet because the floor gets too slick. So I wipe my feet, walked up to my desk and turned my computer on, it takes a little while to boot up. So I walked back into the break room to take my lunch and put it in the refrigerator…
>
> ***
>
> Approximately the second step as I walked in my feet slid right out from underneath me…

Additionally, when asked if she noticed anything on the floor, Petitioner responded, "I didn't notice, uh, you know, everybody walking in with the snow outside, I would put it past, you know, there was, you know puddles." Resp.'s Ex. 12. Rather than belying the presence of water on the floor, I find this statement is simply Petitioner inferring the floor was wet because of snow and ice tracked in by her coworkers. I find that everything Petitioner said during the recorded statement indicates that Petitioner slipped on a wet substance in the breakroom, most likely water from melted snow and ice due to the storm that occurred a few days before March 4, 2014.

Based on the above, I find Petitioner proved she slipped and fell because of water on the breakroom floor. Having found Petitioner's fall resulted from an employment risk, I further find her current lumbar spine condition of ill-being is causally related to the work accident. While Petitioner had a prior lower back injury which affected her ability to sit for prolonged periods, her condition clearly deteriorated after the March 4, 2014 accident. *See Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d 30, 36, 440 N.E.2d 861 (1982) (A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition.) *See also Schroeder v. Illinois Workers' Compensation Commission*, 2017 IL App (4th) 160192WC, ¶ 26, 79 N.E.3d 833 ("'Cases involving aggravation of a preexisting condition concern primarily medical questions and not legal ones.' That is, if a [workers' compensation] 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.") Moreover, Dr. Jones opined Petitioner's current condition is related to her work accident, explaining Petitioner suffered the slip and fall and had an acute onset of symptoms, subsequent imaging revealed spondylolisthesis at L5-S1 not seen on her pre-accident imaging, and Petitioner's symptoms correlate to that new pathology. Pet.'s Ex. 9, p. 8, 20-21. As to Petitioner's claimed upper extremity injuries, I find the conclusions of Dr. Sudekum establish Petitioner sustained mild impact injuries to her bilateral wrists but suffered no resultant peripheral neuropathy or nerve injury. I further adopt Dr. Sudekum's January 27, 2015 conclusion that Petitioner had reached maximum medical improvement with no need for further treatment or work restrictions with respect to her upper extremities.

Regarding the disputed benefits, I find Petitioner was temporarily and totally disabled from July 21, 2016 through August 7, 2016, corresponding to the dates Dr. Jones authorized Petitioner off work following her initial spine surgery. Pet.'s Ex. 4. I further find Petitioner entitled to temporary partial disability benefits from August 8, 2016 through September 13, 2016, as Dr.

Jones restricted Petitioner to a four-hour workday during that period. Pet.'s Ex. 4. The medical expenses award includes the charges incurred for treatment of the lumbar spine as detailed in Petitioner's Exhibit 8 as well as for upper extremity treatment rendered through January 27, 2015. As to permanent partial disability, Petitioner underwent two lumbar spine surgeries as a consequence of her work accident. On July 21, 2016, Dr. Jones performed a lumbar hemilaminectomy, foraminotomy, medial facetectomy, and primary transforaminal lumbar interbody fusion of L5-S1. Pet.'s Ex. 4. After Petitioner was subsequently diagnosed with pseudoarthrosis with failed hardware, Dr. Hill performed fusion revision surgery on September 15, 2017. Pet.'s Ex. 4. Considering Petitioner's age of 58, her retirement from her relatively sedentary pre-accident occupation of service representative, and the persistent though mild complaints as documented by her current treating physician, I find Petitioner sustained a 30% loss of use of the person as a whole. For all of the above reasons, I respectfully dissent.

MAY 28, 2021

/s/ *Deborah J. Baker*

DJB/mck

O: 4/7/21

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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0257

BASLER, KATHY
Employee/Petitioner

Case# **14WC010319**

IL DEPT OF EMPLOYMENT SECURITY
Employer/Respondent

On 12/20/2019, 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 1.55% 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:

4377 MICHAEL MILES ATTY AT LAW
3200 FISHBACK ROAD
PO BOX 907
CARBONDALE, IL 62903

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
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0558 ASSISTANT ATTORNEY GENERAL
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ATTORNEY GENERAL
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CHICAGO, IL 60601-3227

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

DEC 20 2019

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Kathy Basler
Employee/Petitioner

v.

Illinois Department of Employment Security
Employer/Respondent

Case # 14 WC 10319

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 William R. Gallagher, Arbitrator of the Commission, in the city of Herrin, on October 16, 2019. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On March 4, 2014, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $68,952.00; the average weekly wage was $1,326.92.

On the date of accident, Petitioner was 58 years of age, single with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

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

Respondent is entitled to a credit of amounts paid under Section 8(j) of the Act.

ORDER

Based upon the Arbitrator's Conclusion of Law attached hereto, claim for compensation is denied.

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

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

William R. Gallagher, Arbitrator

December 18, 2019
Date

DEC 20 2019

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment by Respondent on March 4, 2014. The Application alleged "Petitioner injured during the course of employment" and sustained an injury to "bilateral knees, bilateral wrists, bilateral elbows, bilateral hips, low back" (Arbitrator's Exhibit 2). Respondent disputed liability on the basis of accident and causality (Arbitrator's Exhibit 1).

At trial, Petitioner's counsel tendered into evidence 10 exhibits. Respondent's counsel objected to a written statement of an individual who saw Petitioner shortly after the accident which was contained in Petitioner's Exhibit 10, on the basis of hearsay. The statement was prepared by Paul Smolak, one of Respondent's employees, on March 28, 2014, and was directed to Petitioner. The Arbitrator reserved ruling on the hearsay objection at the time of trial. Respondent's hearsay objection is hereby sustained and this portion of Petitioner's Exhibit 10 is not admitted into evidence.

Petitioner became employed by Respondent in 1981 and worked in a variety of capacities. On March 4, 2014, Petitioner was in the process of changing her job from a service representative to a program representative.

Petitioner testified that on March 3, 2014, there was an ice storm which caused Respondent to close its office. Petitioner stated that the following day, March 4, 2014, there was a large accumulation of ice on the sidewalks and driveway adjacent to Respondent's building. Petitioner stated she exercised a considerable amount of caution when entering the building because there was a shiny linoleum floor and she was concerned she might slip on it. Petitioner walked to her office, started her computer and proceeded to take her lunch to the break room. When Petitioner entered the break room, she slipped and fell.

No one witnessed the accident and Petitioner reported it to Penny Valentine, her supervisor, shortly after it occurred. Penny Valentine was present during Petitioner's testimony and testified on behalf of Respondent.

When Valentine testified, she confirmed she was present on March 4, 2014, but did not witness the accident. She stated she heard a loud noise and someone say that Kathy fell. Valentine did not recall if the floor in the break room was wet or not. She did agree on cross-examination, that the break room was not open to the public.

An Employee's First Report of Injury was prepared on March 4, 2014. According to the Report, Petitioner slipped on the floor because her shoes were slick from ice and she fell on her knees/elbows and strained her middle/low back (Respondent's Exhibit 1).

On March 10, 2014, Petitioner completed and signed a Notice of Injury which noted Petitioner was walking into the break room and when she stepped into the room, she fell to her knees/hands. There was no reference to Petitioner having ice on her shoes or any water on the floor (Petitioner's Exhibit 10).

On March 19, 2014, Petitioner gave a statement to Barbara John, Respondent's claims representative. A transcript of the statement was received into evidence at trial. When Petitioner was asked to describe how the accident occurred, she stated there was a large accumulation of snow and ice, she went to her desk and turned her computer on and walked to the break room to put her lunch in the refrigerator. When she took her second step into the break room, her feet slid out from underneath her causing her to fall forward. When asked if there was anything on the floor Petitioner said "I didn't notice, uh, you know, everybody walking with the snow outside, I would put it past, you know, there was, you know, puddles." (Respondent's Exhibit 12; p 3).

Petitioner initially sought medical treatment from Dr. Mark Korte, her family physician, on March 5, 2014. Dr. Korte noted Petitioner had a prior back injury years ago and, yesterday, slipped on a wet floor and fell forward on her knees/forearms. Dr. Korte ordered an MRI scans of Petitioner's lumbar spine as well as physical therapy (Petitioner's Exhibit 2).

The MRI was performed on April 15, 2014. According to the radiologist, it revealed spondylosis, minor subluxations and bulging discs at multiple levels (Petitioner's Exhibit 2).

Dr. Korte treated Petitioner through July, 2014, for back and arm pain and subsequently referred Petitioner to Dr. Jeffrey Jones, a neurosurgeon. Dr. Jones evaluated Petitioner on August 8, 2014. At that time, Petitioner completed an information sheet which noted Petitioner sustained a fall on March 4, 2014, in the break room at work because she slipped in a puddle of water (Petitioner's Exhibit 4).

At the direction of Respondent, Petitioner was examined by Dr. David Lange, an orthopedic surgeon, on December 3, 2014. In connection with his examination of Petitioner, Dr. Lange reviewed medical records and diagnostic studies provided to him by Respondent. When examined by Dr. Lange, Petitioner complained primarily of low back pain which she associated with a slip/fall that occurred on March 4, 2014. Dr. Lange opined Petitioner sustained a lumbar strains superimposed on pre-existing multilevel degenerative changes. He related Petitioner's current symptoms to the accident of March 4, 2014, but opined she was at MMI and surgery was not appropriate (Respondent's Exhibit 6).

At the direction of Respondent, Petitioner was examined by Dr. Anthony Sudekum, a hand surgeon, on January 27, 15. Dr. Sudekum examined Petitioner in regard to her bilateral hand symptoms. He opined Petitioner had no objective evidence of bilateral carpal tunnel syndrome and her upper extremity symptoms were not caused or aggravated by the accident of March 4, 2014 (Respondent's Exhibit 8).

Dr. Jones subsequently diagnosed Petitioner with a spondylolisthesis and L5-S1. On July 21, 2016, Dr. Jones performed fusion surgery with metal hardware at that level (Petitioner's Exhibit 4).

Because of Petitioner's ongoing symptoms, Dr. Jones subsequently referred Petitioner to Dr. Clint Hill, an orthopedic surgeon. On September 15, 2017, Dr. Hill performed an anterior fusion at L5-S1 with insertion of an interbody fusion spacer (Petitioner's Exhibit 4).

Petitioner was also diagnosed with bilateral carpal tunnel syndrome. On May 12, 2017, Dr. Steve Young, an orthopedic surgeon, performed carpal tunnel release surgery on both the right and left wrist (Petitioner's Exhibit 4).

Dr. Lange was deposed on March 11, 2015, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Lange's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. He testified Petitioner informed him that she had sustained a slip and fall on March 4, 2014, and her current symptoms were causally related to the accident. However, he stated Petitioner was at MMI and further treatment was not indicated (Respondent's Exhibit 7; pp 14-17).

Dr. Sudekum was deposed on October 29, 2015, and his deposition testimony was received into evidence at trial. Dr. Sudekum's testimony was consistent with his medical report and he stated Petitioner had subjective symptoms of pain and parasthesias of both upper extremities of unknown etiology (Respondent's Exhibit 11; pp 15-16).

Dr. Jones was deposed on February 9, 2016, and his deposition testimony was received into evidence at trial. In regard to causality, Dr. Jones testified that Petitioner's symptoms were "... related somehow to the fall" and that a spondylolisthesis can be caused by trauma. Dr. Jones recommended Petitioner undergo a minimally invasive transforaminal lumbar interbody fusion at L5-S1 (Petitioner's Exhibit 9; pp 14, 20-21). It should be noted that Dr. Jones was deposed approximately five months prior to the time he performed surgery.

At trial, Petitioner testified she suspended treatment for her low back condition because she was diagnosed with breast cancer. Obviously, Petitioner gave priority to being treated for that condition because it was life threatening. Petitioner was able to continue to work following the first surgery. In May, 2017, Petitioner felt a "pop" in her back when she picked up something at home. Petitioner testified she made the decision to retire sometime prior to undergoing the second back surgery.

Petitioner continues to have complaints of low back pain and she limits her bending and is unable to sit for long period of time. Further, she avoids participating in any heavy lifting.

Conclusion of Law

In regard to disputed issue (C) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner did not sustain an accidental injury arising out of and in the course of her employment by Respondent on March 4, 2014.

In support of this conclusion the Arbitrator notes following:

It is clear that Petitioner sustained a slip/fall on Respondent's premises, the break room, on March 4, 2014. However, it is not readily apparent what caused Petitioner to sustain the slip/fall.

Petitioner testified there was an ice storm on March 3, 2014, and she exercised caution when entering the building. The First Report of Injury indicated Petitioner sustained the fall because her shoes were slick from ice. However, the Notice of Injury, prepared and signed by Petitioner, noted she stepped into the room and fell to her knees. There was no reference to Petitioner having ice on her shoes or there being water on the floor.

Petitioner's supervisor, Penny Valentine, testified that she did not recall if the floor in the break room was wet or not.

When Petitioner gave a statement, she was asked if there was anything on the floor and she gave a very evasive response, in which she initially stated "I didn't notice," but then stated there may have been "puddles."

Based upon the preceding, it is not possible for the Arbitrator to determine what caused Petitioner to sustain the slip and fall on March 4, 2014.

Further, even if Petitioner had proven that she sustained the slip and fall because of a puddle of water on the floor, she was not subjected to a risk of injury to a greater extent than to that of the general public. *Caterpillar Tractor Co. v. Industrial Commission*, 541 N.E.2d 665 (Ill. 1989).

In this regard, compensation was denied to a Petitioner who sustained a slip and fall on an employer's ice covered parking lot. The Court reasoned that Petitioner was exposed to the same risk of injury as the general public. *Wal-Mart Stores v. Industrial Commission*, 761 N.E.2d 768 (Ill.App.4th Dist. 2001).

In regard to disputed issues (F), (J), (K) and (L) the Arbitrator makes no conclusions of law as these issues are rendered moot because of the Arbitrator's conclusion of law in disputed issue (C).

William R. Gallagher, Arbitrator